UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-2992(L) Caption [use short title]

Motion for: Joint Motion For Leave to File a Foreign Law Declaration

In Re: Irving H. Picard, Trustee

Set forth below precise, complete statement of relief sought:

The parties respectfully request leave to file the declaration of Mark Phillips, QC on the laws of British Virgin Islands and the Cayman Islands.

MOVING PARTY: Irving H. Picard, Trustee
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Appellees - See Appendix A

MOVING ATTORNEY: David J. Sheehan

OPPOSING ATTORNEY: See Appendix A

[name of attorney, with firm, address, phone number and e-mail]

Baker & Hostetler LLP
45 Rockefeller Plaza, New York, New York 10111
(212) 589-4200; dsheehan@bakerlaw.com

Court-Judge/Agency appealed from: Hon. Stuart M. Bernstein, U.S. Bankruptcy Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ David J. Sheehan **Date:** May 9, 2018

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Appendix A			
Number	**Case Number**	**Appellee Name**	**Counsel**
1.	17-2992	Banque Lombard Odier & Cie SA, FKA Lombard Odier Darier Hentsch & Cie	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza New York, NY 10006
2.	17-2995	Union Securities Investment Trust Co., Ltd.	Blanka K. Wolfe, Esq., Direct: 212-653-8700 Sheppard, Mullin, Richter & Hampton LLP 30 Rockefeller Plaza New York, NY 10112
3.	17-2995	Union USD Global Arbitrage Fund	Blanka K. Wolfe, Esq.
4.	17-2995	Union USD Global Arbitrage A Fund	Blanka K. Wolfe, Esq.
5.	17-2995	Union Arbitrage Strategy Fund	Blanka K. Wolfe, Esq.
6.	17-2996	Banque Cantonale Vaudoise	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza New York, NY 10006
7.	17-2999	Grosvenor Investment Management Ltd.	Russell T. Gorkin, Esq., Proskauer Rose LLP 11 Times Square New York, NY 10036 Gregg M. Mashberg, Esq., Partner Proskauer Rose LLP 11 Times Square New York, NY 10036
8.	17-2999	Grosvenor Aggressive Growth Fund Limited	Russell T. Gorkin, Esq. Gregg M. Mashberg, Esq., Partner
9.	17-2999	Grosvenor Balanced Growth Fund Limited	Russell T. Gorkin, Esq. Gregg M. Mashberg, Esq., Partner
10.	17-2999	Grosvenor Private Reserve Fund Limited	Russell T. Gorkin, Esq. Gregg M. Mashberg, Esq., Partner
11.	17-3003	BSI AG, individually and as successor in interest to Banco Del Gottardo	David Farrington Yates, Esq., Direct: 212-488-1200 Kobre & Kim LLP

			6th Floor 800 3rd Avenue New York, NY 10022 George W. Shuster, Jr., Esq., Direct: 212-937-7232 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007
12.	17-3004	First Gulf Bank	George M. Chalos, Direct: 516-721-4076 Chalos & Co., P.C. 55 Hamilton Avenue Oyster Bay, NY 11771 Briton Paul Sparkman, Attorney Direct: 713-574-9454 Chalos & Co., P.C. 7210 Tickner Street Houston, TX 77055
13.	17-3005	Parson Finance Panama S.A.	Eugene F. Getty, Esq., Direct: 212-889-2821 Kellner Herlihy Getty & Friedman LLP 7n 470 Park Avenue South New York, NY 10016
14.	17-3006	Delta National Bank and Trust Company	Lawrence Joel Kotler, Esq., Direct: 215-979-1514 Duane Morris LLP 1540 Broadway New York, NY 10036
15.	17-3007	Unifortune Asset Management SGR SPA	Richard B. Levin, Esq., Jenner & Block LLP 919 3rd Avenue New York, NY 10022 Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner & Block LLP 37th Floor 919 3rd Avenue New York, NY 10022
16.	17-3007	Unifortune Conservative Fund	Richard B. Levin, Esq.

			Carl Nicholas Wedoff, Esq.
17.	17-3008	National Bank of Kuwait SAK	Richard A. Cirillo, Esq., King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
18.	17-3009	Natixis	Bruce M. Ginsberg, Esq., - Direct: 212-468-4820 [COR NTC Retained] Davis & Gilbert LLP 1740 Broadway New York, NY 10019 James R. Serritella, Esq., - Direct: 212-468-4945 [COR NTC Retained] Davis & Gilbert LLP 1740 Broadway New York, NY 10019
19.	17-3009	Natixis Corporate & Investment Bank, FKA Ixis Corporate & Investment Bank	Bruce M. Ginsberg, Esq. James R. Serritella, Esq.
20.	17-3009	Bloom Asset Holdings Fund	Bruce M. Ginsberg, Esq. James R. Serritella, Esq.
21.	17-3009	Tensyr Limited	Timothy P. Harkness, Esq., Direct: 212-277-4000 Freshfields Bruckhaus Deringer US LLP 31st Floor 601 Lexington Avenue New York, NY 10022 David Y. Livshiz, Esq., Direct: 212-277-4000 Freshfields Bruckhaus Deringer US LLP 31st Floor 601 Lexington Avenue New York, NY 10022
22.	17-3010	Cathay Life Insurance Co. LTD.	Scott D. Lawrence, Esq., Direct: 214-720-4300 Akerman LLP Suite 3600 2001 Ross Avenue Dallas, TX 75201

			David W. Parham, Esq., Direct: 214-720-4345 Akerman LLP Suite 3600 2001 Ross Avenue Dallas, TX 75201
23.	17-3011	Barclays Bank (Suisse) S.A.	Marc J. Gottridge, Esq., - Direct: 212-909-0643 [COR NTC Retained] Hogan Lovells US LLP 875 3rd Avenue New York, NY 10022
24.	17-3011	Barclays Bank S.A.	Marc J. Gottridge, Esq.
25.	17-3011	Barclays Private Bank & Trust Limited	Marc J. Gottridge, Esq.
26.	17-3012	Arden Asset Management LLC	M. William Munno, Esq., Attorney Direct: 212-574-1200 Seward & Kissel LLP 1 Battery Park Plaza New York, NY 10004 Michael Benjamin Weitman, Esq., Direct: 212-574-1486 Seward & Kissel LLP 1 Battery Park Plaza New York, NY 10004
27.	17-3012	Arden Asset Management Inc.	M. William Munno, Esq. Michael Benjamin Weitman, Esq.
28.	17-3012	Arden Endowment Advisers, Ltd.	M. William Munno, Esq. Michael Benjamin Weitman, Esq.
29.	17-3013	Royal Bank of Canada	Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022 Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
30.	17-3013	Guernroy Limited	Mark Thomas Ciani, Esq.

			Anthony L. Paccione, Esq.
31.	17-3013	Royal Bank of Canada (Channel Islands) Limited	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
32.	17-3013	Royal Bank of Canada (Asia) Limited	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
33.	17-3013	Royal Bank of Canada (Suisse) S.A.	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
34.	17-3013	RBC Dominion Securities Inc.	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
35.	17-3013	Royal Bank of Canada Trust Company (Jersey) Limited	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
36.	17-3014	SNS Bank N.V.	Charles C. Platt, Direct: 212-230-8860 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007 Andrea J. Robinson, Esq., Direct: 617-526-6360 Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109 George W. Shuster, Jr., Esq., Direct: 212-937-7232 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007
37.	17-3014	SNS Global Custody B.V.	Charles C. Platt Andrea J. Robinson, Esq. George W. Shuster, Jr., Esq.

38.	17-3016	Koch Industries, Inc., as successor in interest to Koch Investment (UK) Company	Jonathan P. Guy, Esq., Direct: 202-339-8516 Orrick, Herrington & Sutcliffe LLP 1152 15th Street, NW Washington, DC 20005
39.	17-3018	Kookmin Bank	Richard A. Cirillo, Esq., King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
40.	17-3019	Bank Julius Baer & Co., Ltd.	Eric Brian Halper, Esq., Direct: 212-402-9413 McKool Smith, PC 47th Floor 1 Bryant Park New York, NY 10036 Virginia Weber, Esq., Direct: 212-402-9417 McKool Smith, PC 47th Floor 1 Bryant Park New York, NY 10036
41.	17-3020	Six Sis AG	Peter R. Chaffetz, Attorney Direct: 212-257-6961 Chaffetz Lindsey LLP 33rd Floor 1700 Broadway New York, NY 10019 Erin Valentine, Esq., Direct: 212-257-6960 Chaffetz Lindsey LLP Suite 400 1700 Broadway New York, NY 10019
42.	17-3021	Trincastar Corporation	Richard B. Levin, Esq., Jenner & Block LLP 919 3rd Avenue New York, NY 10022 Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner & Block LLP 37th Floor 919 3rd Avenue

			New York, NY 10022
43.	17-3023	Schroder & Co. Bank AG	Robert S. Fischler, Attorney Direct: 212-596-9000 Ropes & Gray LLP 1211 Avenue of the Americas New York, NY 10036
44.	17-3024	Bureau of Labor Insurance	Amiad Moshe Kushner, Esq., Direct: 646-414-6936 Lowenstein Sandler LLP 18th Floor 1251 Avenue of the Americas New York, NY 10020 Zachary Rosenbaum, Direct: 212-204-8690 Lowenstein Sandler LLP 1251 Avenue of the Americas New York, NY 10020
45.	17-3025	Caceis Bank, Luxembourg Branch	Daniel Schimmel, Esq., Direct: 646-927-5500 Foley Hoag LLP 23rd Floor 1540 Broadway New York, NY 10036
46.	17-3025	Caceis Bank	Daniel Schimmel, Esq.
47.	17-3026	Credit Agricole (Suisse) S.A.	Lawrence B. Friedman, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
48.	17-3026	Credit Agricole S.A., AKA Banque Du Credit Agricole	Lawrence B. Friedman
49.	17-3029	Solon Capital, Ltd., c/o Appleby Corporate Services (Bermuda) Canons Court 22 Victoria Street Hamilton HM 12 Bermuda	William J. Sushon, Esq., O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
50.	17-3032	Quilvest Finance Ltd.	Thomas E. Lynch, Attorney Direct: 212-326-3939 Jones Day 250 Vesey Street New York, NY 10281
51.	17-3033	Lloyds TSB Bank PLC	Mark Thomas Ciani, Esq.,

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52.	17-3034	Atlantic Security Bank	Anthony D. Boccanfuso, Arnold & Porter Kaye Scholer LLP 250 West 55th Street New York, NY 10019 Scott Schreiber, Esq., Direct: 202-942-5672 Arnold & Porter LLP 601 Massachusetts Avenue, NW Washington, DC 20001
53.	17-3035	Orbita Capital Return Strategy Limited	Gary J. Mennitt, Esq., Direct: 212-698-3671 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas New York, NY 10036
54.	17-3038	The Sumitomo Trust & Banking Co., Ltd.	Michael Zeb Landsman, Esq., Direct: 212-888-3033 Becker, Glynn, Muffly, Chassin & Hosinski LLP 16th Floor 299 Park Avenue New York, NY 10171 Jordan E. Stern, Esq., Direct: 212-888-3033 Becker, Glynn, Muffly, Chassin & Hosinski LLP 16th Floor 299 Park Avenue New York, NY 10171
55.	17-3039	Zephyros Limited	William J. Sushon, Esq., O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036

56.	17-3040	Merrill Lynch Bank (Suisse) SA	Pamela A. Miller, Esq., Direct: 212-326-2088 O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
57.	17-3041	Northern Trust Corporation, 50 LaSalle Street Chicago, IL 60603	Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022 Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
58.	17-3041	Barfield Nominees Limited, Trafalgar Court Les Baques St. Peters Port Guernsey United Kingdom	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
59.	17-3042	Credit Agricole Corporate and Investment Bank, 1301 Avenue of the Americas New York, NY 10019, DBA Credit Agricole Private Banking Miami, FKA Calyon S.A., DBA Credit Agricole Miami Private Bank, Successor in Interest to Credit Lyonnais S.A.	Lawrence B. Friedman, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
60.	17-3043	Korea Exchange Bank, Individually And As Trustee For Korea Global All Asset Trust I-1, And For Tams Rainbow Trust III	Richard A. Cirillo, Esq., King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
61.	17-3043	Korea Investment Trust Management Company	John D. Giampolo, Esq., Direct: 212-382-3300 Wollmuth Maher & Deutsch LLP 500 5th Avenue New York, NY 10110
62.	17-3044	Nomura International plc	Brian H. Polovoy, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
63.	17-3047	Societe Generale Private Banking (Suisse) S.A., FKA SG Private Banking Suisse S.A.	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza

			New York, NY 10006
64.	17-3047	Societe Generale Private Banking (Lugano-Svizzera) S.A., FKA SG Private Banking (Lugano-Svizzera) S.A.	John F. Zulack, Esq.
65.	17-3047	Socgen Nominees (UK) Limited	John F. Zulack, Esq.
66.	17-3047	Lyxor Asset Management S.A., as Successor in Interest to Barep Asset Management S.A.	John F. Zulack, Esq.
67.	17-3047	Societe Generale Holding De Participations S.A., as Successor in Interest to Barep Asset Management S.A	John F. Zulack, Esq.
68.	17-3047	SG AM AI Premium Fund L.P., FKA SG AM Alternative Diversified U.S. L.P.	John F. Zulack, Esq.
69.	17-3047	Lyxor Asset Management Inc., as General Partner of SG AM AI Premium Fund L.P., FKA SGAM Asset Management, Inc.	John F. Zulack, Esq.
70.	17-3047	SG Audace Alternatif, FKA SGAM AI Audace Alternatif	John F. Zulack, Esq.
71.	17-3047	SGAM AI Equilibrium Fund, FKA SGAM Alternative Multi Manager Diversified Fund	John F. Zulack, Esq.
72.	17-3047	Lyxor Premium Fund, FKA SGAM Alternative Diversified Premium Fund	John F. Zulack, Esq.
73.	17-3047	Societe Generale, S.A., as Trustee for Lyxor Premium Fund	John F. Zulack, Esq.
74.	17-3047	Societe Generale Bank & Trust S.A.	John F. Zulack, Esq.
75.	17-3047	OFI MGA Alpha Palmares, FKA Oval Alpha Palmares	Brian J. Butler, Esq., Direct: 315-218-8000 Bond, Schoeneck & King, PLLC 1 Lincoln Center 110 West Fayette Street Syracuse, NY 13202
76.	17-3047	Oval Palmares Europlus	Brian J. Butler, Esq.
77.	17-3047	UMR Select Alternatif	Brian J. Butler, Esq.
78.	17-3047	Bank Audi S.A.M.-Audi Saradar Group, FKA Dresdner Bank Monaco S.A.M.	Gary J. Mennitt, Esq., Direct: 212-698-3671 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas

			New York, NY 10036
79.	17-3050	Intesa Sanpaolo S.p.A., as Successor in Interest to Banca Intesa SpA 1 William Street New York, NY 10004	Andrew Ditchfield, Direct: 212-450-3009 Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017 Elliot Moskowitz, Esq., Direct: 212-450-4241 Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017
80.	17-3050	Eurizon Capital SGR S.p.A., Eurizon Capital SGR SpA (as Successor in Interest to Eurizon Investimenti SGR SpA, f/k/a Nextra Investment Management SGR SpA, and Eurizon Alternative Investments SGR Spa, f/k/a Nextra Alternative Inv Piazzatte Giordano Dell'Amore 3 20121 Milan Italy	Andrew Ditchfield Elliot Moskowitz, Esq.
81.	17-3050	Eurizon Low Volatility, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility	Andrew Ditchfield Elliot Moskowitz, Esq.
82.	17-3050	Eurizon Low Volatility II, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility II	Andrew Ditchfield Elliot Moskowitz, Esq.
83.	17-3050	Eurizon Low Volatility PB, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility PB	Andrew Ditchfield Elliot Moskowitz, Esq.
84.	17-3050	Eurizon Medium Volatility, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Medium Volatility	Andrew Ditchfield Elliot Moskowitz, Esq.
85.	17-3050	Eurizon Medium Volatility II, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Medium Volatility II	Andrew Ditchfield Elliot Moskowitz, Esq.
86.	17-3050	Eurizon Total Return, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Total Return	Andrew Ditchfield Elliot Moskowitz, Esq.
87.	17-3054	Banco Itau Europa Luxembourg, S.A.	Brian H. Polovoy, Esq., Shearman & Sterling LLP

			599 Lexington Avenue New York, NY 10022
88.	17-3054	Banco Itau Europa International	Brian H. Polovoy, Esq.
89.	17-3057	UBS AG	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166 Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166
90.	17-3057	UBS (Luxembourg) SA	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166 Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166
91.	17-3057	UBS Fund Services (Luxembourg) S.A.	Gabriel Herrmann, Esq. Marshall R. King, Esq., Attorney
92.	17-3057	UBS Third Party Management Company S.A.	Gabriel Herrmann, Esq. Marshall R. King, Esq., Attorney
93.	17-3057	Access International Advisors Ltd.	Brian Lee Muldrew, Esq., Direct: 212-940-6581 Katten Muchin Rosenman LLP Suite 1422 575 Madison Avenue New York, NY 10022 Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
94.	17-3057	Access Management Luxembourg SA, FKA Access International Advisors Luxembourg SA, as	Brian Lee Muldrew, Esq. Anthony L. Paccione, Esq.

		represented by its Liquidator Maitre Ferdinand Entringer	
95.	17-3057	Access Partners SA, as represented by its Liqudator Maitre Ferdinand Entringer	Brian Lee Muldrew, Esq. Anthony L. Paccione, Esq.
96.	17-3057	Patrick Littaye	Anthony L. Paccione, Esq.
97.	17-3057	Pierre Delandmeter	Scott Berman, - Direct: 212-833-1100 Friedman Kaplan Seiler & Adelman LLP 7 Times Square New York, NY 10036
98.	17-3058	Banque Internationale a Luxembourg S.A., individually and as successor in interest to Dexia Nordic Private Bank S.A., FKA Dexia Banque Internationale a Luxembourg S.A.	Jeff Edward Butler, Esq., Clifford Chance US LLP 31 West 52nd Street New York, NY 10019
99.	17-3058	RBC Dexia Investor Services Bank S.A.	Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022 Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
100.	17-3058	RBC Dexia Investor Services Espana S.A.	Mark Thomas Ciani, Esq. Anthony L. Paccione, Esq.
101.	17-3058	Banque Internationale a Luxembourg (Suisse) S.A., FKA Dexia Private Bank (Switzerland) Ltd.	Jeff Edward Butler, Esq.
102.	17-3059	Abu Dhabi Investment Authority	Marc Greenwald, Direct: 212-849-7140 Quinn Emanuel Urquhart & Sullivan, LLP 22nd Floor 51 Madison Avenue New York, NY 10010 Eric Mark Kay, Esq., Direct: 212-849-7273 Quinn Emanuel Urquhart & Sullivan, LLP 22nd Floor 51 Madison Avenue

			New York, NY 10010
103.	17-3060	Dakota Global Investments, Ltd.	Jeff Edward Butler, Esq., - Clifford Chance US LLP 31 West 52nd Street New York, NY 10019
104.	17-3062	HSBC Bank PLC	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
105.	17-3062	HSBC Securities Services (Luxembourg) SA	Thomas J. Moloney
106.	17-3062	HSBC Bank Bermuda Limited	Thomas J. Moloney
107.	17-3062	HSBC Fund Services (Luxembourg) S.A.	Thomas J. Moloney
108.	17-3062	HSBC Private Bank (Suisse) S.A.	Thomas J. Moloney
109.	17-3062	HSBC Private Banking Holdings (Suisse) SA	Thomas J. Moloney
110.	17-3062	HSBC Bank (Cayman) Limited	Thomas J. Moloney
111.	17-3062	HSBC Securities Services (Bermuda) Limited	Thomas J. Moloney
112.	17-3062	HSBC Bank USA, N.A., Fein, Such, and Crane LLP.	Thomas J. Moloney
113.	17-3062	HSBC Institutional Trust Services (Bermuda) Limited	Thomas J. Moloney
114.	17-3062	HSBC Securities Services (Ireland) Limited	Thomas J. Moloney
115.	17-3062	HSBC Institutional Trust Services (Ireland) Limited	Thomas J. Moloney
116.	17-3062	HSBC Holdings PLC	Thomas J. Moloney
117.	17-3062	Hermes International Fund Limited	Joseph Patrick Moodhe, Esq., Attorney Direct: 212-909-6242 Debevoise & Plimpton LLP 919 3rd Avenue New York, NY 10022
118.	17-3062	Lagoon Investment Limited	Joseph Patrick Moodhe, Esq., Attorney
119.	17-3062	Thema Fund Limited	Joseph Patrick Moodhe, Esq., Attorney
120.	17-3062	BA Worldwide Fund Management Limited	Franklin B. Velie, Esq., Direct: 212-660-3000 Sullivan & Worcester LLP 32nd Floor

			1633 Broadway New York, NY 10019 Jonathan G. Kortmansky, Esq., Direct: 212-660-3000 Sullivan & Worcester LLP 32nd Floor 1633 Broadway New York, NY 10019
121.	17-3062	Lagoon Investment Trust	Joseph Patrick Moodhe, Esq., Attorney
122.	17-3064	SICO Limited	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
123.	17-3065	ABN AMRO Fund Services (Isle of Man) Nominees Limited, FKA Fortis (Isle of Man) Nominees Limited	Thomas Giblin, Esq., Direct: 212-906-1200 Latham & Watkins LLP 885 3rd Avenue New York, NY 10022 Christopher R. Harris, Esq., Attorney Latham & Watkins LLP 885 3rd Avenue New York, NY 10022
124.	17-3065	Platinum All Weather Fund Limited	Anthony D. Boccanfuso, Arnold & Porter Kaye Scholer LLP 250 West 55th Street New York, NY 10019 Scott Schreiber, Esq., Direct: 202-942-5672 Arnold & Porter LLP 601 Massachusetts Avenue, NW Washington, DC 20001
125.	17-3065	Odyssey	Ralph A. Siciliano, Esq., Direct: 212-508-6718 Tannenbaum Helpern Syracuse & Hirschtritt LLP 900 3rd Avenue New York, NY 10022
126.	17-3066	Fairfield Investment Fund Limited	Frederick Reed Kessler, Direct: 212-382-3300 Wollmuth Maher & Deutsch LLP 12th Floor

			500 5th Avenue New York, NY 10110 Fletcher Strong, Esq., Direct: 212-382-3300 Wollmuth Maher & Deutsch LLP 500 5th Avenue New York, NY 10110
127.	17-3066	Fairfield Greenwich Limited	Jeffrey Edward Baldwin, Esq., Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Mark G. Cunha, Attorney Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Peter E. Kazanoff, Esq.
128.	17-3066	Fairfield Greenwich (Bermuda) Limited	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
129.	17-3066	Fairfield Greenwich Advisors LLC	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
130.	17-3066	Fairfield International Managers, Inc.	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
131.	17-3066	Walter Noel	Andrew Hammond, Direct: 212-819-8297 White & Case LLP 1221 Avenue of the Americas New York, NY 10020
132.	17-3066	Jeffrey Tucker	Daniel Jeffrey Fetterman, Esq., Direct: 212-506-1700 Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019

			David Mark, Attorney Direct: 212-506-1700 Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019
133.	17-3066	Andres Piedrahita	Andrew Joshua Levander, Esq., Direct: 212-698-3683 Dechert LLP 1095 Avenue of the Americas New York, NY 10036 Neil A. Steiner, Esq., Direct: 212-698-3671 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas New York, NY 10036
134.	17-3066	Mark Mckeefry	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
135.	17-3066	Daniel Lipton	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
136.	17-3066	Amit Vijayvergiya	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
137.	17-3066	Gordon McKenzie	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
138.	17-3066	Richard Landsberger	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.

139.	17-3066	Philip Toub	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
140.	17-3066	Andrew Smith	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
141.	17-3066	Harold Greisman	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
142.	17-3066	Gregory Bowes	Bruce Allen Baird, Esq., Direct: 202-662-5122 Covington & Burling LLP 1 CityCenter 850 10th Street, NW Washington, DC 20001
143.	17-3066	Corina Noel Piedrahita	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
144.	17-3066	Lourdes Barreneche	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
145.	17-3066	Cornelis Boele	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
146.	17-3066	Santiago Reyes	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
147.	17-3066	Jacqueline Harary	Jeffrey Edward Baldwin, Esq.

			Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
148.	17-3066	Robert Blum	Edward Spiro, - Direct: 212-856-9600 Morvillo Abramowitz Grand Iason & Anello P.C. 565 5th Avenue New York, NY 10017
149.	17-3067	Falcon Private Bank Ltd., FKA AIG Privat Bank AG	Eric Xinis Fishman, Esq., Direct: 212-858-1745 Pillsbury Winthrop Shaw Pittman LLP 1540 Broadway New York, NY 10036
150.	17-3068	Bank Vontobel AG, FKA Bank J. Vontobel & Co. AG	Gregory F. Hauser, Esq., Direct: 212-509-4717 Wuersch & Gering LLP 21st Floor 100 Wall Street New York, NY 10005
151.	17-3068	Vontobel Asset Management Inc.	Gregory F. Hauser, Esq.
152.	17-3069	BNP Paribas Arbitrage SNC	Breon S. Peace, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
153.	17-3070	SafeHand Investments	Gerardo Gomez Galvis, Esq., Direct: 212-468-8000 Morrison & Foerster LLP 250 West 55th Street New York, NY 10019 Carl H. Loewenson, Jr., Esq., Direct: 212-468-8128 Morrison & Foerster LLP 250 West 55th Street New York, NY 10019
154.	17-3070	Strongback Holdings Corporation	Gerardo Gomez Galvis, Esq. Carl H. Loewenson, Jr., Esq.
155.	17-3070	PF Trustees Limited, in its capacity as trustee of RD Trust	Gerardo Gomez Galvis, Esq.

			Carl H. Loewenson, Jr., Esq.
156.	17-3071	Meritz Fire & Marine Insurance Co. LTD.	Michael T. Driscoll, Esq., Direct: 212-653-8700 Sheppard, Mullin, Richter & Hampton LLP 30 Rockefeller Plaza New York, NY 10112 Seong Hwan Kim, Esq., Direct: 310-228-3700 Sheppard, Mullin, Richter & Hampton LLP 16th Floor 1901 Avenue of the Stars Los Angeles, CA 90067
157.	17-3072	Bank Hapoalim B.M.	Scott Balber, Esq., Direct: 917-542-7810 Herbert Smith Freehills New York, LLP 14th Floor 450 Lexington Avenue New York, NY 10017 Jonathan C. Cross, Esq., Direct: 917-542-7600 Herbert Smith Freehills New York, LLP 14th Floor 450 Lexington Avenue New York, NY 10017
158.	17-3072	Bank Hapoalim (Switzerland) Ltd.	Scott Balber, Esq. Jonathan C. Cross, Esq.
159.	17-3073	UKFP (Asia) Nominees Limited	Michael Evan Rayfield, Esq., Direct: 212-506-2560 Mayer Brown LLP 1221 Avenue of the Americas New York, NY 10020 Brian Trust, Esq., Direct: 212-506-2500 Mayer Brown LLP 1221 Avenue of the Americas New York, NY 10020
160.	17-3074	Multi-Strategy Fund Limited	Robert Joel Lack, Direct: 212-833-1108 Friedman Kaplan Seiler & Adelman LLP 7 Times Square

			New York, NY 10036
161.	17-3074	CDP Capital Tactical Alternative Investments	Robert Joel Lack
162.	17-3075	ZCM Asset Holding Company (Bermuda) LLC	Jack G. Stern, Esq., Direct: 212-446-2340 Boies Schiller Flexner LLP 575 Lexington Avenue New York, NY 10022 Alan B. Vickery, Esq., Partner Direct: 212-446-2300 Boies Schiller Flexner LLP 7th Floor 575 Lexington Avenue New York, NY 10022
163.	17-3076	Citibank (Switzerland) AG	Eva Pascale Smith Bibi, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Carmine D. Boccuzzi, Jr., Esq., Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Erica Klipper, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
164.	17-3077	Federico M. Ceretti	Anthony Antonelli, Esq., Direct: 212-318-6730 Paul Hastings LLP 200 Park Avenue New York, NY 10166 Jodi Aileen Kleinick, Esq., Direct: 212-318-6751 Paul Hastings LLP 200 Park Avenue New York, NY 10166 Barry Gordon Sher, Attorney Direct: 212-318-6085 Paul Hastings LLP 200 Park Avenue

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165.	17-3077	Carlo Grosso	Anthony Antonelli, Esq. Jodi Aileen Kleinick, Esq. Barry Gordon Sher, Attorney
166.	17-3077	FIM Advisers LLP	Anthony Antonelli, Esq. Jodi Aileen Kleinick, Esq. Barry Gordon Sher, Attorney
167.	17-3077	FIM Limited	Anthony Antonelli, Esq. Jodi Aileen Kleinick, Esq. Barry Gordon Sher, Attorney
168.	17-3077	Citi Hedge Fund Services Limited	Eva Pascale Smith Bibi, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Carmine D. Boccuzzi, Jr., Esq., Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Erica Klipper, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
169.	17-3077	First Peninsula Trustees Limited, Individually and as Trustees of the Ashby Trust	Timothy P. Harkness, Esq., Direct: 212-277-4000 Freshfields Bruckhaus Deringer US LLP 31st Floor 601 Lexington Avenue New York, NY 10022
170.	17-3077	The Ashby Trust	Timothy P. Harkness, Esq.
171.	17-3077	Ashby Investment Services Limited, Individually and as Trustees of The Ashby Trust	Timothy P. Harkness, Esq.

172.	17-3077	Alpine Trustees Limited, Individually and as Trustees of the El Prela Trust	Timothy P. Harkness, Esq.
173.	17-3077	Port of Hercules Trustees Limited, Individually and as Trustee of the El Prela Trust	Timothy P. Harkness, Esq.
174.	17-3077	El Prela Trust	Timothy P. Harkness, Esq.
175.	17-3077	El Prela Group Holding Services Limited	Timothy P. Harkness, Esq.
176.	17-3077	Ashby Holding Services Limited	Timothy P. Harkness, Esq.
177.	17-3077	El Prela Trading Investments Limited	Timothy P. Harkness, Esq.
178.	17-3077	HSBC Bank Bermuda Limited	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
179.	17-3077	Kingate Management Limited	Scott Walter Reynolds, Esq., Direct: 212-257-6960 Chaffetz Lindsey LLP 33rd Floor 1700 Broadway New York, NY 10019 Erin Valentine, Esq., Direct: 212-257-6960 Chaffetz Lindsey LLP Suite 400 1700 Broadway New York, NY 10019
180.	17-3078	Banque SYZ SA	Richard B. Levin, Esq., Jenner & Block LLP 919 3rd Avenue New York, NY 10022 Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner & Block LLP 37th Floor 919 3rd Avenue New York, NY 10022
181.	17-3080	Credit Suisse AG	William J. Sushon, Esq., O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036

182.	17-3080	Credit Suisse AG, Nassau Branch	William J. Sushon, Esq.
183.	17-3080	Credit Suisse AG, Nassau Branch Wealth Management	William J. Sushon, Esq.
184.	17-3080	Credit Suisse AG, Nassau Branch LATAM Investment Banking	William J. Sushon, Esq.
185.	17-3080	Credit Suisse Wealth Management Limited	William J. Sushon, Esq.
186.	17-3080	Credit Suisse (Luxembourg) SA	William J. Sushon, Esq.
187.	17-3080	Credit Suisse International Limited	William J. Sushon, Esq.
188.	17-3080	Credit Suisse Nominees (Guernsey) Limited	William J. Sushon, Esq.
189.	17-3080	Credit Suisse London Nominees Limited	William J. Sushon, Esq.
190.	17-3080	Credit Suisse (UK) Limited	William J. Sushon, Esq.
191.	17-3080	Credit Suisse Securities (USA) LLC	William J. Sushon, Esq.
192.	17-3083	Standard Chartered Financial Services (Luxembourg) S.A., FKA American Express Financial Services (Luxembourg) S.A., FKA American Express Bank (Luxembourg) S.A., as represented by its Liquidator Hanspeter Kramer, Hanspeter Kramer, in his capacities as liquidator and representative of Standard Chartered Financial Services (Luxembourg) S.A	Diane Lee McGimsey, Esq., Direct: 310-712-6644 Sullivan & Cromwell LLP Suite 2100 1888 Century Park East Los Angeles, CA 90067 Sharon Nelles, Esq., Direct: 212-558-4976 Sullivan & Cromwell LLP 125 Broad Street New York, NY 10004
193.	17-3083	Standard Chartered Bank International (Americas) Limited, FKA American Express Bank International	Diane Lee McGimsey, Esq. Sharon Nelles, Esq.
194.	17-3083	Standard Chartered International (USA) Ltd., FKA American Express Bank, Ltd.	Diane Lee McGimsey, Esq. Sharon Nelles, Esq.
195.	17-3084	Fullerton Capital PTE Ltd.	Daniel R. Bernstein, Esq., Direct: 212-836-7120 Arnold & Porter Kaye Scholer LLP 250 West 55th Street New York, NY 10019 Kent A. Yalowitz, Direct: 212-836-8344 Arnold & Porter Kaye Scholer LLP

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196.	17-3086	Banque Privee Espirito Santo S.A., FKA Compagnie Bancaire Espirito Santo S.A.	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza New York, NY 10006
197.	17-3087	Naidot & Co.	Heather Kafele, Esq., Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006 Keith Palfin, Esq., Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006
198.	17-3088	BNP Paribas S.A.	Breon S. Peace, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
199.	17-3088	BNP Paribas (Suisse) SA, Individually and as Successor in Interest to United European Bank	Breon S. Peace
200.	17-3088	BNP Paribas Arbitrage SNC	Breon S. Peace
201.	17-3088	BNP Paribas Bank & Trust Cayman Limited	Breon S. Peace
202.	17-3088	BNP Paribas Securities Services - Succusale De Luxembourg	Breon S. Peace
203.	17-3088	BNP Paribas Securities Services S.A.	Breon S. Peace
204.	17-3088	BGL BNP Paribas Luxembourg S.A., as Successor in Interest to BNP Paribas Luxembourg S.A.	Breon S. Peace
205.	17-3091	Credit Suisse AG, as successor in interest to Clariden Leu AG and Bank Leu AG	William J. Sushon, Esq., O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
206.	17-3100	UBS Deutschland AG, as successor in interest to Dresdner Bank LateinAmerika AG	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166 Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP

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207.	17-3100	LGT Bank (Switzerland) LTD., as successor in interest to Dresdner Bank (Schweiz) AG	Alexander B. Lees, Esq., Direct: 212-530-5000 Milbank, Tweed, Hadley & McCloy LLP 28 Liberty Street New York, NY 10005 Stacey J. Rappaport, Direct: 212-530-5347 Milbank, Tweed, Hadley & McCloy LLP 28 Liberty Street New York, NY 10005
208.	17-3101	Banca Carige S.P.A.	David Mark, Attorney Direct: 212-506-1700 Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019
209.	17-3102	Somers Dublin Designated Activity Company	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
210.	17-3102	Somers Nominees (Far East) Limited	Thomas J. Moloney
211.	17-3106	Lion Global Investors Limited	Russell T. Gorkin, Esq., Proskauer Rose LLP 11 Times Square New York, NY 10036 Gregg M. Mashberg, Esq., Partner Proskauer Rose LLP 11 Times Square New York, NY 10036
212.	17-3109	Public Institution for Social Security	Nathan Haynes, Direct: 212-801-2137 Greenberg Traurig, LLP 200 Park Avenue Metlife Building New York, NY 10166
213.	17-3112	Bordier & Cie	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza

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214.	17-3113	Barreneche, Inc.	Jeffrey Edward Baldwin, Esq., Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Mark G. Cunha, Attorney Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Peter E. Kazanoff, Esq., Direct: 212-455-3525 Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017
215.	17-3113	Fairfield Greenwich Capital Partners	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
216.	17-3113	Fortuna Asset Management Inc.	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
217.	17-3113	Selecta Financial Corporation Inc.	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
218.	17-3113	Share Management LLC	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
219.	17-3113	Dove Hill Trust	Jeffrey Edward Baldwin, Esq. Mark G. Cunha, Attorney Peter E. Kazanoff, Esq.
220.	17-3115	EFG Bank S.A., FKA EFG Private Bank S.A.	Reid L. Ashinoff, Esq., Direct: 212-768-6730

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221.	17-3115	EFG BANK (MONACO) S.A.M., FKA EFG Eurofinancire dInvestissements S.A.M.	Reid L. Ashinoff, Esq. Justin Nessim Kattan, Esq. Adam Lavine, Esq. David Farrington Yates, Esq.
222.	17-3115	EFG BANK & TRUST (BAHAMAS) LIMITED, as successor-in-interest to Banco Atlantico (Bahamas) Bank & Trust Limited	Reid L. Ashinoff, Esq. Justin Nessim Kattan, Esq. Adam Lavine, Esq. David Farrington Yates, Esq.
223.	17-3117	ABN AMRO Retained Custodial Services (Ireland) Limited	Thomas Giblin, Esq., Direct: 212-906-1200 Latham & Watkins LLP 885 3rd Avenue New York, NY 10022 Christopher R. Harris, Esq., Attorney Latham & Watkins LLP 885 3rd Avenue

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224.	17-3117	ABN AMRO Custodial Services (Ireland) Ltd., FKA Fortis Prime Fund Solutions Custodial Services (Ireland) Ltd.	Thomas Giblin, Esq. Christopher R. Harris, Esq., Attorney
225.	17-3122	Banco Bilbao Vizcaya Argentaria, S.A.	Heather Kafele, Esq., Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006 Keith Palfin, Esq., Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006 Richard F. Schwed, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
226.	17-3126	LGT Bank (Liechtenstein) Ltd.	Alexander B. Lees, Esq., Direct: 212-530-5000 Milbank, Tweed, Hadley & McCloy LLP 28 Liberty Street New York, NY 10005 Stacey J. Rappaport, Direct: 212-530-5347 Milbank, Tweed, Hadley & McCloy LLP 28 Liberty Street New York, NY 10005
227.	17-3129	Nomura International plc	Brian H. Polovoy, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
228.	17-3132	Lighthouse Investment Partners, LLC, DBA Lighthouse Partners, LLC	Eugene R. Licker, Direct: 646-346-8074 Ballard Spahr LLP 37th Floor 919 3rd Avenue New York, NY 10022
229.	17-3132	Lighthouse Supercash Fund Limited	Eugene R. Licker
230.	17-3132	Lighthouse Diversified Fund Limited	Eugene R. Licker

231.	17-3134	Merrill Lynch International	Pamela A. Miller, Esq., Direct: 212-326-2088 O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
232.	17-3136	Inteligo Bank Ltd. Panama Branch, FKA Blubank Ltd Panama Branch	Heather Kafele, Esq. Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006 Keith Palfin, Esq., Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006 Richard F. Schwed, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
233.	17-3139	Citigroup Global Markets Limited	Eva Pascale Smith Bibi, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Carmine D. Boccuzzi, Jr., Esq., Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006 Erica Klipper, Esq., Direct: 212-225-2000 Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
234.	17-3140	KBC Investments Limited	Andrew P. Propps, Esq., Direct: 212-839-5300 Sidley Austin LLP 787 7th Avenue New York, NY 10019 Alan M. Unger, Esq., Direct: 212-839-5300 Sidley Austin LLP 787 7th Avenue

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235.	17-3141	UBS AG	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166 Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166
236.	17-3141	UBS (Luxembourg) SA	Gabriel Herrmann, Esq. Marshall R. King, Esq., Attorney
237.	17-3141	UBS Fund Services (Luxembourg) S.A.	Gabriel Herrmann, Esq. Marshall R. King, Esq., Attorney
238.	17-3141	UBS Third Party Management Company S.A.	Gabriel Herrmann, Esq. Marshall R. King, Esq., Attorney
239.	17-3141	M&B Capital Advisers Sociedad De Valores, S.A.	Richard B. Levin, Esq., Jenner & Block LLP 919 3rd Avenue New York, NY 10022 Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner & Block LLP 37th Floor 919 3rd Avenue New York, NY 10022
240.	17-3143	Inter Investissements S.A., FKA Inter Conseil S.A.	Andrew Ehrlich, Direct: 212-373-3166 Paul, Weiss, Rifkind, Wharton & Garrison LLP 1285 Avenue of the Americas New York, NY 10019 Martin Flumenbaum, Direct: 212-373-3000 Paul, Weiss, Rifkind, Wharton & Garrison LLP 1285 Avenue of the Americas New York, NY 10019
241.	17-3144	Banco General, S.A.	Joshua E. Abraham, Esq., Direct: 646-245-6710

			Joshua E. Abraham, Esq. 7-L 679 West 239th Street Bronx, NY 10463
242.	17-3144	BG Valores, S.A., FKA Wall Street Securities, S.A.	Joshua E. Abraham, Esq.
243.	17-3862	ABN AMRO Bank N.V., presently known as The Royal Bank of Scotland, N.V.	Rachel Nechama Agress, Esq., Direct: 212-756-1122 Allen & Overy LLP 1221 Avenue of the Americas New York, NY 10020 Faraj Abdussalam Bader, Esq., Direct: 212-610-6300 Allen & Overy LLP 1221 Avenue of the Americas New York, NY 10020 Michael Feldberg, Esq., Direct: 212-610-6360 Allen & Overy LLP 1221 Avenue of the Americas New York, NY 10020 Derek Jackson, Esq., Direct: 212-610-6300 Allen & Overy LLP 1221 Avenue of the Americas New York, NY 10020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC	Case No. 17-2992(L)

JOINT MOTION FOR LEAVE TO
FILE A FOREIGN LAW DECLARATION

Under Federal Rule of Appellate Procedure 27, Local Rule 27.1, and Federal Rule of Civil Procedure 44.1, Appellant Irving H. Picard (the "Trustee"), as trustee for the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the chapter 7 estate of Bernard L. Madoff, and statutory intervenor, Securities Investor Protection Corporation ("SIPC"), respectfully submit this motion for leave to file the Declaration of Mark Phillips, QC on the laws of British Virgin Islands and the Cayman Islands, attached hereto as Exhibit A (the "Declaration").[1]

STATEMENT OF FACTS

This appeal asks whether the lower courts erred in ruling that prescriptive comity bars recovery of customer property under SIPA from subsequent

[1] In accordance with Local Rule 27.1(b), the Trustee notified Appellees of this joint motion. Appellees indicated they did not consent.

transferees, even if the Bankruptcy Code and SIPA authorize such recovery. *See* Trustee Br. 2, 12.

The lower courts held that because certain BLMIS feeder funds were in liquidation in foreign countries, "international comity" barred the Trustee's actions to recover customer property. SPA219–22; SPA253–61. Without specifically identifying which foreign laws applied, the district court noted that the funds' foreign jurisdictions had their own disgorgement rules that were in conflict with the Trustee's recovery actions. SPA219–20. Upon remand, the bankruptcy court likewise found that prescriptive comity was a bar to the Trustee's actions, principally relying on *Fairfield Sentry Ltd. v. Migani*, [2014] UKPC 9 (Ct. App. British Virgin Is.), SPA967.

On appeal, the Trustee addressed the limited scope of the lower courts' reliance on *Migani* and the reasons why, under U.S. law, comity should not preclude the Trustee's recovery actions. Four *amicus curiae* briefs were filed in support of the Trustee. Three briefs advocated for why extraterritoriality and comity do not apply to the Trustee's actions. The fourth brief, filed by Liquidator Kenneth Krys, provided further detail to the Court on the settlement between the Fairfield Liquidator and the Trustee. None of the *amicus* briefs filed in support of the Trustee addressed any substantive provisions of foreign law.

In response, Appellees defended the lower courts' decisions, arguing that the Trustee's recovery actions put U.S. law "on a collision course with the laws of the BVI, Bermuda, the Cayman Islands, and other countries." Appellees' Br. 26; *see also id.* 6, 18–19, 65, 71, 78–80, 85, 87, 90, 92–94. Among other things, Appellees engaged in an extensive analysis of *Migani* and its application to the instant appeal. Appellees also filed an unopposed motion for judicial notice of Bermuda and BVI court orders,[2] a declaration of Paul Pretlove,[3] and exhibits of orders of the Bermuda court from the proceeding *In the Matter of Kingate Global Fund, Ltd (In Liquidation).*[4] These documents were submitted to support Appellees' position that the supposed conflict with foreign law provides a proper basis for dismissal under comity.

Four amicus curiae briefs were submitted in support of Appellees. Although all four *amici* made arguments that dismissal was appropriate because of the conflict with foreign law, two briefs were filed by foreign insolvency professionals from the BVI and Cayman Islands that provided the Court with a primer on the

[2] Motion for Judicial Notice, *In re Irving H. Picard*, No. 17-2992(L) (2d Cir. Apr. 17, 2018), Dkt No. 923.

[3] *Id.* at Dec. Exs. 1, 2 (Paul Pretlove serves as a Joint Liquidator for Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd.).

[4] 2009: No. 270 (Supreme Court of Bermuda).

insolvency regimes of the BVI and Cayman Islands.[5] These briefs went beyond the analysis of the lower courts in their rulings on comity and expanded upon Appellees' arguments based on foreign law. For example, the BVI and Cayman Islands insolvency professionals argued that the Trustee's actions will disrupt future insolvency proceedings, Br. of *Amicus Curiae* BVI Restructuring Professionals at 23, and may irrevocably harm cross-border cooperation in insolvency proceedings touching the United States. Br. of *Amicus Curiae* Cayman Finance, *et al.* at 2. These *amici* did not attach any copies of the 19 foreign law decisions cited in their briefs.

Because various issues of foreign law not raised in the lower courts' opinions have now been addressed by Appellees and *amici*, the Trustee seeks leave to file the Declaration. Mark Phillips, QC, is a seasoned authority on BVI and Cayman corporate and insolvency law, having practiced law for over 35 years, 18 of which have been as Silk.

The Declaration sets forth relevant principles of insolvency law and other statutory law in the BVI and the Cayman Islands. The Declaration explains how the foreign law decisions relied upon by the lower courts fit into the BVI and

[5] Br. of *Amicus Curiae* of Cayman Finance, *et al.*, *In re Irving H. Picard*, No. 17-2992(L) (2d Cir. Apr. 25, 2018), Dkt No. 1024; Br. of *Amicus Curiae* of the BVI Rest. Profs., *In re Irving H. Picard*, No. 17-2992(L) (2d Cir. May 2, 2018), Dkt No. 1065.

Cayman Islands legal paradigms and apply to the instant appeal. Finally, the Declaration provides copies of all foreign law decisions cited in the Declaration, as well as those cited by the BVI and Cayman Island insolvency *amicus* briefs, which are not readily accessible.

ARGUMENT

A determination of foreign law is a question of law. Fed. R. Civ. P. 44.1; *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998). A circuit court owes no deference to a lower court's determination of foreign law. *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998) ("[A] court's determination of foreign law is treated as a question of law, which is subject to *de novo* review").

Federal Rule of Civil Procedure 44.1 permits courts to consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. The purpose behind Rule 44.1 is to allow "flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties." *See* Fed. R. Civ. P. 44.1 adv. comm. note 1966.

When this Court interprets and applies foreign law on appeal, it "may consider any relevant material or source, including the legal authorities supplied by the parties on appeal as well as those authorities presented to the district court

below." *Carlisle Ventures, Inc. v. Banco Espanol de Credito*, S.A., 176 F.3d 601, 604 (2d Cir. 1999); *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 n.2 (2d Cir. 1998) (noting that appellate court may consider "any relevant source"). Such materials may include statutes, administrative materials, judicial decisions, treatises, or declarations or affidavits from professionals practicing in the relevant field. *See Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999) ("expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined"); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2444 ("Statutes, administrative material, and judicial decisions can be established most easily by introducing a copy of the applicable provisions or court reports supported by expert testimony about their meaning.").

In exercising this plenary review on questions of foreign law, the Court may consider materials not considered by the district court. *Ancile Inv. Co. Ltd. v. Archer Daniels Midland Co.*, 538 F. App'x 19, 20 (2d Cir. 2013) (citing *Carlisle Ventures, Inc. v. Banco Espanol de Credito*, S.A., 176 F.3d 601, 604 (2d Cir. 1999)); *see also Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("[w]e may consider [foreign law] materials not considered by the District Court"); *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1239 (3d Cir. 1994) (same);

Banco de Credito Indus., S.A. v. Tesoreria General, 990 F.2d 827, 832−33 & n.12 (5th Cir. 1993) (same).

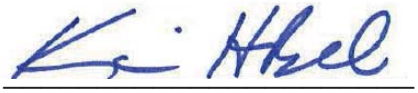
The submissions by Appellees and their *amici* in this appeal developed and expanded the foreign law issues now before this Court. To assist the Court in resolving these issues of foreign law, the Trustee seeks to file the Declaration. Doing so will allow the Court to have a panoply of views on the foreign law issues relevant to this appeal, including elements of BVI and Cayman Island law identified in the *amicus* briefs of the BVI and Cayman Island insolvency professionals. The Declaration adds no new facts or evidence to this appeal but seeks to place foreign law (including *Migani*) in a more understandable context for the Court. Finally, the Declaration attaches all foreign law decisions cited therein as well as in the *amicus* briefs of the BVI and Cayman Island insolvency professionals to further assist the Court in its review of these issues.

CONCLUSION

The Trustee and SIPC respectfully request that the Court grant this motion and consider the Declaration.

Dated: May 9, 2018
New York, New York

Respectfully submitted,



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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC	Case No. 17-2992(L)

DECLARATION OF
MARK PHILLIPS, QC IN SUPPORT OF APPELLANT

Pursuant to 28 U.S.C. § 1746, I, MARK PHILLIPS, QC declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I make this declaration to set out my views, as an expert in BVI, Cayman, and English law at the request of Appellant Irving H. Picard, as trustee for the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investment Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, and the chapter 7 estate of Bernard L. Madoff.

2. I was called to the Bar by Inner Temple in 1984. In 1999 I was appointed Queen's Counsel. I graduated in law with an LLB in 1982 and with an LLM (Commercial Law) in 1983. I specialise in insolvency law, primarily of an international nature. I have argued cases in the English Courts at all levels including the Supreme Court. I am a past President of the Insolvency Lawyers Association (UK) and a Fellow of the Association of Business Recovery Professionals (UK), I am a member of INSOL, a member of the

International Insolvency Institute (co-chairman and organiser of the 2017 London conference), and I am a member of RISA (Cayman). I was admitted to the Bar of the Eastern Caribbean (BVI) in 2000 and I have appeared in the Grand Court of the Cayman Islands since 1999 (admitted case by case). I have appeared in Grand Cayman both at first instance (including before Chief Justice Smellie, Sir Andrew Morritt and Jones J) and in the Court of Appeal. I appeared for the Liquidators of SICL and Singularis in a trial lasting 129 days before Chief Justice Smellie and in several hearings, some lasting days, and the scheme of arrangement, in SPhinX, a matter in which Ken Krys was the liquidator and in which I acted for the Liquidation Committee. I have appeared in the BVI in the Versailles matter and others including Monarch.

3. My general CV is attached hereto as Annex A.

4. Over the course of my career to date I have acted both for and against many of the Defendants, in numerous different cases. As I have stated above, I am a member of RISA. I have had no prior involvement in any Madoff-related matters. My remuneration is not dependent on the outcome of any proceeding.

INTRODUCTION

5. I have been asked to provide a declaration on whether comity under Cayman and BVI law would prevent, or require the U.S. court to prevent, the Trustee

from bringing proceedings in New York under the U.S. Bankruptcy Code in the SIPA liquidation of BLMIS.

6. For the reasons set out below, it is my opinion that, as a matter of Cayman and BVI law, comity would not prevent, or require the U.S. court to prevent, the Trustee from bringing proceedings in New York under the U.S. Bankruptcy Code in the SIPA liquidation of BLMIS. To the contrary, the Cayman and BVI courts would expect the Trustee to be able to bring such proceedings, even in respect of transfers and defendants located outside the United States.

7. I have reviewed the decisions of the lower courts (namely, the decision of Judge Rakoff in *SIPC v. BLMIS*, 513 B.R. 222 (S.D.N.Y. 2014) and the decision of Judge Bernstein in the same matter, 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22 2016)), the briefs of the Trustee, Appellees, and their respective *amici*.

THE FRAMEWORK OF INSOLVENCY LAW IN THE UNITED KINGDOM AND BRITISH OVERSEAS TERRITORIES

Distinguishing between non-insolvency claims and insolvency claims

8. In the legal systems of the United Kingdom and British Overseas Territories, it is important to distinguish between 'non-insolvency' claims and 'insolvency' claims.

9. First, in the period before the commencement of insolvency proceedings, a company may have monetary claims against third parties under the general

law, such as claims for damages for breach of contract or statutory duty or in tort and restitutionary claims to reverse a payment of monies which occurred by reason of a mistake of fact or law. The correct claimant or plaintiff in such 'non-insolvency' claims is the company itself.

10. Secondly, upon the commencement of insolvency proceedings, new claims arise, pursuant to statutory insolvency laws, in order to adjust transactions which occurred before the commencement of insolvency proceedings.

11. In systems based on English law, such 'insolvency claims' generally take a number of broad forms, such as preferences and fraudulent transfers, as explained in Keay, *McPherson's Law of Company Liquidation* (4th ed., 2017) ("***McPherson***"), at [11-014]:

> "*Historically, the adjustment (or avoidance) provisions contained in the insolvency legislation of the UK (and in other common law countries such as Australia, New Zealand, Canada and the US) can, it is submitted, be divided loosely into two groups of provisions. First, there are provisions, such as s.239 [of the United Kingdom Insolvency Act 1986] that regulate the giving of preferences by a corporate debtor, and aim at adjusting rights among the creditors inter se. The second group, including provisions such as s.238 and s.423 [of the United Kingdom Insolvency Act 1986], is designed to adjust the rights of creditors as against the debtor. This latter group has its origins in fraudulent conveyance law which can be traced back to the Statute of Elizabeth, and are aimed at preventing the depletion of the estate of a debtor to non-creditors and with loss for the creditors*".

12. Of course, such provisions are not unique to United Kingdom and British Overseas Territories or other systems based on English law. To the contrary, all developed systems of insolvency law in the modern world generally contain such provisions, in order to enable the liquidator or trustee to take

steps to reverse prejudicial antecedent transactions. As Lord Sumption observed in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (SC) at [108]:

> "*Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom*".

13. Such provisions are based on basic concepts of fairness and the reversal of transactions which are tainted by a lack of good faith or some other adverse factor such of unequal treatment of creditors. Lord Collins explored the underlying policy justifications in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 ("***Rubin***"), at [94]-[95]:

> "*Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency … The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance*".

14. Lord Collins cited in *Rubin* (at [96]) the following passage of the UNCITRAL Legislative Guide on Insolvency Law (2005), at [150]-[151]:

> *[151] It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the*

> *same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate*".

15. Avoidance claims under insolvency law are thus different from non-insolvency causes of action in both concept and rationale.

Transaction avoidance under Cayman insolvency law

16. Under the current law of the Cayman Islands (following reforms in recent years), section 145 of the Cayman Companies Law provides for the avoidance of preferences made by a company in favour of any creditor at a time when the company is unable to pay its debts.

17. Section 146(2) deals with fraudulent transfers by providing that every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

18. Section 147 provides a remedy in cases of fraudulent trading.

19. These claims are insolvency claims, in that they may be brought: (i) only where the company in question has gone into insolvency proceedings; and (ii) only in the name of the liquidator appointed in that liquidation.

Transaction avoidance under BVI insolvency law

20. Broadly similar transaction avoidance provisions are contained in the BVI Insolvency Act 2003 (the "**2003 Act**").

21. Section 245 relates to unfair preferences. In summary, an unfair preference is a pre-liquidation transaction that puts a creditor of a company that goes into liquidation into a better position than he would have been if the transaction had not been made.

22. Section 246 relates to undervalue transactions. In summary, an undervalue transaction occurs where a company enters into a transaction for consideration which is significantly less than the consideration provided by the company. The beneficiary of such a transaction will have a defence if "*(a) the company enters into the transaction in good faith and for the purposes of its business; and (b) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company*" (section 246(2)).

23. Claims under sections 245 and 246 of the 2003 Act are insolvency claims, in that they may be brought: (i) only where the company in question has gone into insolvency proceedings; and (ii) only in the name of the liquidator appointed in that liquidation.

Universality of insolvency proceedings

24. The courts of the United Kingdom and British Overseas Territories (and indeed the courts of other English law based legal systems) have traditionally taken the view that insolvency proceedings should be unitary and universal – that is, that there should be a single insolvency procedure

with worldwide effect. As Lord Hoffmann explained in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 ("***HIH***") at [6]:

> "*English judges have for many years regarded as a general principle of private international law … that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition*".

25. Lord Hoffmann had previously remarked in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 A.C. 508 ("***Cambridge Gas***"), at [16]:

> "*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove*".

26. Lord Hoffmann explained in *HIH* at [7] that this "*was very much a principle rather than a rule*" and that it might be better to describe it as an "*aspiration*". Whilst the result of *Cambridge Gas* was disapproved both in *Rubin* and in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] A.C. 1675 ("***Singularis***"), the Privy Council confirmed in *Singularis* that the principle of modified universalism remains good law. See, in particular, Lord Sumption in *Singularis* at [19] ("*the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in HIH … and by Lord Collins of Mapesbury (with whom*

Lord Walker and Lord Sumption JJSC agreed) in Rubin …. In the Board's opinion, the principle of modified universalism is part of the common law …").

27. Consistently with this, bankruptcy and winding-up proceedings in England have (as a matter of English law) worldwide effect. As Lord Sumption explained in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (SC) at [109]: "*The English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution*". As Sir Richard Scott V-C explained in *Banco Nacional de Cuba v Cosmos Trading Corporation* [2000] 1 BCLC 813 at 819–820: "*Once a winding-up order is made in this jurisdiction it purports to have worldwide effect*".

28. The position in this regard is the same in the Cayman Islands and also in the BVI, as Lord Sumption explained in *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41; [2015] AC 616 ("***Shell***") at [14]:

> "*In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute … In the case of a winding up of a BVI company in the BVI,* ***this applies not just to assets located within the jurisdiction of the winding up court, but all assets world-wide****. In England, this follows from the unqualified terms of section 144(1) of the Insolvency Act 1986. In the British Virgin Islands, it is provided for in terms by section 175(1) of the Insolvency Act 2003, combined with the inclusive definition of 'asset' in section 2(1) ('every description of property, wherever situated').* ***It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets****. They will fall to be distributed in the BVI liquidation pari*

> *passu among unsecured creditors and, to the extent of any surplus, among its members*" (emphasis added).

Extraterritorial effect of avoidance provisions

29. Recognising both that avoidance provisions are integral parts of insolvency proceedings and that insolvency proceedings should be unitary and universal, the courts of the United Kingdom and British Overseas Territories have consistently held that avoidance provisions should have extraterritorial effect.

30. In *Re Paramount Airways Ltd* [1993] Ch 223 ("***Paramount***"), for example, Sir Donald Nicholls V-C held that section 238 of the United Kingdom Insolvency Act 1986 (which governs transactions at an undervalue) applies extraterritorially, explaining at page 239:

> "*In my view the solution to the question of statutory interpretation raised by this appeal does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities*".

31. The position under English law is the same in respect of section 239 of the United Kingdom Insolvency Act 1986 (preferences), which also has extraterritorial effect (see *Paramount*) and section 423 of the United Kingdom Insolvency Act (transactions defrauding creditors), which is also extraterritorial in application (see *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] BCC 16 per Evans-Lombe J at 32-33).

32. Section 213 of the United Kingdom Insolvency Act 1986 (fraudulent trading) was recently held by the Supreme Court of the United Kingdom to have extraterritorial effect, in *Bilta (UK) Ltd v Nazir (No 2)* [2013] 2 WLR 825; aff'd [2014] Ch 52 (CA); aff'd [2016] AC 1 (SC). At first instance, Morritt VC held at [44]:

> "*Though stated in relation to section 238 the principles expressed by Sir Donald Nicholls V-C* [in *Paramount*] *are equally, if not more, applicable to this case some twenty years later. If a company is involved in trade across state boundaries and that trade is designed to defraud its creditors there is no more reason to confine the operation of the section to those within the jurisdiction than in cases where the transaction in question is at an undervalue. In the case of both sections 213 and 238 the object of the section is 'any person'. Both sections confer on the court a discretion as to what order to make. Both sections, and many others, are directed to recovering assets, wherever they may be, or compensation for the benefit of all the creditors of the company in liquidation whether resident in the United Kingdom or elsewhere. I would hold that section 213 is of extraterritorial effect*".

33. In the Supreme Court, Lord Sumption agreed at [107]-[111]) and Lord Toulson and Hodge also agreed (at [212]–[218]), saying:

> "*In our view section 213 has extraterritorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding up order is worldwide … The section provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to*

> *contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business*".

Recognition and assistance of foreign insolvency proceedings

34. The courts of the United Kingdom and British Overseas Territories have a long history of seeking to assist foreign officeholders in foreign insolvency proceedings. Indeed, as Lord Hoffmann explained in *HIH* at [30], the "*golden thread running through English cross-border insolvency law since the 18th century*" has been the "*principle of (modified) universalism, which … requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution*".

35. Thus the courts will recognise the authority of the foreign liquidator or trustee and actively seek to assist him to carry out his duties in respect of the foreign insolvency proceedings. In *Singularis*, the Privy Council cited with approval the view of "*the great South African judge Sir James Rose Innes, then Chief Justice of the Transvaal*" in the decision of the full court of the Supreme Court of the Transvaal in *Re African Farms Ltd* [1906] TS 373 at

page 377 that "*recognition … carries with it the active assistance of the court*".

36. This principle may have been motivated originally to some extent by self-interest: the English courts took the view that English insolvency proceedings (including English transaction avoidance provisions) had extraterritorial effect and, to encourage foreign courts to recognise the extraterritorial application of English law, made clear that they would willingly reciprocate by recognising the extraterritorial effect of the foreign court's insolvency proceedings.[1]

37. The importance of recognition and assistance has been recognised by the common law: see *Singularis*, in which the Privy Council held at [19] that "*the principle of modified universalism is part of the common law*" and that common law powers may be exercised to assist a foreign officeholder in the conduct of foreign insolvency proceedings.

[1] As Lord Hoffmann explained in *Cambridge Gas* at [17]: "*This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view*".

38. Recognition and assistance has also been provided for by statute. In England, section 426 of the United Kingdom Insolvency Act 1986 enables the English court to grant assistance to foreign insolvency officeholders from designated countries and territories; and the Cross-Border Insolvency Regulations 2006 (the "**CBIR**") have enacted the UNCITRAL Model Law on cross-border insolvency (the "**Model Law**") to enable the English court to recognise and assist insolvency officeholders appointed in any country anywhere in the world.

Assistance in the Cayman Islands

39. It is correct to say that "[t]*here are numerous examples in Cayman Islands case law of the Grand Court providing support and assistance to the courts and bankruptcy trustees in the United States*" (Cayman Finance Brief, page 20).

40. The Grand Court of the Cayman Islands has confirmed repeatedly that the common law powers of recognition and assistance are part of the law of the Cayman Islands. The Chief Justice of the Cayman Islands held in *Re Al Sabah* [2002] CILR 148 at [31] that "*this court has inherent common law powers to recognize and enforce the appointment of a foreign trustee in bankruptcy for the purposes of bringing into the estate the assets of a bankrupt which may exist in this jurisdiction*" – a conclusion affirmed by the Privy Council in *Al Sabah and Another v Grupo Torras SA* [2005] UKPC 1, [2005] 2 A.C. 333.

41. In the Cayman Islands, this inherent common law power of assistance has been augmented by specific statutory provisions for conferring assistance, in Part XVII of the Cayman Companies Law:

    (1) Section 240 of the Cayman Companies Law defines the term "*debtor*" to mean a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established.

    (2) Section 241(1) enables the Grand Court to make orders "*ancillary to a foreign bankruptcy proceeding*" for various purposes including "*(e) ordering the turnover to a foreign representative of any property belonging to a debtor*".

    (3) Section 242(1) requires the Grand Court's decisions in such cases to be "*guided by matters which will best assure an economic and expeditious administration of the debtor's estate*" including "*(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate*".

42. The Chief Justice of the Cayman Islands has confirmed extrajudicially that Part XVII is fully consistent with the aims and ideals of the Model Law.[2]

[2] See Smellie, "A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation," Beijing Law Review, 2011, 2, 145-154, at 153.

43. The Cayman Islands Court of Appeal held in *Picard v. Primeo Fund (In Liquidation)*, 2014(1) CILR 379 that these provisions enabled a foreign representative to bring avoidance actions in the Cayman Islands in accordance with Cayman Islands law.

    (1) At first instance, Jones J had held that Part XVII of the Companies Law could not allow a foreign representative to bring avoidance actions, because "*property belonging to a debtor*" in section 241(1)(e) "*does not include property which is recoverable only by an officeholder pursuant to the transaction avoidance provisions of the applicable bankruptcy law*": *Picard v. Primeo Fund (In Liquidation)* (Andrew Jones J, 14 January 2014) at [19].

    (2) Overturning Jones J's conclusion, the Cayman Islands Court of Appeal held at [45] that "[the] *making of a transaction avoidance order restores to the debtor the property which is the subject of that order and so enables the court to order 'the turnover' of that restored property to the foreign representative*". On this basis, it held that the concept of "*property belonging to a debtor*" in section 241(1)(e) was apt to include property recovered through the bringing of an avoidance action.

44. It is therefore correct to say that "*the Grand Court has numerous tools at its disposal, both in statute and at common law, to provide assistance and support to U.S. bankruptcy trustees (and indeed to insolvency practitioners*

from a host of other jurisdictions around the world)" (Cayman Finance Brief, page 25) and that the Grand Court has demonstrated a "*willingness and flexibility of the Grand Court to facilitate and support insolvency proceedings in courts of concurrent jurisdiction*" (Cayman Finance Brief, page 21).

Assistance in the British Virgin Islands

45. The importance of the universality principle and the concept of assistance has also been confirmed in the BVI. See, for example, *ABN AMRO Fund Services (Isle of Man) 24 Nominees Ltd. v. Krys*, BVIHCMAP 11/2016 (Eastern Caribbean Supreme Court) ("***ABN***") per Pereira CJ at [79] (with emphasis added):

> "*The focus of international business companies … is for the conduct of offshore or international business. This is all the more so in relation to matters of insolvency as it is well recognised that* ***cross-border cooperation between courts is essential to the fair and effective operation of liquidation schemes for the fair and equal benefit of all creditors****. It is now widely accepted and consistent with the universality principle that all creditors should be treated equally under the same law. I am inclined to agree … that as a policy reason it could not be appropriate for BVI to provide for international business companies to conduct international business outside of BVI and not expect a foreign court to be able to apply BVI law to matters in dispute involving them before their courts …* ***It would be absurd indeed were the BVI court able to grant relief in aid of foreign proceedings but a foreign court could not grant relief in aid of BVI insolvency proceedings***".

46. The basis for such assistance has been codified in the BVI in Part XIX of the BVI Insolvency Act 2003, which enables a foreign representative from a 'relevant' foreign country to apply to the BVI Court for an order in aid of

the foreign proceedings. The United States of America has been designated as a 'relevant' foreign country for the purposes of Part XIX. In summary of section 467 of the BVI Insolvency Act 2003:

(1) Pursuant to section 467(2), a foreign representative may apply to the BVI Court for an order in aid of the foreign proceeding in respect of which he is authorized.

(2) Section 467(3) sets out the range of orders available, which include orders to "*(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property*". Importantly, section 467(1) makes clear that "*property*" means property that is "*subject to or involved in*" the foreign proceeding – a wide definition which is plainly not limited to assets of the debtor at the commencement of the proceedings and extends to recoveries which may be obtained in avoidance actions.

47. It is therefore correct to say that "[t]*he BVI's insolvency laws and controlling jurisprudence also acknowledge the international nature of modern insolvency proceedings*" (BVI Brief, page 10). As Pereira CJ confirmed in *ABN*, the provisions of BVI law display "*full recognition of cross-border cooperation* … [and] *capture the essence of reciprocity and comity between countries in insolvency matters*".

THE PRESENT CASE

48. For the reasons set out below, the position in the present case is that the courts of the Cayman Islands and the BVI would seek to assist the Trustee to bring his avoidance claims under the U.S. Bankruptcy Code and would not impede him from so doing. They would not view such avoidance claims as an interference or annoyance and would not stay the avoidance claims or enjoin the Trustee from pursuing them in New York. On the contrary, in accordance with the principles identified above, they would consider that New York was the proper place for BLMIS to be wound up and that U.S. bankruptcy laws should be applied to determine which transfers could be recovered and from whom.

Cayman and BVI courts would recognize the BLMIS liquidation in the United States under U.S. law

49. The first point to note is that the courts of the Cayman Islands and the BVI would not have any hesitation in recognising the legitimacy of the liquidation of BLMIS in New York. Both the Cayman Islands and the BVI have adopted what was originally a principle of English law that "*the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation*": *Rubin* per Lord Collins at [13]. Indeed, in the Cayman Islands, the statutory power to recognise and assist a foreign representative is expressly limited to cases where the foreign corporation or other foreign

legal entity is "*subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established*": see section 240 of the Cayman Companies Law, as mentioned above.

50. Further, in the Cayman Islands, the Grand Court has already recognised the liquidation of BLMIS under the laws of New York: on 5 February 2010 Jones J granted the Trustee's petition for recognition in the Cayman Islands. As Jones J explained subsequently in *Picard v. Primeo Fund (In Liquidation)* (Andrew Jones J, 14 January 2014) at [13], the effect of that recognition order was to "*constitute*[] *recognition that the Trustee is the only person entitled to act as agent on behalf of BLMIS* … [and] *determine*[] *that the New York court is competent to exercise bankruptcy jurisdiction in respect of BLMIS*".

51. The BVI court would also recognise the Trustee, although for a time this was unclear. Specifically, in *Picard v. Bernard L Madoff Investment Securities LLC*, BVIHCV140/2010, Bannister J declined to grant recognition, seemingly in the belief that recognition could not be granted on its own and that it was available only when coupled with a grant for some specific assistance. In a subsequent case, *In re C (A Bankrupt)*, BVIHC 0080/2013, however, Bannister J changed his view, saying at [23]:

> "*I was also wrong, I regret to have to say, in denying Mr Picard the relief (at any rate in some form or another, even if not precisely in which the terms in which he sought it) which he had applied for*".

52. Accordingly, it is apparent that the Trustee would now be recognised without hesitation in the BVI. To be clear, however, the initial difficulty of Bannister J was not based on any notion that BLMIS should not be wound up in New York in accordance with U.S. law. The BVI court would readily accept that a company formed in New York should be wound up in New York and that U.S. law should govern those proceedings, including any actions for the adjustment of prior transactions under statutory provisions of insolvency. Rather, Bannister J's sole initial concern had been the view that recognition must be coupled with assistance and could not be granted on its own.

Cayman and BVI courts would assist the Trustee in any insolvency actions he chooses to bring and recognize U.S. judgments

How the Trustee's avoidance claims would be viewed

53. The Cayman and BVI courts would regard the Trustee's claims under sections 548 and 550 of the U.S. Bankruptcy Code as being transaction avoidance claims which constituted an integral part of the insolvency proceedings in respect of BLMIS.

54. In *Rubin* at [100] Lord Collins was content to adopt the European Court of Justice's concept of "*claims which derive directly from the bankruptcy or winding up and which are closely connected with them*". The Cayman and BVI courts, which have followed *Rubin*, would adopt the same distinction between insolvency and non-insolvency claims.

55. Applying that test, there can be no doubt that the Trustee's claims under sections 548 and 550 of the U.S. Bankruptcy Code are part of the BLMIS insolvency proceedings which are being conducted in New York in accordance with United States law.

56. In accordance with the principle of universality described above, the courts of the Cayman Islands and the BVI would expect the effects of the BLMIS liquidation to take effect in the same way throughout the world, as a matter of U.S. legal theory.

57. Further, since Cayman and BVI transaction avoidance provisions have clear extraterritorial effect, the Cayman and BVI courts would not be surprised to be told that the U.S. transaction avoidance provisions were similarly extraterritorial.

58. It has been explained above that the Cayman and BVI courts would recognise the liquidation of BLMIS in New York under United States law. It is helpful to proceed to consider whether the Cayman and BVI courts would grant assistance to the Trustee and if so what form such assistance could, and would be likely to, take.

Assistance by the Grand Court of the Cayman Islands

59. As explained above, the Grand Court of the Cayman Islands has power to assist the Trustee both at common law and under statute. In respect of avoidance claims, there are two principal forms which such assistance could take.

60. First, the Grand Court would recognise and enforce judgments of the United States courts in avoidance actions under U.S. law, provided that the United States courts could be said to have had jurisdiction as a matter of private international law: see *Rubin*. Accordingly, the Grand Court could recognise and enforce a judgment of the New York court in the Trustee's avoidance claims under sections 548 and 550 of the U.S. Bankruptcy Code, if on the facts it could be shown that the New York court had jurisdiction in the claims.

61. Secondly, the Grand Court would assist the Trustee by permitting him to bring avoidance actions in the Cayman Islands, if he so chose. The decision of the Cayman Islands Court of Appeal in *Primeo* established that such claims could be brought by the Trustee under sections 241 and 242 of the Cayman Companies Law. Specifically, the Court of Appeal held in *Primeo* at [59] that the Grand Court "*does have jurisdiction under ss 241 and 242 of the Companies Law to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding*".

62. Importantly, therefore, the Cayman Islands Court of Appeal was holding that Cayman law permitted the Trustee to bring avoidance claims against Primeo, a subsequent transferee. The Cayman Islands Court of Appeal did not condemn the Trustee's proposed claim against Primeo as an improper attempt to 'reach around' the estates of the mediate transferees but instead made clear that it would permit him to proceed with the claim.

63. It has been suggested in the Cayman Finance Brief that "*relief was not available on the facts*" in *Primeo* "*due to a fundamental difference in interpretation between U.S. and English (and therefore Cayman Islands) law over what constitutes property of the debtor*" (Cayman Finance Brief, page 26). In this regard, the Cayman Finance *amici* have asserted that: "*Mr Justice Jones held, and the Court of Appeal agreed, that the appropriate interpretation of "property of the debtor" is, consistent with English jurisprudence, the property which the debtor held at the commencement of the liquidation, thereby excluding the right to avoid preferential transactions*" (ibid.).

64. This is wrong. In fact, whilst Jones J held at first instance that Part XVII of the Companies Law could not allow a foreign representative to bring avoidance actions, because "*property belonging to a debtor*" in section 241(1)(e) "*does not include property which is recoverable only by an officeholder pursuant to the transaction avoidance provisions of the applicable bankruptcy law*" (at [19]), the Cayman Islands Court of Appeal expressly overturned this finding and held at [45] that "[the] *making of a transaction avoidance order restores to the debtor the property which is the subject of that order and so enables the court to order 'the turnover' of that restored property to the foreign representative*". On this basis, it held that the concept of "*property belonging to a debtor*" in section 241(1)(e) was apt to include property recovered through the bringing of an avoidance action

and that Part XVII of the Companies Law may be used by a foreign representative to bring avoidance actions in the Cayman Islands.

65. The position in the Cayman Islands is therefore that "*there is every reason to believe that the strong tradition of co-operation in trans-national insolvency and bankruptcy matters at common law will continue by the Cayman Islands Courts*" (Smellie, "A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation" Beijing Law Review, 2011, 2, 145-154, at 154).

Assistance by the BVI court

66. The position is materially the same in the BVI:

(1) First, the BVI court would enforce a judgment of the New York court in favour of the Trustee, if on the facts the New York court could be shown to have had jurisdiction as a matter of private international law, in accordance with *Rubin*.

(2) Secondly, the BVI court would enable the Trustee to bring avoidance claims in the BVI, under Part XIX of the BVI Insolvency Act 2003, if he so chose.

67. Bannister J made clear in the case mentioned above at [12] that the BVI court "*remains ready, in a proper case, to grant whatever relief it may decide is appropriate upon an application made by Mr Pickard* [sic] *under Part XIX of the Act*".

Refusal to impede the Trustee's avoidance actions

68. It is also clear that the Cayman and BVI courts would not take any steps to impede or prevent the Trustee from bringing avoidance claims in New York, nor his decision to seek relief under the U.S. Bankruptcy Code (as opposed to foreign law).

69. First, the Cayman and BVI courts (like the English courts) do not grant stays in respect of legal proceedings which are taking place in a foreign court: see *Re Oriental Inland Steam Co, Ex p Scinde Railway Co* (1874) LR 9 Ch App 557 and *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187. Indeed, even the statutory stay which applies in a Cayman or BVI liquidation will not prevent a foreign trustee from suing that company abroad: *ibid*. Accordingly, the Cayman and BVI courts would not purport to grant a stay of the Trustee's avoidance actions in New York.

70. Lord Sumption explained in *Shell* that the courts (in that case, Bermuda, but the same applies in the Cayman Islands and the BVI) have an equitable power to grant injunctions to restrain conduct which is "*calculated to violate the statutory scheme of distribution*" in insolvency proceedings (at [18]). Such injunctions have been granted to prevent creditors from seeking to take steps in foreign courts to attach property which falls within the estate, as this would result in a contravention of the *pari passu* scheme of distribution (at [19]).

71. Lord Sumption held at [24] that it is not necessary to demonstrate that the foreign litigation is vexatious or oppressive for an injunction to issue:

> "*In protecting its insolvency jurisdiction … the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered*".

72. The Cayman and BVI courts have not expressed the view that the Trustee's insolvency claims in New York are disruptive to Cayman or BVI insolvency proceedings; and they have not sought to injunct him from proceeding. Nor would they do so.

73. That is because the Trustee's actions in New York do not interfere with or disrupt insolvency proceedings in the Cayman Islands or the BVI. To the contrary, the Cayman and BVI courts would expect the liquidation of BLMIS to have worldwide effect under U.S. law, including in respect of the reversal of antecedent transactions under the U.S. Bankruptcy Code. This is true notwithstanding any judgment or settlements in Cayman or BVI insolvency proceedings to which the Trustee is not a party.

74. The Cayman and BVI courts would regard the Trustee's actions in New York as being consistent with Cayman and BVI legal norms in respect of the reversal of antecedent transactions in insolvency proceedings. Cayman

and BVI law takes the attitude that avoidance and recovery must occur with global effect to ensure equal treatment of creditors worldwide and would not disagree with the suggestion that the Trustee should be permitted to bring avoidance actions in New York under U.S. law. As the United Kingdom Supreme Court recognised in *Bilta (UK) Ltd v Nazir (No 2)* [[2016] AC 1: *"In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom*". Courts in the United Kingdom and British Overseas Territories recognise that extraterritoriality of avoidance provisions in insolvency proceedings is both necessary and desirable.

75. There does not appear to be a single case of injunctive relief to prevent an insolvency officeholder from bringing avoidance claims in his home jurisdiction in accordance with the law applicable to those insolvency proceedings. Indeed, the only cases which we have found are examples of injunctive relief being refused or discharged to permit the foreign insolvency proceedings to continue. In *AWB Geneva SA v North America Steamships Limited* [2007] 1 CLC 749, [2007] 2 Lloyd's Rep 31, for example, the English court refused to grant an injunction to restrain a Canadian bankruptcy trustee from seeking relief from the Canadian court under Canadian insolvency law. Similarly, in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, Hoffmann J discharged injunctions which he feared might interfere with the proper conduct of Chapter 11 proceedings

in Texas, saying at 117: "*This court … will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under Chapter 11*". Instead of seeking to prevent the pursuit of foreign liquidations such as the liquidation of BLMIS (and the adjustment of prior transactions which forms an integral part of such proceedings), the courts of British Overseas Territories will seek to assist.

Analysis of the Defendants' contentions regarding disruption and interference

76. The Defendants and their *amici* contend that the continuance of the Trustee's avoidance claims against subsequent transferees in New York would cause disruption to liquidations of feeder funds in offshore jurisdictions. It has been argued (for example) that "*if the Trustee were to recover from the BVI Investors, those investors … would likely pursue claims against the BVI Debtors …* [S]*uch a development would add billions in new claims against the estates, likely causing the estates to incur millions of dollars in professional fees while the proceedings are kept open*" (BVI Brief, pages 20 to 21).

77. This misunderstands the nature and effect of insolvency avoidance claims. The consequences of the adjustment of antecedent transactions – which the *amici* seek to characterise as 'disruption' or 'interference' – would not be regarded in that way by the courts of the Cayman Islands and the BVI. To the contrary, those courts would view the factors to which the *amici* refer as

the necessary and inevitable consequence of the avoiding of prior transactions. Specifically, in the present case, the investor's claim against the feeder fund may be revived (enabling him to lodge a claim in the feeder fund's liquidation) whilst the feeder fund may receive an enhanced distribution from the BLMIS estate as a result of recoveries from investors. That is not undesirable disruption to which objection may validly be taken but merely represents the ordinary consequence of the statutory avoidance provisions under the applicable laws.

Protocols and coordination

78. Even if they were to be faced with a risk of disruption, the Cayman and BVI courts would wish to formulate a suitable protocol for the coordination of the relevant cross-border insolvency proceedings. Indeed, section 467(3)(d) of the BVI Insolvency Act 2003 expressly enables the BVI court to "*make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding*". In the present case, the BVI's court's prior approval of the Trustee's settlement agreement with Fairfield's liquidators – a settlement that contemplated dual proceedings brought by the Trustee and the liquidators against common defendants – is an example of the BVI's court's ability to engage in sensible and pragmatic coordination and assistance.

The Defendants' contentions regarding *Migani* and *Kingate*

Analysis of the *Migani* case

79. The Defendants have sought to rely on the *Migani* decision. In connection with that decision, they say that BVI law has "[its] *own rules relating to the disgorgement of transfers*" (Defendants' Brief, page 18)' that Fairfield's liquidators' claims against investors have been rejected by the BVI courts; and that the "*plain purpose*" of the Trustee's U.S. proceedings is to "*skirt*" this result (Defendants' Brief, page 65).

80. The Defendants' arguments proceed on a false premise. The liquidators of Fairfield Sentry Limited ("**Fairfield**") did not bring any claims in the BVI. The plaintiff was Fairfield itself, the limited company, as a separate legal entity. Further, Fairfield was not relying on any avoidance claims under BVI insolvency law (which could have been pursued only in the names of Fairfield's liquidators); and Fairfield's liquidators themselves did not bring any claims in the BVI courts under section 245 or 246 of the 2003 Act. Instead Fairfield was bringing restitutionary claims for unjust enrichment against the defendants, who were alleged to have received payments by mistake. In short, the claims brought by Fairfield were ordinary non-insolvency claims, not avoidance claims under insolvency laws. This is apparent from the judgment of Bannister J dated 20 April 2011 at [2], the decision of the Eastern Caribbean Court of Appeal (the "**BVI Court of Appeal**") dated 13 June 2012 at [2]-[3], and the opinion of the Judicial

Committee of the Privy Council (the "**Privy Council**") dated 16 April 2014 at [4].

(1) Bannister J explained at [2] that Fairfield alleged that "*the relevant redemption payments … were made under a mistake of fact … Although not pleaded in this way, the mistake relied upon is that* [Fairfield], *when it calculated the redemption price, thought it had much more money in the bank, so to speak, than it really had and it is this mistake that* [Fairfield] *relies upon in order to plead that the redeemers were unjustly enriched when they redeemed their shares*".

(2) The BVI Court of Appeal confirmed in its decision dated 13 June 2012 at [2]-[3] that Fairfield's claim was one which was "*based on an alleged mistake in the calculations of the NAV of the shares redeemed by Sentry at the request of the shareholder in question …* [Fairfield] *alleges that the NAV was calculated under a mistake as BLMIS was in fact operating a Ponzi scheme, and Sentry's investments in BLMIS were lost from the date of their investment in BLMIS. As a result,* [Fairfield] *alleges, its NAV was at all times either nil or a nominal value, so that the aggregate redemption sums should have been either nil or nominal*".

(3) The law of restitution for unjust enrichment concerns cases in which a "*defendant has been enriched by the receipt of a benefit gained at the*

claimant's expense in circumstances that the law deems to be unjust" (Goff & Jones, *The Law of Unjust Enrichment*, 9th Ed., [1-08]).

(4) Among other things, a claim will lie where the claimant's mistake has caused him to confer a benefit on the defendant, to which the defendant was not genuinely entitled. The Privy Council explained in *Migani* at [18] that the basic principle is that a recipient of money "*cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him*": *Kleinwort Benson Ltd v Lincoln City Council [1999] CLC 332* at 375; [1999] 2 AC 349 at 408B (Lord Hope).

(5) As the Privy Council noted in its opinion in *Migani* at [18], "*to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered … So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess*".

(6) In essence, Fairfield was arguing that it had mistakenly paid too much money to the Defendants. It argued that the NAV had been miscalculated and that the sums payable to redeeming investors should have been nil or at least considerably lower than the sums actually paid out. Fairfield argued that the Defendants had no right to receive the more substantial sums which had been paid to them, which had been calculated on the basis of a mistake as to the true NAV.

(7) As the Privy Council noted at [19], Fairfield's claim depended on whether it was bound by the redemption terms to make the payments which it did make.

81. The defendants to Fairfield's claims sought to rely on Article 11(1) of Fairfield's articles of association (the "**Articles**"), which provided: "*Any certificate as to the Net Asset Value per Share or as to the Subscription Price or Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on all parties*".

82. As the BVI Court of Appeal explained in its decision dated 13 June 2012 at [6], the defendants argued that the requirements of Article 11(1) were satisfied when their shares in Fairfield were redeemed and that Fairfield was prevented from attempting to go behind, disturb or recalculate the NAV.

83. The defendants also argued that they had given good consideration for the redemption monies and that the bargain could not be reopened.

84. The claims which Fairfield brought against the Defendants therefore did not involve any rights of action conferred by statutory insolvency law. Instead, they were non-insolvency claims, which did not depend on the fact that Fairfield had gone into liquidation in the BVI and could equally have been asserted by Fairfield before the commencement of its liquidation.

85. The Defendants are therefore wrong in implying or asserting that the Trustee's claims in the US Bankruptcy Court closely relate to the claims brought by Fairfield in the BVI. Although the Trustee and Fairfield have

brought claims against the same defendants, the claims are entirely different. The Privy Council in *Migani* was therefore not required to consider (and did not consider) any of the issues that might arise in respect of the BVI statutory scheme for the disgorgement of transfers in a liquidation. In any event, the Trustee represents the liquidation estate of BLMIS, whereas Fairfield's liquidators seek to make recoveries on behalf of a different estate.

86. For essentially the same reasons, the Defendants are wrong to contend that "*the Judicial Committee of the Privy Council of the United Kingdom— the highest court presiding over the BVI, Bermuda, the Cayman Islands, and other nations in the British Commonwealth—explicitly held that BVI law governs the transfers at issue here*" (Defendants' Brief, page 6) and that the Trustee is unable to overcome "*the holdings of the Privy Council … that it is BVI law, not New York law, that governs the transfers from the Fairfield Funds to their investors*" (Defendants' Brief, page 71).

87. The Privy Council did not hold that BVI law governed the transfers. Rather, it held that BVI law governed the restitutionary claims to reverse unjust enrichment for mistake, which Fairfield had asserted. In other words, the Privy Council was merely commenting on the law applicable to the specific cause of action which had been selected by Fairfield. BVI law applied to that that claim, because Fairfield was seeking to recover monies which it claimed to have paid to the defendants by mistake. The defendants' right to those monies was based on the Articles, which were governed by BVI law. In

order to determine whether the defendants had been entitled to receive those monies, it was necessary to construe the Articles to ascertain their true meaning.

88. The applicability of BVI law was therefore the direct result of the specific cause of action which had been asserted by Fairfield, which brought the Articles into play. The Privy Council was not ruling that BVI law would necessarily apply to every claim or cause of action which might be asserted in connection with the transfers. Specifically, it was not ruling out the possibility of a claim under U.S. bankruptcy law, as no such claim was before it.

89. This is clear from the opinion of the Privy Council at [17], where the Privy Council explained that "[the] *availability of a claim for restitution arising out of a transaction governed by the articles of the Fund is governed by the same law which governs the articles themselves, namely the law of the British Virgin Islands. In every relevant respect, the principles of the law of the British Virgin Islands governing the construction of the articles and any associated common law right to restitution are the same as those of English law*". Two points in particular should be noted:

(1) First, the Privy Council was concerned solely with the "*availability of a claim for restitution arising out of a transaction governed by the articles of the Fund*". It was not concerned with other claims, such as claims under insolvency law.

(2) Secondly, the relevant principles of BVI law which were engaged were simply those concerning "*the construction of the articles and any associated common law right to restitution*". In particular, the Privy Council was not concerned with the BVI statutory scheme for the readjustment of prior transfers and other transactions in the event of the commencement of insolvency proceedings.

90. Counsel for Fairfield argued that "*New York law, which is the proper law of the subscription agreement, might be relevant*" (opinion of the Privy Council, [20]).

91. The Privy Council rejected this argument (at [20]), on the basis that:

(1) The issues before the Privy Council depended on the true effect of Fairfield's articles. That was the central issue which was properly before the Privy Council (at [20]). The Privy Council was not addressing any other issues.

(2) None of the parties had pleaded New York law. (In the BVI, as in England, foreign law is a question of fact, which must be pleaded and proved. The court will not investigate matters of foreign law of its own volition. The absence of a plea of foreign law means that there is no relevant factual allegation before the court and nothing on which the court may adjudicate.)

(3) The Privy Council could not "*discern any basis on which New York law could be relevant, since none of the questions raised by the preliminary*

issues depends on the terms of the subscription agreement. They depend wholly on the construction of the articles, which is governed by the law of the British Virgin Islands". This third reason for rejecting the possible application of New York law emphasises the narrow scope of the Privy Council's enquiry in the *Migani* appeal. As explained above, the Privy Council was concerned solely with the issue as to whether the defendants had been entitled to receive the sums paid to them by Fairfield. That question turned on the proper interpretation of the Articles, which were governed by BVI law. The Privy Council was not concerned with any other issues. In particular, it was not concerned with the terms of the subscription agreement (which, as the Privy Council recognised, was governed by New York law).

92. Thus, the Privy Council was holding merely that BVI law applied to the particular cause of action on which Fairfield relied, because those claims turned on the question of whether the defendants had been entitled to the monies, which depended on the Articles, which were governed by BVI law. The Privy Council was not ruling that New York law could never be relevant, or that it could not apply to any other cause of action.

93. There is therefore no basis whatsoever for the Defendants' suggestion that the Privy Council would be affronted by the suggestion that the Trustee's avoidance claims are governed by sections 548 and 550 of the U.S. Bankruptcy Code. To the contrary, the Privy Council would readily accept

that those avoidance claims should be governed by U.S. law, in accordance with the principle of universality. Further, since the avoidance laws of the jurisdictions over which the Privy Council presides claim extraterritorial reach, the Privy Council would not be surprised to be told that the Trustee's avoidance claims could reach transfers and/or persons outside of the United States.

94. It follows from the above that the Defendants are wrong to suggest that the Privy Council has already decided that no claims will lie against the Defendants to recover the transfers and that the Trustee is seeking to avoid that result by bringing a further claim against them (Defendants' Brief, page 85).

(1) Repeatedly, the Defendants emphasise what they describe as "*the importance of maintaining certainty and finality in dealings between a fund and its investors*" (Defendants' Brief, page 26; see also pages 78-79 and 85).

(2) However, it would be wrong to suggest that the Privy Council had held that there could never be any valid claim to recover the transfers or that considerations of finality will necessarily mandate such a result. Further, the Privy Council was not considering the validity of claims by the Trustee, who was not a party to the *Migani* proceedings.

(3) It is important to appreciate the limited compass of the issues before the Privy Council. As explained above, the sole claims which had been

brought were restitutionary claims by Fairfield. Further, Bannister J had directed the trial of certain preliminary issues in respect of those claims. In broad summary, those issues were: (i) whether the defendants had a defence under Article 11 (which turned on the question as to whether the NAV had been certified in the manner required by that Article; and (ii) whether the defendants had a defence on the basis that they had given good consideration.

(4) The Privy Council's decision is confined to those preliminary issues, which themselves relate solely to the restitutionary claims. See, for example, the reasoning in the opinion of the Privy Council at [21]-[22], which is concerned with the proper construction of the Articles, to decide whether the NAV could be re-opened.

(5) The Privy Council's reference to the importance of ascertaining a binding NAV at the date of the redemption is to be understood in this context. The Privy Council rejected Fairfield's proposed construction of the Articles on the basis that it would be commercially unworkable (at [21]). The Privy Council relied on this commercial context to justify a broad meaning of the concept of "*certificate*" in Article 11(1), so as to include "*the ordinary transaction documents recording the NAV per share or the subscription or redemption price which will necessarily be generated and communicated to the member at the time*" (at [21]).

(6) The Privy Council did not make any findings – or indeed any comments – about the importance of maintaining certainty and finality in dealings between a fund and its investors (as the Defendants' wrongly contend in their Brief at [26]). No such broad policy point was before the Privy Council.

(7) Further, it is wrong to suggest that the Privy Council "*has made clear that the legal regimes in the BVI, Cayman, and Bermuda … are reluctant to unwind financial transactions, even to advance the goal of making distributions more equitable*" (Defendants' Brief, pages 77-78). First, the Privy Council was dealing with an appeal from the BVI Court of Appeal and was not concerned in *Migani* with the legal regimes of the Cayman Islands or Bermuda. Secondly, the Privy Council's decision does not exhibit some sort of general reluctance of unwind financial transactions. Instead, the commercial necessity of having a binding NAV in the context of the Articles as a whole pointed to a particular answer to the first of the preliminary issues with which the Privy Council was concerned, as a matter of the interpretation of the Articles. Thirdly, the existence of transaction avoidance of BVI insolvency law is flatly inconsistent with any suggestion that BVI law is reluctant to unwind financial transactions: those BVI insolvency avoidance provisions are equally application to transactions of a financial nature.

(8) The Defendants are also wrong to suggest that "[the] *Privy Council held that the Fairfield Funds' transfers to their investors could not be recovered from the investors*" (Defendants' Brief, page 26). There was no such broad finding. The Privy Council merely held that the particular common law claims (namely, restitution of unjust enrichment on the basis of mistake) which had been selected and pursued by that particular claimant (namely, Fairfield) were defective and could not succeed, because the defendants had been entitled under the Articles to receive the monies which had been paid to them by Fairfield. The Privy Council did not need to (and did not) opine on the viability of any other causes of action by any other parties under any other legal systems. In particular, the Privy Council did not consider whether there was any basis in insolvency law to recover the payments which the defendants had received.

95. The Trustee's claims in the United States on the basis of U.S. bankruptcy law are therefore not in conflict with the Privy Council's decision in *Migani*. The Defendants are wrong to rely on *Migani* to suggest (as they do in their Brief at page 26) that, "[if] *the Trustee were empowered to recover those subsequent transfers, U.S. law would be on a collision course with the laws of the BVI, Bermuda, the Cayman Islands, and other countries in defiance of comity of nations and the presumption against extraterritorial application of U.S. law*". There is no conflict between the Privy Council's decision

(holding that Fairfield could not assert restitutionary claims against the defendants to reverse unjust enrichment) and the Trustee's claims, which are based on entirely different legal principles under a different system of laws.

96. Finally, it is important to note that the Privy Council was not dealing with any issues of good faith, whether as a matter of legal principle or by reference to the facts.

(1) None of the preliminary issues selected by Bannister J sought to consider the relevance of good faith, or the definition of good faith, or the question of whether Fairfield and/or its investors had been acting in good faith at any particular moment in time.

(2) As the BVI Court of Appeal noted in decision at [61ii-iii]:

> "*The Preliminary Issues in Migani did not address the issues of bad faith whether on the part of the giver or receiver of a certificate pursuant to Article 11 of* [Fairfield's] *articles or indeed any question as to attribution of Citco's alleged bad faith as agent of the Funds … Nothing whatsoever was addressed in respect of lack of good faith nor could there be, as no evidential or pleaded basis for such consideration was before the* [Privy Council]".

Analysis of the *Kingate* case

97. The same is true of the *Kingate* litigation in Bermuda, which involved non-insolvency claims brought by certain companies under the general law. In summary, the Kingate funds brought restitutionary claims against their asset manager, Kingate Management Limited ("**KML**"), and others, seeking to recover management fees which had been calculated on the basis of the funds' reported NAVs. The funds alleged that, those NAVs having been

revealed to be incorrect, the fees had been calculated on an incorrect basis and were recoverable on a restitutionary basis as a claim for money had and received under a mistake of fact: see *Kingate Global Fund Ltd v Kingate Management & Ors* [2015] SC (Bda) 65 Com (25 September 2015) ("***Kingate***") at [12]- KML and the other defendants who had received those fees or their traceable proceeds sought to defend those claims by contending that, under the terms of the management contract, KML had been entitled to those fees and that a subsequent discovery of an error in the calculation of the NAV did not retrospectively nullify that entitlement.

98. Kawaley J determined certain preliminary issues concerning the calculation of the NAV and in particular whether the NAVs which had been calculated historically remained binding on the parties as a matter of contract law, even in the event of the subsequent discovery of an error. These points turned essentially on the proper interpretation of the contractual framework. If KML could show that it had a contractual right to those fees, the funds' claims for unjust enrichment would necessarily fail.

99. The claims in the *Kingate* litigation were thus not insolvency claims. Instead, they were non-insolvency claims. The decision of the courts of Bermuda in respect of those non-insolvency claims therefore says nothing about whether the monies at issue could or could not be clawed back under any provision of insolvency law and does not preclude the bringing of insolvency law claims against persons who received subsequent transfers.

CONCLUSION

100. As a matter of Cayman and BVI law comity would not require the U.S. court to prevent the Trustee from bringing proceedings in New York for the adjustment of prior transactions under U.S. law in the liquidation of BLMIS.

101. To the contrary, the Cayman and BVI courts would expect the Trustee to be able to bring such avoidance actions – even in respect of transfers and defendants located outside the United States.

102. In these circumstances, the Cayman and BVI courts would consider that comity required them to assist the Trustee to bring such avoidance claims (including by permitting him to do so in the Cayman Islands and the BVI under local laws).

103. The fact that the Cayman and BVI courts would permit the Trustee to bring avoidance actions (and, in the case of *Primeo*, specifically allowed him to bring an avoidance action again a subsequent transferee) demonstrates that they would not view such claims as a disruptive or improper attempt to 'reach around' or side step the immediate transferee.

104. Further, whilst the Cayman and BVI courts have extensive powers to prevent by injunction any conduct which interferes with Cayman or BVI insolvency proceedings, they would not grant such an injunction to prevent the pursuit of the avoidance actions by the Trustee in New York under U.S. law and would not regard such actions to be disruptive of Cayman or BVI insolvency proceedings.

Executed on the 9th day of May, 2018

Signed: Mark Phillips

Mark Phillips, QC

ANNEX A

ANNEX A:

MARK PHILLIPS QC

CURRICULUM VITAE

Called to the English Bar 1984, Queen's Counsel 1999

Mark Phillips QC recently completed the *Saad* fraud trial that lasted for 129 days in the Grand Court of the Cayman Islands over 12 months. His trial advocacy includes successfully defending the Bank of England against the *Three Rivers* claim arising out of its regulation of BCCI (a trial that lasted 2 years).

Mark Phillips QC appeared in several high-profile cases at every level. In the House of Lords and Supreme Court Mark Phillips QC led in the *Lehman/Nortel* pensions appeal and in *Toshoku Finance*, and appeared in *Paramount Airways*, *Leyland Daf*, *Sher v Policyholders Protection Board* and *Three Rivers*. In the Court of Appeal Mark Phillips QC established that directors of insolvent companies had a duty to have regard to the interests of creditors in the ground-breaking case, *West Mercia Safetywear v Dodd*. He also appeared in *Re. Esal Commodities*, *Re. Jokai Tea Trading* and more recently he led for the appellants in the *Northern Rock* case.

In the late 1980s and early 1990s Mark Phillips QC acted in every major administration including *Maxwell*, *Olympia & York* (Canary Wharf), *British & Commonwealth*, *Barings* (for the Bank of England), *Butlers Wharf*, *Atlantic Computers* and *Paramount Airways*. Over recent years his work has included *The Co-operative Bank*, *Re. Maud* and *STX Pan Ocean* (that concerned giving effect to an overseas insolvency pursuant to the UNCITRAL model law).

AREAS OF PRACTICE

Insolvency and Restructuring
Mark Phillips QC has extensive experience in all aspects of insolvency and restructuring.

On expenses and the insolvency waterfall, cases include:

- ***Re Lehman Brothers International (Europe)*** [2013] UKSC 52, ranking of Pensions Act 2004 claims in insolvency waterfall
- ***Revenue & Customs Commissioners v Football League*** [2012] EWHC 1372 (Ch), validity of the "football creditors" rule
- ***Re Toshoku Finance UK*** [2002] 1 WLR 671 (HL), ranking of claims for corporation tax in a liquidation

On schemes and voluntary arrangements, cases include:

- ***The Co-operative Bank***, advising and appearing on behalf of noteholders on the Co-operative bank restructuring and scheme of arrangement
- ***Re Cape*** [2006] 3 All ER 1222, scheme of arrangement concerning asbestosis claims
- ***Sea Assets v Perusahaan Pereroan (Peroso) PT Perusahaan (Garuda Airlines***) [2001] EWCA 1696, established that in a scheme the same offer need not be made to all creditors, only to scheme creditors

- ***Somji v Cadbury Schweppes*** [2001] 1 BCLC 498 (CA), collateral deal invalidating scheme of arrangement
- ***Maxwell Communications Corporation*** [1994] 1 All ER 737, subordinated debt was valid
- ***Re British and Commonwealth Holdings (No 3)*** [1992] 1 WLR 672, subordinated creditors not entitled to vote

On administration, cases include:

- ***Re Maltby Investments*** [2012] EWHC 4 (Ch), the EMI pre-pack
- ***Re Metronet Rail BCV*** [2008] BCLC 760
- ***Re Ferranti International***; ***Powdrill v Watson Re Leyland DAF*** [1995] 2 AC 394 (HL), liabilities to employees under adopted contracts
- ***Re Olympia & York Canary Wharf (No 3)*** [1994] 1 BCLC 702, administration and restructuring of Canary Wharf
- ***In re Hartlebury Printers*** [1993] 1 All ER 470, administrator's duty to consult on redundancies
- ***Re Arrows (No 3)*** [1992] BCLC 555, contested administration order
- ***Re Atlantic Computer Systems (No 1)*** [1992] Ch 505 (CA), criteria for leave to enforce rights
- ***Re Charnley Davies (No 2)*** [1990] BCLC 760, administrator's duty of sale
- ***Re Smallman Construction*** [1989] BCLC 420, power to give directions to take steps other than those approved by creditors

On recognition of overseas insolvencies, cases include:

- ***STX Pan Ocean Co***, recognition of the stay of termination provisions under a Korean insolvency process
- ***BTA Bank***, advising on the Kazakh schemes for the restructuring of the Kazakh BTA Bank, and appearing at the hearing for recognition

On directors' duties, cases include:

- ***West Mercia Safetywear v Dodd*** [1988] BCLC 250 (CA), duty of directors where a company is insolvent or on the verge of insolvency

On the use of compulsory powers, cases include:

- ***Re Galileo Group*** [1999] Ch 100, production of documents by the Bank of England under the liquidator's powers of compulsion
- ***Re Barlow Claims Gilt Manager*** [1992] Ch 208, whether transcripts of examinations could be used in criminal proceedings
- ***Re Esal (Commodities)*** [1989] BCC 784 (CA), disclosure by liquidators of information obtained under compulsion

Banking and Finance

- ***Harbinger v Caldwell, Re Northern Rock*** [2013] EWCA Civ 492, acting for the shareholders of Northern Rock in their appeal against the nil valuation of their shares
- ***Britannia Bulk v Bulk Trading*** [2012] EWCA Civ 419, [2011] 2 Lloyd's Rep 84, dispute over the construction of the ISDA Master Agreement
- ***Re Butlers Wharf*** [1995] 2 BCLC 43, rights of subordination and the effect of suspense accounts
- ***Scher v Policyholders Protection Board; Ackman v Policyholders Protection Board*** [1993] 3 WLR 357 (HL), whether overseas insurance policies were caught by the Policyholders Protection Act 1975
- ***Re Bank of Credit and Commerce International*** [1992] BCLC 570, winding up of BCCI

- ***Re Rafidain Bank*** [1992] BCLC 301, provisional liquidators making payments out of the bank's assets
- ***ED & F Man (Coffee) v Miyazaki SA Commercial Agricola*** [1991] Lloyd's Rep 154

Commercial Litigation and Arbitration
Mark has wide ranging experience of commercial litigation, including:

- ***Three Rivers District Council v Bank of England*** [2003] AC (HL), representing the Bank of England on the misfeasance claim brought by the liquidators of BCCI SA. Several applications over a 10-year period (twice in the House of Lords and 2 year commercial trial)
- ***Stephen John Akers, Mark McDonald (Joint Liquidators of Chesterfield United Inc and Partridge Management Group) v Deutsche Bank AG*** [2012] EWHC 244 (Ch), representing the liquidators of Kaupthing in potential claims arising out of related SPVs

International and Offshore
Mark has regularly appears in the courts of the Cayman Islands and BVI. Cases include:

- ***Re Sphinx Group of Companies***, advising the Liquidation Committee over several years in relation to all aspects, including the issues of priority as between different classes of claim, the provisions that should be made for legal expenses and potential US claims, and the scheme of arrangement
- ***Re ICO,*** insolvency of the satellite group
- ***Re X***, acting for the Attorney General of the Cayman Islands in relation to an authorised bank
- ***Re Integra,*** valuation of shares in a dispute over a Russian company
- ***Re Charm Communications,*** valuation of shares in a dispute over a Chinese company
- ***Re Monarch***, the ranking of redeeming creditors in a liquidation
- ***Re Trading Partners,*** appearing on a winding up petition of a trading group
- ***AHAB v SICL and others***, claim arising out of the collapse of the AHAB and SICL groups in Saudi Arabia

CAREER

2002-2003	President Insolvency Lawyers Association
2000-2008	Recorder sitting as a part time judge in the Crown Court
2000	Called to the Bar of the British Virgin Islands
1999	Appointed Queen's Counsel
1984	Called to the Bar of England and Wales

MEMBERSHIPS
International Insolvency Institute
Insolvency Lawyers Association (Past President)
Association of Business Recovery Professionals (Fellow and past Council Member)
INSOL International
INSOL Europe
Commercial Bar Association
Chancery Bar Association

EDUCATION AND QUALIFICATIONS
Bristol University, LLM, Commercial Law
Bristol University, LLB

Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
AWB Geneva SA v. North America Steamships Limited [2007] 2 Lloyd's Rep 31	Canada	8
Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825	United Kingdom	11
Bilta (UK) Ltd v. Nazir [2014] Ch 52 (CA)	United Kingdom	12
Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
In re C (A Bankrupt) BVIHC 0080/2013	British Virgin Islands	15
Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852	United Kingdom	18
Jyske Bank (Gibraltar) Ltd v. Spjeldnaes [2000] BCC 16	United Kingdom	19
Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

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	Jurisdiction	Exhibit Number
Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
Picard v. Bernard L Madoff Investment Securities LLC BVIHCV140/2010	British Virgin Islands	22
Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
Stichting Shell Pensioenfonds v. Krys [2015] AC 616; [2014] UKPC 41	United Kingdom	25
Other Authorities		
McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
Cases Cited by *Amici Curiae*		
A, B, C & D v. E , HCVAP 2011/001	Anguilla	28
Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 1

VIRGIN ISLANDS INSOLVENCY ACT, 2003

PART XIX

Section 466

(1) In this Part,

"foreign proceeding" means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy and "debtor" shall be construed accordingly;

"foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding;

"insolvency officer" means the Official Receiver, a liquidator, provisional liquidator, bankruptcy trustee, administrator, receiver, supervisor, or interim supervisor; "relevant foreign country" means a country, territory or jurisdiction designated by the Commission as a relevant foreign country for the purposes of this Part; and

"Virgin Islands insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to this Act, or to any other enactment in the Virgin Islands, relating

(i) to the bankruptcy, liquidation, administration or receivership of a debtor; or

(ii) to the reorganisation of a debtor's affairs;

where, in all cases, the property of the debtor is or will be realized for the benefit of secured or unsecured creditors.

(2) Notwithstanding subsection (1), a country or territory that is designated as a designated country for the purposes of Part XVIII ceases to be a relevant foreign country from the date of its designation as a designated country. (3) The designation of a country for the purposes of Part XVIII does not affect the validity of any order made under this Part.

Section 467

(1) For the purposes of this section "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized.

(2) A foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.

(3) Subject to section 468, upon an application under subsection (1), the Court may

(a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;

(b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

(d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;

(e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such order or grant such other relief as it considers appropriate.

(4) An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest.

(5) In making an order under subsection (3), the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding.

Section 468

(1) In determining an application under section 467, the Court shall be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with

(a) the just treatment of all persons claiming in the foreign proceeding;

(b) the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding;

(c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property;

(d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency; and

(e) comity.

(2) An order under section 467 shall not, without the consent of the person concerned,

(a) affect the right of any creditor of the debtor to benefit from set-off as provided for in section 150; or

(b) result in a person who is a preferential creditor of the debtor, or who in a Virgin Islands insolvency proceeding in respect of the debtor would be a preferential creditor, receiving less than he would receive in a Virgin Islands insolvency proceeding .

(3) The Court shall not make an order under 467 that is contrary to the public policy of the Virgin Islands.

Section 469

(1) Subject to subsection (2), an application to the Court by a foreign representative under section 467 does not submit the foreign representative to the jurisdiction of the Court for any other purpose except with regard to the costs of the proceedings.

(2) The Court may make an order under this Part conditional on the compliance by the foreign representative with any other order of the Court.

Section 470

Subject to section 443, nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands.

Section 471

An application by a foreign representative under this Part shall be made to the Court in accordance with the Rules.

Section 472

The Court may, on the application of an insolvency officer, authorize him to act in a foreign country on behalf of a Virgin Islands insolvency proceeding as permitted by the applicable foreign law.

Exhibit 2

CAYMAN ISLANDS COMPANIES LAW, 2016

Section 145

(1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

Section 146

(1) In this section and section 147-

(a) "disposition" has the meaning ascribed in Part VI of the Trusts Law (2011 Revision);

(b) "intent to defraud" means an intention to wilfully defeat an obligation owed to a creditor;

(c) "obligation" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;

(d) "transferee" means the person to whom a relevant disposition is made and shall include any successor in title; and

(e) "undervalue" in relation to a disposition of a company's property means-

(i) the provision of no consideration for the disposition; or

(ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith-

(a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and

(b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Section 147

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

Section 240

In this Part-

"debtor" means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;

"foreign bankruptcy proceeding" includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor; and

"foreign representative" means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

Section 241

(1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of-

(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor.

(2) An ancillary order may only be made under subsection (1)(d) against-

(a) the debtor itself; or

(b) a person who was or is a relevant person as defined in section 103(1).

Section 242

(1) In determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with-

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

(2) In the case of a debtor which is registered under Part IX, the Court shall not make an ancillary order under section 241 without also considering whether it should make a winding up order under Part V in respect of its local branch.

Section 243

(1) Where a company incorporated under Part II or registered under Part IX is made the subject of a foreign bankruptcy proceeding, notice of this fact shall be filed with the Registrar and published in the Gazette.

(2) The notice shall contain the prescribed particulars and shall be filed by the company's liquidator or, if no liquidator has been appointed under this Law, by its directors within fourteen days of the date upon which the foreign bankruptcy proceeding commenced.

(3) A liquidator or a director who fails to comply with this section commits an offence and is liable on summary conviction to a fine of ten thousand dollars.

Exhibit 3

UNITED KINGDOM CROSS-BORDER INSOLVENCY REGULATIONS, 2006

Schedule 1

Article 25

1. In matters referred to in paragraph 1 of article 1, the court may cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Exhibit 4

UNITED KINGDOM INSOLVENCY ACT, 1986

Section 213

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

Section 238

(1) This section applies in the case of a company where—

(a) the company enters administration,

(b) the company goes into liquidation;

and "the office-holder" means the administrator or the liquidator, as the case may be.

(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and

(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

Section 239

(1) This section applies as does section 238.

(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(4) For the purposes of this section and section 241, a company gives a preference to a person if—

> (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and
>
> (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).

(7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

Section 423

(1) Subject to subsection (2) below, subsection (4) below applies to a transaction entered into by a company, whether before or after 1st April 1986, which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before the commencement of the winding up of the company or [F1the company enters administration].

(2) Subsection (4) below does not apply to any of the following transactions—

> (a) a transaction in the ordinary course of trade or business;
>
> (b) a payment in cash for a debt which when it was paid had become payable, unless the transaction was collusive with the purpose of prejudicing the general body of creditors;
>
> (c) a transaction whereby the parties to it undertake reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive as aforesaid;
>
> (d) the granting of a mandate by a company authorising an arrestee to pay over the arrested funds or part thereof to the arrester where—

(i) there has been a decree for payment or a warrant for summary diligence, and

(ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.

(3) For the purposes of subsection (1) above, the day on which a preference was created is the day on which the preference became completely effectual.

(4) A transaction to which this subsection applies is challengeable by—

(a) in the case of a winding up—

(i) any creditor who is a creditor by virtue of a debt incurred on or before the date of commencement of the winding up, or

(ii) the liquidator; and

(b) where the company has entered administration, the administrator.

(5) On a challenge being brought under subsection (4) above, the court, if satisfied that the transaction challenged is a transaction to which this section applies, shall grant decree of reduction or for such restoration of property to the company's assets or other redress as may be appropriate;

Provided that this subsection is without prejudice to any right or interest acquired in good faith and for value from or through the creditor in whose favour the preference was created.

(6) A liquidator and an administrator have the same right as a creditor has under any rule of law to challenge a preference created by a debtor.

(7) This section applies to Scotland only.

Section 426

(1) This section applies in the case of a company where—

(a) the company enters administration,

(b) the company goes into liquidation, or

(c) a provisional liquidator is appointed;

and "the office-holder" means the administrator, the liquidator or the provisional liquidator, as the case may be.

(2) Subject as follows, a lien or other right to retain possession of any of the books, papers or other records of the company is unenforceable to the extent that its enforcement would deny possession of any books, papers or other records to the office-holder.

(3) This does not apply to a lien on documents which give a title to property and are held as such.

Exhibit 5

[2002 CILR 148]
IN THE MATTER OF AL SABAH

GRAND COURT (Smellie, C.J.): March 27th, 2002

Bankruptcy and Insolvency—assistance to foreign court—enforcement of foreign bankruptcy order—Bahamian Supreme Court is "court in bankruptcy" for purposes of Grand Court's recognition and enforcement of appointment of trustee in bankruptcy under Bankruptcy Law (1997 Revision), s.156 in relation to Cayman assets

Bankruptcy and Insolvency—assistance to foreign court—enforcement of foreign bankruptcy order—inherent jurisdiction to recognize and enforce appointment of foreign trustee in bankruptcy as matter of comity if bankrupt subject to foreign court's jurisdiction and foreign court willing to reciprocate—may grant foreign trustee in bankruptcy powers under Cayman law to deal with Cayman assets

The Supreme Court of The Bahamas requested the Grand Court's recognition of its appointment of a trustee in bankruptcy for the purpose of recovering Cayman assets.

On the petition of Grupo Torras S.A. ("GT"), a company owned by the Kuwaiti government, the Bahamian Supreme Court adjudged Sheikh Fahad Mohammed Al Sabah bankrupt on the basis of judgment against him in the English High Court ordering that he repay the funds he had obtained by fraud from GT. The trustee in bankruptcy moved the Bahamian court to request an order for recognition and enforcement of his appointment to assist in the recovery of assets held by Cayman trusts of which the bankrupt was the settlor and primary beneficiary. The application was made under s.156 of the Cayman Bankruptcy Law, by which "all the Courts in bankruptcy" were to assist one another, and by which an order made by one court in bankruptcy could, on application to another, be made an order that court. He also applied in his own right to the Grand Court for the same order to be made under the inherent jurisdiction of the court.

He submitted that (a) although ss. 2 and 3(1) of the Law designated the Grand Court as the only court in bankruptcy, s.156 in fact referred to all British courts in bankruptcy wherever they might be (including the Bahamian court), since (i) the Grand Court and the Bahamian court had each been enabled, as British courts with bankruptcy jurisdiction, to exercise on request the same jurisdiction as the other, under s.74 of the English Bankruptcy Act 1869 (as re-enacted in s.122 of the Bankruptcy

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Act 1914); (ii) s.156 contained identical provisions to s.64 of the Jamaican Bankruptcy Law 1871, which had formerly applied to the Cayman Islands by virtue of the Cayman Islands Act 1863 and which had been enacted in awareness of the provisions of s.74; (iii) in the Cayman context (unlike Jamaica), where the Grand Court alone exercised jurisdiction in bankruptcy, the reference in s.156 to co-operation between all courts of bankruptcy could only contemplate assistance to overseas courts; alternatively, (iv) s.122 of the 1914 Act, as the successor to the 1869 Act, continued to apply here, as the Insolvency Acts by which it had been repealed in the United Kingdom did not apply to the Cayman Islands, and the Cayman Constitution preserved the application of legislation previously in force in the Islands; (b) the jurisdiction to be exercised by the Grand Court was its own jurisdiction rather than that of the Bahamian court, so as to vest the trustee with the powers in relation to the Cayman assets permitted by Cayman law; and (c) the Grand Court also had inherent jurisdiction to recognize and enforce the appointment of a foreign trustee in bankruptcy.

Held, making the orders requested:

(1) The Bahamian court was to be regarded, for the purposes of s.156 of the Bankruptcy Law (1997 Revision), as one of the courts in bankruptcy which the Grand Court was required to assist and at the request of which it could exercise its bankruptcy jurisdiction in relation to the Cayman assets. The legislative history of the Law made it clear that such was the legislature's intention. The English Bankruptcy Act 1869 had enabled all British courts, including those of The Bahamas and Jamaica to assist each other in the same way. Since the English Parliament had, in 1863, conferred on Jamaica the power to legislate for the Cayman Islands, the Bankruptcy Law of 1871, s.64, which was identical to the modern s.156, had applied here until the local legislature was established, and ultimately passed the local Bankruptcy Law in 1964. The 1871 Act had been passed in awareness of the import of the English legislation and was to be construed, in the context of the Cayman Islands, where only one court in bankruptcy existed (the Grand Court), as referring to all British courts in bankruptcy. The Act would otherwise have been void for repugnancy to an Imperial statute, under s.2 of the Colonial Laws Validity Act 1865 (paras. 7–19).

(2) Alternatively, the English Bankruptcy Act 1914, s.122, which had re-enacted the provisions of s.74 of the 1869 Act, governed the Jamaican (and Cayman) courts' dealings with other British courts in bankruptcy whereas the 1871 Act had applied only between Jamaican courts. The 1914 Act

remained in effect here despite its repeal in England by the Insolvency Act 1986, since the new regime established under that Act had no direct application to the Cayman Islands. Moreover, s.57(1) of the Cayman Constitution preserved in force all Acts forming part of the law of the Islands prior to its enactment in 1972. The Bahamian court

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properly regarded itself as a British court for the purposes of s.122, notwithstanding its independence from Britain, by virtue of Bahamian legislation and the Bahamian Constitution (paras. 20–27).

(3) The jurisdiction to be exercised by the Grand Court under s.156 or s.122 was "the like jurisdiction" in respect of the Bahamian court's order as it could exercise in regard to a similar matter here. The court had not been requested to exercise the jurisdiction of the Bahamian court and would not purport to do so. Furthermore, since the Cayman assets were probably held in trusts governed by Cayman law, it was appropriate that the Grand Court have control of the administration of the bankrupt's estate in relation to them. Accordingly, the Bahamian trustee in bankruptcy would be granted all the powers accorded to such an officer here and the Cayman official trustee in bankruptcy would assist him. His conduct would be governed by the Cayman Bankruptcy Law (1997 Revision) (paras. 29–30).

(4) The court's order was also based on its inherent jurisdiction at common law to recognize and enforce the appointment of a foreign trustee in bankruptcy for the purposes of realizing the bankrupt's Cayman assets. It was satisfied that Sheikh Fahad was subject to the jurisdiction of the Bahamian Supreme Court and that that court would be prepared to recognize and enforce similar orders of the Grand Court (paras. 31–32).

Cases cited:

(1) *Al Sabah*, *In re*, Supreme Ct. of The Bahamas, Cause No. 511 of 2001, March 12th, 2002, unreported, applied.

(2) *Blum* v. *Bruce Campbell & Co.*, 1992–93 CILR 591, referred to.

(3) *Callender*, *Sykes & Co.* v. *Colonial Secy. of Lagos*, [1891] A.C. 460, applied.

(4) *Clunies-Ross*, *ex p. Totterdell*, *Re* (1988), 82 Aust. L.R. 475; on appeal, 20 Fed. C.R. 358, referred to.

(5) *Didisheim* v. *London & Westminster Bank*, [1900] 2 Ch. 15; [1900] W.N. 87, *dicta* of Lindley, M.R. applied.

(6) *Gibbons*, *Re*, *ex p. Walter* (1960), 26 Ir. Jur. 60, referred to.

(7) *Gray* v. *Royal Bank of Canada*, 1997 CILR *N*–10, referred to.

(8) *Kilderkin Invs.* v. *Player*, 1984–85 CILR 63, applied.

(9) *Lee*, *In re*, [1933] Jam. L.R. 10, referred to.

(10) *Nadan* v. *R.*, [1926] A.C. 482; (1926), 95 L.J.P.C. 114, *sub nom. R.* v. *Nadan*, [1926] 1 W.W.R. 801; [1926] 2 D.L.R. 177, referred to.

(11) *New Zealand Loan & Mercantile Agency Co.* v. *Morrison*, [1898] A.C. 349, referred to.

(12) *Reilly*, *In re*, [1942] I.R. 416, followed.

(13) *Wallace Bros. & Co. Ltd.* v. *Commr. of Income Tax, Bombay City & Bombay Suburban District* (1948), L.R. 75 I.A. 86, referred to.

Legislation construed:

Bankruptcy Law (1997 Revision) (Laws of the Cayman Islands, 1964, *cap.* 7, revised 1997), s.2: The relevant terms of this section are set out at para. 6.

s.3(1): The relevant terms of this sub-section are set out at para. 6.

s.9(1): "Any person aggrieved by any order of a Judge of the Court in respect of a matter of fact or law, may appeal to the Court of Appeal . . ."

(2): "The judgment of the Court of Appeal upon appeal is final, subject only to the right of appeal to Her Majesty in Council."

s.156: The relevant terms of this section are set out at para. 5.

Act for the Government of the Cayman Islands 1863 (26 & 27 Vict., c.31), s.2: The relevant terms of this section are set out at para. 10.

Bankruptcy Act 1869 (32 & 33 Vict., c.71), s.74: The relevant terms of this section are set out at para. 7.

Bankruptcy Act 1914 (5 & 6 Geo. V, c.59), s.122: The relevant terms of this section are set out at para. 29.

Cayman Islands (Constitution) Order 1972 (S.I. 1972/1101), s.57(1): The relevant terms of this sub-section are set out at para. 27.

Colonial Laws Validity Act 1865 (28 & 29 Vict., c.63), s.2:

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate . . . shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

G.F.R. Ritchie and *Mrs. R.M. Whittaker-Myles* for the Bahamian trustee in bankruptcy.

1 **SMELLIE, C.J.:** Sheikh Fahad Al Sabah is domiciled in the Commonwealth of The Bahamas. He has been adjudged a bankrupt by the Supreme Court of that country which has certified the appointment of Mr. G. Clifford Culmer as his trustee in bankruptcy ("the trustee"). The petitioner in bankruptcy was Grupo Torras S.A. ("GT"), an entity owned by the Kuwaiti Government and through which it held overseas investments. Sheikh Fahad, a member of the Kuwaiti royal family, was once the person in charge of the Kuwaiti Investment Authority, based in London, and in that capacity directed the affairs of GT on behalf of the Kuwaiti Government. In abuse of that important position of trust, Sheikh Fahad became personally involved in a number of fraudulent schemes from on or about May 1988, by which GT was defrauded of hundreds of millions of dollars.

2 In recovery actions in a number of jurisdictions around the world, GT has sought to restrain, trace and recover its assets, primarily as against

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bank accounts, trusts and other property alleged or already proven to be under the control of Sheikh Fahad. In the central action brought in England, GT has obtained against Sheikh Fahad a final judgment in its favour in the amount of US$716,846,263. This judgment debt accrues interest at the amount of some US$147,713 per day. It is the judgment debt which grounded the petition in bankruptcy before the Bahamian court.

3 Sheikh Fahad is known to have interests in certain Cayman Islands trusts which are believed to have assets of substantial value. It has already been established in other proceedings before this court that he is the settlor and primary beneficiary of at least one of these trusts. It is against that background that the trustee has moved the Bahamian court to seek the aid of this court in the recognition and enforcement here of his appointment, with the attendant powers to recover the assets of the bankrupt within this jurisdiction.

4 The present application is in furtherance of that objective. It is brought *ex parte* by originating summons in two alternative ways: first, pursuant to a letter of request to this court from the Bahamian court, seeking orders of this court in aid of, and auxiliary to, the orders of the Bahamian court by which that court certified the appointment of the trustee and empowered him to act—this basis of the application is said to rest upon s.156 of the Cayman Bankruptcy Law 1964 ("the local Law"). The second basis depends upon the inherent jurisdiction of this court, pursuant to which the trustee applies in his own right for orders recognizing and enforcing his appointment and so enabling him to act as trustee within this jurisdiction.

5 The first basis, which Mr. Ritchie relies upon primarily and urges me to follow, gives rise to issues of construction and jurisdiction which have not arisen in this court before. Section 156 of the local Law provides:

"All the Courts in bankruptcy and the officers of such Courts shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court that made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

There are two fundamental issues of construction which go to the jurisdiction of this court and to the kind and extent of the powers vested.

Jurisdiction

6 Put in context, the first and fundamental issue is whether s.156 of the local Law enables this court to act in aid of and be auxiliary to the Bahamian court in bankruptcy. This depends on how the phrase "all the Courts in bankruptcy" is to be construed. By s.2 of the local Law, "'Court' means 'the

Chief Court of Bankruptcy . . .'" which, by s.3(1), is defined as this, "the Grand Court." Thus, the only court exercising original jurisdiction in bankruptcy under the local Law is this court. There is a right of appeal by s.9(1) to the Court of Appeal and, by s.9(2), the right of final appeal to the Privy Council is recognized.

7 What, then, is to be made of the pluralistic phrase: "all the Courts in bankruptcy" within this statutory context in the Cayman Islands? I consider that the answer is historical, going back to Jamaican legislation of 1871, in which the local Law has its provenance and, before that, to the English Bankruptcy Act of 1869. By s.74 of the 1869 Act, it was enacted that—

"the London Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

The 1869 Act, by necessary implication arising from the wording and intent of s.74 (and from other provisions which it contained), was clearly Imperial legislation. It applied to all courts in bankruptcy throughout the British Empire. That was affirmed by the judgment of the Privy Council in *Callender*, *Sykes & Co.* v. *Colonial Secy. of Lagos* (3).

8 Provisions in practically identical terms to s.74 were re-enacted in the Bankruptcy Acts of 1883 and 1914, which successively repealed and replaced the 1869 Act, each having effect in turn as Imperial legislation: see *New Zealand Loan & Mercantile Agency Co.* v. *Morrison* (11) ([1898] A.C. at 357–358, *per* Lord Davey) in the Privy Council, where there is further authoritative pronouncement on the Imperial application of the Bankruptcy Acts.

9 Section 122 of the Bankruptcy Act of 1914 is, ultimately, the provision primarily relied upon by the Bahamian court for this request

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and which, for reasons which follow, I regard as a primary and proper basis for granting the request. The historical link to the Cayman Islands runs through the Jamaican legislation of 1871 and that link with the Imperial legislation is fundamental. Section 64 of the Jamaican Bankruptcy Law (Law 25 of 1871) contained identical wording to s.156 of the local Law, which was originally passed in the Cayman Islands in 1964.

10 The relevant history began in 1863 when the Imperial Parliament enacted the Act for the Government of the Cayman Islands. An important function of the Act of 1863 was expressed in s.2 which granted to the Jamaica legislature the power "to make laws for the peace, order and good government of the [Cayman I]slands." This was so even while the local Cayman Islands Assembly of Justices and Vestry was also endowed with limited power to make regulations, and later, by retrospective validation, the Jamaica legislature validated all Laws and Acts which the local Assembly had purported to pass between 1863 and 1893. This was necessary because the local Assembly had been granted no legislative power: see s.2 of the Cayman Islands Government Law enacted by the Jamaica legislature in 1893

11 Thus, the Cayman Islands Act of 1863 of the Imperial Parliament formalized the constitutional theory—if not the political reality—of the Cayman Islands being regarded as and administered as part of the Colony of Jamaica. The significance for present purposes is that the Bankruptcy Law of 1871 of the Jamaica legislature, by virtue of the Act of 1863, applied also to the Cayman Islands.

12 The legislative and governmental responsibility of the Jamaica legislature for the Cayman Islands continued until Jamaica opted to become a part of the ill-fated and short-lived Federation of the West Indies. At that time, the Cayman Islands and the Turks and Caicos Islands (also constitutionally governed as a dependency of Jamaica) chose to remain colonies of Britain, even while being a part of the Federation which was established under the British Caribbean Federation Act of 1956 of the Imperial Parliament.

13 Then followed yet another Act of the Imperial Parliament: the Cayman Islands and Turks and Caicos Islands Act 1958 (c.13). Section 2 of the 1958 Act brought the operation of the 1863 Act to an end and vested power in Her Majesty by Order in Council to provide for the government of the Islands. This yielded the first "Constitutional" Order in Council for the Cayman Islands, which, among other things, provided for the first representative legislature in the Islands.

14 Only shortly thereafter, the Federation of the West Indies was dissolved by the last Act of the Imperial Parliament of relevance to this

matter: the West Indies Act 1962 (c.19). By virtue of the Act of 1962, the Cayman Islands (along with the Turks and Caicos Islands) formally seceded from the Federation and, by s.5, express powers were conferred on Her Majesty again to provide for the government of the Islands by Orders in Council. Such an Order in Council in respect of the Cayman Islands was made in 1962, providing again for a representative legislature. This was the legislature which passed the local Law in 1964 which, as we have seen, carried over in s.156, the identical provisions of s.64 of the Jamaican Bankruptcy Law of 1871.

15 Given the relative importance of Jamaica as a colony, it must have been the case that in 1871 the Jamaica legislature was aware of the provisions of the Imperial Act of Bankruptcy enacted two years earlier in 1869. The similarity of wording between s.64 and s.74 of the Imperial Act of 1869 leaves room for no other inference. In the Jamaican context, the pluralistic reference in the 1871 Law to "all the Courts in bankruptcy" may well have had immediate local application where there were a number of courts exercising limited jurisdiction in bankruptcy and which could therefore have been mandated to act in aid of, and auxiliary to, each other: see, for instance, *In re Lee* (9).

16 No such immediate practicability would have been possible in the post-Federation Cayman Islands. Mr. Ritchie therefore submitted before me that the pluralistic reference in the local Law makes sense after 1964 only if construed as a reference to all courts in bankruptcy *wherever they might be*, or at least to all *British* courts in bankruptcy wherever they might be.

17 I have concluded from a review of the constitutional and legislative history that his latter submission is correct. Whatever the practical effect in Jamaica of the Bankruptcy Law 1871, the Jamaica legislature might not be taken as having intended to limit the effect of the courts' mandate as applying only as amongst the courts of Jamaica. Purporting so to do would have involved impeding the effect of the Imperial Act of 1869 in its mandate which required that assistance be given by all British courts to all other British courts in bankruptcy, wherever they might be. By virtue of s.2 of the Colonial Laws Validity Act 1865, any such purported delimitation created by a colonial legislature would have been void for repugnancy to the Imperial Act: see *Nadan* v. *R.* (10).

18 And while there was no rule of law that territorial limits defined the competence of a colonial legislature, its law-making powers were given for "the peace, order and grand government" of the colony (the express wider powers—including that to repeal Imperial legislation and to legislate extra-territorially—given to "Dominion" parliaments by the Statute of Westminster 1931 not being relevant here): see *Wallace Bros. & Co. Ltd.* v. *Commr. of Income Tax*, *Bombay City & Bombay Suburban*

District (13); and Roberts-Wray, *Commonwealth & Colonial Law*, at 359 *et seq.* (1966). See also, for a helpful discussion on the legislative and constitutional issues, *Re Clunies-Ross, ex p. Totterdell* (4); and *In re Reilly* (12).

19 As a matter of arriving at the proper construction of the Jamaica legislative intent, it would therefore be inappropriate to regard s.64 as having general worldwide effect. Rather, I am persuaded to the more obvious and permissible construction that s.64 was intended to require and enjoin all Jamaican courts in bankruptcy to act in aid of, and auxiliary to, each other and to all other British courts in bankruptcy. Thus, it follows, it would expressly further the mandate of the Imperial Act of 1869 and the local provisions equivalent and correspondent to those of the Imperial Act. I am fortified in this construction by a similar view taken, *vis-à-vis* the Imperial Act, by the Irish Supreme Court of similar provisions enacted by the Irish legislature: see *In re Reilly* (12) ([1942] I.R. at 446–447).

20 The third possible construction—that the 1871 Law was intended to apply only within the territorial limits of the Jamaica legislature, leaving the Imperial Act of 1869 to govern entirely the manner in which the Jamaican courts related to other British courts in bankruptcy—is equally permissible. That construction would have brought the same results as the second, which I prefer, so long as the Imperial Act governed. The effect would be that the local courts in bankruptcy since 1871 would have had the power to act in aid of and auxiliary to each other and similarly in relation to all other British courts in bankruptcy.

21 This statutory scheme was carried over into the last Imperial Bankruptcy Act of 1914, s.122, which ultimately came to apply, on the foregoing construction, to the Cayman Islands. Section 122 of the Bankruptcy Act of 1914 (in terms practically identical to s.74 of the 1869 Act) was the provision invoked and relied upon by the Supreme Court of The Bahamas in sending its request to this court. In so doing, that court held that it is a "British court" (see *In re Al Sabah* (1)). That finding

was a necessary prerequisite to the granting of the request from that court, having regard to the construction set out above arising from the statutory basis upon which this court might so act.

22 Dicey & Morris, *The Conflict of Laws*, 8th ed., at 668–669 (1967) considered the principles:

"(3) Under section 122 [of the Act of 1914], the courts having jurisdiction in bankruptcy in England, Scotland and Ireland and every British court elsewhere having jurisdiction in bankruptcy or insolvency must act in aid of and be ancillary [*sic*] to each other in all bankruptcy matters. But two factors reduce the efficacy of this

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enactment as an aid to the English trustee in obtaining possession of the bankrupt's property situated in the Commonwealth oversea. First, all courts (and the English courts are no exception) whose aid is sought under this or a corresponding section reserve to themselves a discretion and decide for themselves what form of aid to give. Thus, the Irish High Court refused to aid a receiver appointed by the English court in bankruptcy in proceedings initiated in England by the Commissioner of Inland Revenue to recover United Kingdom taxes [citing *Re Gibbons*, *ex p. Walker* (6)—a similar position to which this court would probably adhere]. Secondly, the Commonwealth court whose aid is enlisted may not admit that it is a 'British' court within the meaning of the section. So far as English law is concerned, the expression 'British court' has been widely construed. Thus, during the mandate, it was held that a bankruptcy court in Palestine was a British court. In general, it may be assumed that, so far as English law is concerned, all bankruptcy courts throughout the Commonwealth are 'British courts,' though there may be some exceptions. This is true even though some of the independent countries have assumed republican forms of government; for it is commonly provided that the existing law of the United Kingdom shall continue to apply in relation to them as if they had not become republics. But it is of course of no avail for the English court to seek the aid of a bankruptcy court in the Commonwealth oversea if that court does not admit that it is British."

When the position is *vice versa*, the same concerns hold true.

23 I accepted the Bahamian court's holding of itself to be a British court for the purposes of s.122 of the Act of 1914. That Imperial Act was found to have been saved in its application to that country—its independence from Britain notwithstanding—by specific Bahamian legislation and by the operation of saving provisions in the Constitutional Order in Council of that country. In my opinion, it is sufficient to have regard to the constitutional lineage both of the Bahamian court and of this court, to be satisfied that both can be regarded and treated as British courts for the purposes of s.122 of the Bankruptcy Act of 1914.

24 In the interest of completeness, it is to be noted that the Act of 1914 has been repealed in Britain by the Insolvency Acts of 1985 (c.65) and 1986 (c.45). This repeal appears to have swept away s.122 of the Imperial Act of 1914, notwithstanding momentary savings of that section by s.235(3) and Schedule 10 of the Insolvency Act 1985: see s.438 of the Insolvency Act 1986. The mandate for universal assistance between courts in bankruptcy (or insolvency) is preserved in the Insolvency Act 1986 by s.426. This is subject to the need for Orders of the Secretary of State designating the relevant courts of foreign countries.

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25 That new regime, however, has no general applicability in or in relation to the Cayman Islands. This is notwithstanding that by one such designation Order—the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (S.I. 2123/1986)—provision was made for assistance to be given by UK courts to the courts of the designated countries, including the courts of The Bahamas and the Cayman Islands.

26 The lack of general applicability of the modern UK regime under the Insolvency Acts does not mean that this court, which by virtue of the Imperial operation of the Act of 1914 (s.122) was empowered and enjoined to assist other British courts, is hampered in its ability to do so. On the preferred interpretation of the statutory provisions as taken above, the Bankruptcy Act of 1914 would continue to apply, either directly in its own right or through the equivalent and corresponding s.156 of the local Law.

27 There is a further and separate basis for concluding that the Act of 1914 still applies in these Islands. The repeal of s.122 in the United Kingdom notwithstanding, that section must be regarded as continuing to apply here by virtue of s.57(1) of the Cayman Islands Constitution (which replaced similar provisions in the earlier Constitutions of 1962 and 1965), made by Order in Council pursuant to the powers delegated to Her Majesty under the West Indies Act of 1962:

"(1) All Acts, ordinances, rules, regulations, orders and other instruments made under or having effect by virtue of the Order of 1965 and having effect as part of the law of the Islands immediately before the appointed day [of this Constitutional Order, *i.e.* August 22nd, 1972] shall on and after the appointed day have effect as if they had been made under or by virtue of this Constitution."
Thus, Acts of the British Parliament having effect as part of the law of the Islands before August 22nd, 1972 (as did the Act of 1914) shall continue to have effect by virtue of that Constitutional provision.
28 By reliance on s.122 of the Act of 1914 as Imperial legislation still applicable in the Cayman Islands, or by reliance on s.156 of the local Law, I determined to accede to the request of the Bahamian court as coming from a British court in bankruptcy.
The exercise of the powers
29 This court is enjoined by s.122 of the Act of 1914 and s.156 of the local Law, to exercise "the like jurisdiction" in respect of the order of the Bahamian court as it or the Bahamian court "could exercise in regard to similar matters within their respective jurisdictions." This court has not been requested by the Bahamian court to exercise any of the powers

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which that court itself exercises. My order will therefore not purport to operate so as to subject the whole matter of the administration of the bankrupt's estate, such as might exist in these Islands, as being directly under the control of the Bahamian court. This is not surprising, particularly because the assets in this jurisdiction are likely to be held within trusts which are governed by Cayman law. Such matters in controversy as might arise in relation to those trusts can obviously only be decided in this country. The request is in more general terms, that the trustee be vested with such powers as are allowed under Cayman law in the discretion of this court.
30 Accordingly, I decided in the exercise of the vested powers and discretion that the provisions of the Cayman Bankruptcy Law will govern the conduct of the trustee in this jurisdiction, and in particular, the Clerk of Courts who is our official trustee in bankruptcy will act as the auxiliary officer of the trustee. To that end the second paragraph of my order provides that the trustee—
"be granted all general law powers and the statutory powers accorded to a trustee in bankruptcy in this jurisdiction and, in particular, that he be granted the powers under s.107 of the Bankruptcy Law (1997 Revision)."
The inherent jurisdiction
31 Quite apart from the statutory scheme, this court has inherent common law powers to recognize and enforce the appointment of a foreign trustee in bankruptcy for the purposes of bringing into the estate the assets of a bankrupt which may exist in this jurisdiction. These are powers which have been acknowledged and invoked by this court in the past in analogous circumstances: see *Blum* v. *Bruce Campbell & Co.* (2) and *Gray* v. *Royal Bank of Canada* (7). Those cases recognized the principles of *Didisheim's case* (5) in which Lindley, M.R. stated the principle as based upon the doctrines of obligation and comity as between the courts of friendly states ([1900] 2 Ch. at 51):
"On general principles of private international law, the courts of this country are bound to recognise the authority conferred on [the foreign appointee] unless [equivalent] proceedings in this country prevent them from doing so."
See also *Kilderkin Invs.* v. *Player* (8) for the analogous treatment of the subject of recognition of a foreign receiver, at common law (1984–85 CILR at 81–83, 99 and 103).
32 The common law principles require me to be satisfied that the bankrupt was subject to the jurisdiction of the Bahamian court and that that court would be prepared reciprocally to recognize and enforce

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similar orders of this court. Both of those matters are satisfactorily addressed in the written judgment and order of Lyons, J. of the Bahamian court. The orders I make in recognition and enforcement of the orders of the Bahamian court appointing the trustee are made in reliance also upon this inherent jurisdiction of the court.

Orders accordingly.

Attorneys: *Charles Adams, Ritchie & Duckworth* for the Bahamian trustee in bankruptcy.

Exhibit 6

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A

Privy Council

Al Sabah and another *v* Grupo Torras SA

[2005] UKPC 1

2004 Oct 25, 26, 27;
B 2005 Jan 11

Lord Hoffmann, Lord Scott of Foscote,
Lord Rodger of Earlsferry,
Lord Walker of Gestingthorpe and
Lord Brown of Eaton-under-Heywood

Cayman Islands — Bankruptcy — Jurisdiction — Courts of one British territory assisting those of another in bankruptcy matters — Whether provision in Westminster statute continuing to apply in overseas territory after repeal in United Kingdom — Whether similar provision in Cayman legislation having equivalent effect — Whether Cayman court having jurisdiction to act in aid of Bahamian bankruptcy — Bankruptcy Act 1914 (4 & 5 Geo 5, c 59), s 122[1] *— Insolvency Act 1985 (c 65), ss 235, 236, Sch 10*[2] *— Insolvency Act 1986 (c 45), s 426*[3] *— Bankruptcy Law (Laws of the Cayman Islands, 1997 rev, c 7), ss 107, 156*[4]

C

Statute — Repeal — Extraterritorial effect — Imperial statute repealed by post-imperial statute of Westminster Parliament — Whether repeal taking effect outside United Kingdom

D

The trustee in bankruptcy of a debtor in the Bahamas obtained from the Bahamian court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. The Grand Court held that it had jurisdiction to provide such assistance under either section 156 of the Bankruptcy Law of the Cayman Islands or section 122 of the
E Bankruptcy Act 1914 or under the court's inherent jurisdiction, and that it should as a matter of discretion grant the Bahamian trustee powers under section 107 of the Cayman Bankruptcy Law to enable him to set aside the trusts. An appeal by the debtor's wife and son, who were beneficiaries under the trusts, was dismissed by the Court of Appeal of the Cayman Islands.

On the appellants' appeal to the Privy Council—

Held, (1) that section 156 of the Cayman Bankruptcy Law was a re-enactment in
F identical terms of section 161 of the Jamaican Bankruptcy Law 1880 under which, prior to Jamaica becoming independent and while the Cayman Islands were still being governed as a dependency of Jamaica, the bankruptcy courts of Jamaica and the Grand Court of the Cayman Islands were required to act in each other's aid in bankruptcy matters; that section 161 did not in terms have any extraterritorial effect outside Jamaica and the Cayman Islands and it was hard to see what effect, extraterritorial or otherwise, could sensibly have been intended by its re-enactment,
G following Jamaica's independence, in a legal system under which there was only one bankruptcy court; and that, accordingly, section 156 of the Cayman Bankruptcy Law had no practical present effect in the Cayman Islands and could not be relied upon in aid of a Bahamian bankruptcy (post, paras 17, 21–22, 26–27).

(2) Dismissing the appeal, that section 122 of the Bankruptcy Act 1914, which provided for mutual assistance between bankruptcy courts throughout the United Kingdom and the British Empire, had been repealed under sections 235(3) and
H 236(2) of and Schedule 10 to the Insolvency Act 1985 in so far as it applied within the

[1] Bankruptcy Act 1914, s 122: see post, para 15.
[2] Insolvency Act 1985, ss 235, 236, Sch 10: see post, para 29.
[3] Insolvency Act 1986, s 426: see post, para 38.
[4] Bankruptcy Law, s 107: see post, para 6.
S 156: see post, para 21.

United Kingdom, but continued to apply to former colonial territories overseas unless and until an Order in Council made under section 236(5) of the 1985 Act extended the effect of the 1985 Act to any such territory; and that, since no such Order had yet been made in respect of the Cayman Islands, the Grand Court had jurisdiction under section 122 of the 1914 Act to act in aid of a Bahamian bankruptcy (post, paras 32, 34).

Ukley v Ukley [1977] VR 121 considered.

Per curiam. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope and the inherent jurisdiction of the Grand Court cannot be wider (post, para 35).

(3) That the jurisdiction conferred by section 122 of the 1914 Act in the Cayman Islands and the other territories in which it remained in force was essentially as wide as that conferred by section 426 of the Insolvency Act 1986 in that the powers it conferred were not merely auxiliary but operated as though there were a hypothetical bankruptcy in the receiving territory; and that, accordingly, it authorised the Cayman Grand Court to exercise in favour of the Bahamian trustee a statutory power, under section 107 of the Bankruptcy Law, which might not have been available to him if the trusts were governed by Bahamian law (post, paras 36, 41, 45–46, 48).

In re Osborn; *Ex p Tree* [1931–32] B & CR 189 and *In re a Debtor (Order in Aid No 1 of 1979), Ex p Viscount of the Royal Court of Jersey* [1981] Ch 384 considered.

Hall v Woolf (1908) 7 CLR 207 and *Galbraith v Grimshaw* [1910] AC 508, HL(E) distinguished.

Decision of the Court of Appeal of the Cayman Islands affirmed.

The following cases are referred to in the judgment of their Lordships:

Ayres; Ex p Evans, In re (1981) 34 ALR 582; sub nom *Ayres v Evans* (1981) 39 ALR 129
Bank of Credit and Commerce International SA, In re (No 9) [1994] 2 BCLC 636
Callender, Sykes & Co v Colonial Secretary of Lagos [1891] AC 460, PC
Dallhold Estates (UK) Pty Ltd, In re [1992] BCLC 621
Debtor (Order in Aid No 1 of 1979), In re A, Ex p Viscount of the Royal Court of Jersey [1981] Ch 384; [1980] 3 WLR 758; [1980] 3 All ER 665
Galbraith v Grimshaw [1910] AC 508, HL(E)
Grupo Torras SA v Al Sabah [1999] CLC 1469
Hall v Woolf (1908) 7 CLR 207
Hart, In re; Ex p Green [1912] 3 KB 6, CA
Hughes v Hannover Rückversicherungs-AG [1997] 1 BCLC 497, CA
Osborn, In re; *Ex p Tree* [1931–32] B & CR 189
R v Jameson [1896] 2 QB 425, DC
Radich v Bank of New Zealand (1993) 116 ALR 676
Tucker (A Bankrupt), In re (unreported) 27 September 1988, CA, Guernsey
Ukley v Ukley [1977] VR 121

The following additional cases were cited in argument:

Attorney General for Alberta v Huggard Assets Ltd [1953] AC 420; [1953] 2 WLR 768; [1953] 2 All ER 951, PC
Dent (A Bankrupt), In re [1994] 1 WLR 956; [1994] 2 All ER 904, DC
Dick v McIntosh [2001] FCA 1008; [2002] FCA 1135
First International Bank of Grenada Ltd, In re (unreported) 23 January 2002, Royal Court of Jersey
Fogarty, In re [1904] QWN 67

Globe-X Canadiana Ltd, In re (unreported) 28 May 2003, Eastern Caribbean Supreme Court (Anguilla)
Greenaway, In re (1910) 27 WN (NSW) 112
Hoe, In re (1957) 34 HKCU 1; 49 HKCU 1
Jackson, In re [1973] NI 67
James (An Insolvent), In re (Attorney General intervening) [1977] Ch 41; [1977] 2 WLR 1; [1977] 1 All ER 364, CA
Kelly v Jones (1852) 7 NBR 473
Leisurenet Ltd, In re (unreported) 26 February 2002, Royal Court of Jersey
Oasis Merchandising Services Ltd, In re [1995] 2 BCLC 493
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
R v Marais, In re; Ex p Marais [1902] AC 51, PC
Television Trade Rentals Ltd, In re [2002] EWHC 211 (Ch); [2002] BPIR 859
Tucker, In re 1987–89 MLR 106

APPEAL from the Court of Appeal of the Cayman Islands

The appellants, Barbara Alice Al Sabah and Mishal Roger Al Sabah, who were the wife and son of the debtor, Sheikh Fahab Mohammed Al Sabah, and were beneficiaries of two trusts set up by him in the Cayman Islands, appealed against the decision of the Court of Appeal of the Cayman Islands (Zacca P, Rowe and Taylor JJA) on 1 October 2003 that the Grand Court of the Cayman Islands had jurisdiction to comply with a letter of request obtained from the Grand Court of the Bahamas by the second respondent, Clifford Culmer, as the debtor's trustee in bankruptcy in the Bahamas, who sought to set aside the two trusts under powers conferred by Cayman legislation. The first respondent, Grupo Torras SA, was a Spanish company which sought to recover in the Cayman Islands sums owed by the debtor in satisfaction of a judgment obtained in earlier English proceedings.

The facts are stated in the judgment of their Lordships.

Robin Dicker QC and *Adrian Beltrami* for the appellants. The wording of section 156 of the Cayman Bankruptcy Law was enacted first as section 64 of the Jamaican Bankruptcy Law 1871 and then as section 161 of the Jamaican Bankruptcy Law 1880 as a provision facilitating and mandating auxiliary assistance between local bankruptcy courts. The term "all the courts in bankruptcy" meant all the courts subject to the Jamaican Bankruptcy Law. There was nothing in section 64 of the 1871 Law or section 161 of the 1880 Law to suggest that they were intended to have a wider non-domestic application. [Reference was also made to sections 60 and 102 of the 1871 Law and section 167 of the 1880 Law.] The Jamaican provision therefore applied only in Jamaica and, after 1894, in the Cayman Islands, which was then governed as a dependency of Jamaica and whose Grand Court was given jurisdiction in bankruptcy matters under the Cayman Islands Administration of Justice Law 1894.

The effect of the Cayman Statute Law Revision (Amendments) Act 1963 was to amend the 1880 Law in so far as it applied separately to Jamaica and the Cayman Islands. However, the fact that there was only a single court in the Cayman Islands capable of administering the bankruptcy jurisdiction did not alter the meaning of the words used in section 161 of the Jamaican Bankruptcy Law 1880 and re-enacted as section 156 of the Cayman Bankruptcy Law. Either section 156 envisaged the creation of further bankruptcy courts within the Cayman Islands or its wording is simply one of

a number of copying errors or anomalies. [Reference was also made to sections 3 and 66.] A review of bankruptcy statutes passed by other colonial legislatures does not provide conclusive assistance: compare the Bahamian Bankrupty Law 1870; Hong Kong Bankruptcy Ordinance 1891; Gibraltar Bankruptcy Ordinance 1934 and New Zealand Bankruptcy Law 1883. Section 156 therefore cannot enable the Cayman Grand Court to act in aid of the courts of any other jurisdiction.

Section 122 of the Bankruptcy Act 1914 ceased to have effect in the Cayman Islands when that Act was repealed and replaced in the United Kingdom by the Insolvency Act 1985. [Reference was made to *Halsbury's Laws of England*, 4th ed (1974), vol 6, paras 1200–1202 and *In re James (An Insolvent) (Attorney General intervening)* [1977] Ch 41.] The combined effect of section 235 of and Part IV of Schedule 10 to the 1985 Act, the Insolvency Act 1985 (Commencement No 2) Order 1986 (SI 1986/185) and the Insolvency Act 1985 (Commencement No 5) Order 1986 (SI 1986/1924) was to repeal section 122 of the 1914 Act. The repeal operated as a repeal of the reciprocal regime of auxiliary assistance both in the United Kingdom and in any dependent territories in which the law had hitherto had direct effect. [Reference was made to sections 15 and 16 of the Interpretation Act 1978; the Jesuits etc Act 1584 (27 Eliz 1, c 2); the Roman Catholics Act 1844 (7 & 8 Vict c 102); the Statute Law Revision Acts of 1867, 1871, 1873, 1874 and 1875 and the Statute Law (Repeals) Acts of 1973, 1976, 1981 and 1995.] The effect of the 1985 Act was to introduce a new and more extensive regime for judicial assistance in different terms (which eventually became section 426 of the Insolvency Act 1986), with express provision for dependent territories to adopt the new scheme (by Order in Council) if they so wished. In relation to those jurisdictions which have adopted the new section 426 scheme or its equivalent, there has been no question of any additional or separate repeal of section 122 of the 1914 Act because it has already been repealed: see the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409); article 48 of the Bankruptcy (Desastre) (Jersey) Law 1990 and section 1 of the Bankruptcy Act 1988 of the Isle of Man. [Reference was also made to *Muir Hunter on Personal Insolvency* (looseleaf ed), issues prior to September 2002; *Halsbury's Laws of England* 4th ed (1974), vol 6, para 1186 and 4th ed (1974) (2003 reissue), vol 6, paras 865–877; *Smart, Cross-Border Insolvency*, 2nd ed (1998), p 406; *McDonald, Henry and Meek, Australian Bankruptcy Law and Practice*, 5th ed (1996), para 29.0.10 and the Irish Bankruptcy Act 1988, section 142.] There is no indication that the Cayman Islands considered that section 122 still formed part of their law.

The Court of Appeal correctly concluded that the purpose of Commencement Order No 2 was to repeal section 122 of the 1914 Act in so far as it conferred authority and imposed duties on bankruptcy courts of the dependencies. *Ukley v Ukley* [1977] VR 121 is distinguishable on its facts. [Reference was also made to Evidence (Proceedings in Other Jurisdictions) Act 1975 and Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (SI 1978/1890), section 3.] If, on the other hand, the 1914 Act were still valid in the Cayman Islands, it would not be open to the Cayman legislature to repeal it; nor could it pass extra-territorial legislation: see Cayman Islands (Constitution) Order in Council 1972 (SI 1972/1101), Schedule 2, sections 29 and 58; West Indies Act 1962, section 5; Colonial Laws Validity Act 1865 (28 & 29 Vict c 63), section 2; *Halsbury's Laws of*

England, 4th ed (2003 reissue), vol 6, paras 840–841 and *In re R v Marais; Ex p Marais* [1902] AC 51.

There was no basis for reliance on the court's inherent jurisdiction. There is no jurisdiction to grant a party a power to obtain relief under a statute whose terms do not entitle the party to relief. It follows that Smellie CJ had no jurisdiction to grant the second respondent the statutory powers accorded to a trustee in bankruptcy in the Cayman Islands, in particular the powers under section 107 of the Cayman Bankruptcy Law, and Henderson J and the Court of Appeal were wrong to uphold his order.

As to the nature of the assistance which may be given by the Cayman court to the conduct of a Bahamian bankruptcy, section 107 only applies to a Cayman bankruptcy. Section 122 of the 1914 Act creates an auxiliary or remedial jurisdiction in the court to facilitate the process of a foreign bankruptcy; it does not create any new rights, nor does it enable the foreign bankruptcy to be treated for substantive purposes as a local bankruptcy: see *Hall v Woolf* (1908) 7 CLR 207, 210–212; *Radich v Bank of New Zealand* (1993) 116 ALR 676, 692–695; *In re Ayres, Ex p Evans* (1981) 34 ALR 582, 589, 591; *Ayres v Evans* (1981) 39 ALR 129, 132; *Galbraith v Grimshaw* [1910] AC 508, 510–513; *Dick v McIntosh* [2001] FCA 1008, para 19; [2002] FCA 1135, para 18; *In re Osborn; Ex p Tree* [1931–2] B & CR 189, 190, 194; *In re Fogarty* [1904] QWN 67 and *In re Greenaway* (1910) 27 WN (NSW) 112. The order of Smellie CJ was therefore too wide and the Court of Appeal wrong to consider it a legitimate exercise of jurisdiction under section 156 of the Bankruptcy Law, on the basis of a "hypothesis of jurisdiction" under which the Bahamian bankruptcy was to be treated as a Cayman bankruptcy and the second respondent trustee as a Cayman trustee in bankruptcy: see *In re Osborn* [1931–32] B & CR 189 and *Radich v Bank of New Zealand* 116 ALR 676, 695. Section 107 of the Cayman Bankruptcy Law only applies in relation to transactions effected within a set period of a Cayman bankruptcy order, and the only beneficiary of the section is the Cayman official identified in the Bankruptcy Law as the trustee in bankruptcy.

Section 426 of the 1986 Act, though directed towards the same general aim as section 122 of the 1914 Act, is drafted in very different terms. Its focus is not jurisdiction but law: see *Smart, Cross-Border Insolvency*, p 417. The development of the concept of the hypothesis of jurisdiction in relation to section 426 in cases such as *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497; *In re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621 and *In re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636 therefore does not provide the support which the Court of Appeal sought to find in them.

As to the issue of appropriateness or discretion, although the Bahamas have an almost identical voidable disposition provision, it is subject to the restriction that the transfer is made by a "trader": no such restriction applies under the Cayman legislation, which is more favourable to the respondents. However, even if section 156 of the Cayman Bankruptcy Law is to be interpreted in the same way as section 426 of the 1986 Act, considerations of private international law should still apply. The proper law to be applied to the transactions to be avoided is that of the country with the closest and most real connection with the transaction: see *Bridge and Stevens, Cross-Border Security and Insolvency* (2001), pp 279–281; *Smart, Cross-Border*

Insolvency, p 419; *In re Television Trade Rentals Ltd* [2002] BPIR 859, 864 and *In re Paramount Airways* [1993] Ch 223, 240. [Reference was also made to *In re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493.] A

Andrew Popplewell QC and *Paul Wright* for the respondents. "Courts" in section 156 refers to foreign courts. The use of the plural in the section in making provision for one court to respond to another only makes sense if Grand Court (the sole court exercising bankruptcy jurisdiction in the Cayman Islands) can assist courts outside the Cayman Islands. By contrast, sections 157 and 158 use "court" in the singular to refer only to the Cayman Grand Court. [Reference was also made to section 135 of the New Zealand Insolvency Act 1967 and section 29 of the Australian Bankruptcy Act 1966.] B

As to section 122 of the 1914 Act, there was nothing in the Insolvency Act 1985 or the statutory instruments made thereunder which repealed its application and effect as an Imperial provision in the Cayman Islands. [Reference was made to sections 213, 235(3), 236(2) and (5) of and Part IV of Schedule 10 to the 1985 Act; Commencement Orders No 2 and No 5; section 426 of the Insolvency Act 1986 and the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123).] Statutes of the Westminster Parliament are not to be regarded as having effect in overseas territories unless they clearly so provide: see *Attorney General for Alberta v Huggard Associates Ltd* [1953] AC 420, 436, 441 and *Bennion, Statutory Interpretation*, 4th ed, (2002), paras 282, 283. The same principle applies to repealing enactments: see *Halsbury's Laws*, 4th ed (1974), vol 6, paras 1104–1106; 4th ed (1974) (2003 reissue), vol 6, para 821; *Ukley v Ukley* [1977] VR 121, 124 and *Kelly v Jones* (1852) 7 NBR 473. The logical result of the relevant provisions of the 1985 Act was to repeal section 122 so far as it applied to the UK because it was part of a code that was being replaced, but to leave it intact so far as it applied to other territories unless and until its replacement was extended to, or some equivalent provision was made in, those territories. [Reference was made to *In re Hoe* (1957) 34 HKCU 1; 49 HKCU 1; *In re Tucker* 1987–89 MLR 106 and *In re Tucker (A Bankrupt)* (unreported) 27 September 1988.] C D E

If neither section 156 of the Cayman Bankruptcy Law nor section 122 of the 1914 Act applies, a large hole in the insolvency regime of the Cayman Islands is opened up, thereby destroying the reciprocity which underlies the designation of the Cayman Islands as a relevant territory under section 426 of the Insolvency Act 1986. Both Smellie CJ and Henderson J rightly agreed that the Cayman Court must have inherent jurisdiction to fill that hole and grant the relief sought: see *In re Globe-X Canadiana Ltd* (unreported) 28 May 2003. [Reference was also made to *In re First International Bank of Grenada Ltd* (unreported) 23 January 2002 and *In re Leisurenet Ltd* (unreported) 26 February 2002.] F G

As to section 107 of the Cayman Bankruptcy Law, the courts below rightly rejected the contention that it only affords remedies to the Cayman trustee in bankruptcy, not the second respondent trustee. Section 156 of the Cayman Bankruptcy Law and section 122 of the 1914 Act confer jurisdiction to provide assistance on a hypothetical assumption of jurisdiction, ie, by putting the overseas trustee in a position equivalent to that of the Cayman trustee under a Cayman bankruptcy, "in regard to similar matters within their respective jurisdictions". The distinction H

between creating rights and conferring remedies, derived from *Hall v Woolf* 7 CLR 207, 212 is a false one and has no basis in the wording of section 122. There is nothing in *Galbraith v Grimshaw* [1910] AC 508; *In re Fogarty* [1904] QWN 67; *In re Greenaway* 27 WN (NSW) 112; *In re Osborn, Ex p Tree* [1931–2] B & CR 189, 189; *Radich v Bank of New Zealand* 116 ALR 676, 695, 700; *Dick v McIntosh* [2001] FCA 1008 or *In re Jackson* [1973] NI 67, 69, 71, 73 to prevent the hypothesis of local jurisdiction applying, just as it does under section 426(5) of the 1986 Act: see *In re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, 626; *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, 505, 511, 513, 516, 517; *In re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636, 643 and *In re Television Trade Rentals Ltd* [2002] BPIR 859.

Section 107 has its origin in English statutes: see section 91 of the 1869 Act; section 47 of the Bankruptcy Act 1883; section 42 of the 1914 Act and section 339 of the 1986 Act. It does not operate automatically; void means voidable: see *In re Hart; Ex p Green* [1912] 3 KB 6, 9–10. The trustee must apply to the court, and the grant of relief is discretionary: see *In re Dent (A Bankrupt)* [1994] 1 WLR 956, 959–961. The right vested in the trustee is a contingent one. The property involved in the avoidable transaction must be within the jurisdiction of the receiving court in order for it to render assistance in the first place. Jurisdiction should not depend on the happenstance of where the foreign bankruptcy takes place. The purpose of section 122 is to take that out of the equation. The receiving court should apply the proper law of the transaction, not of the requesting bankruptcy. Section 107 does not therefore create rights so much as recognise and give effect to existing (if contingent) rights created elsewhere. Any other conclusion would deprive sections 156 and 122 of any effect and render them arbitrary and capricious. They are enabling provisions which permit an exercise of discretion, and would be otiose if all they permitted was for the receiving court to exercise a discretion it already possessed. Reliance on them cannot be categorised as either forum shopping or otherwise inappropriate in the circumstances.

Dicker QC replied.

Cur adv vult

11 January 2005. The judgment of their Lordships was delivered by

LORD WALKER OF GESTINGTHORPE

1 The appellants Barbara Alice Al Sabah and Mishal Roger Al Sabah are the wife and adult son respectively of Sheikh Fahad Mohammed Al Sabah ("the debtor"). The debtor was formerly head of the Kuwait Investment Authority in London. It embarked on a huge programme of investment in Spain through a Spanish company named Grupo Torras SA ("GT"). With the help of co-conspirators the debtor defrauded GT on a very large scale. The misappropriations were effected by four separate fraudulent schemes between 1988 and 1990. After a long civil trial in London the debtor was found liable for very large damages (see *Grupo Torras SA v Al Sabah* [1999] CLC 1469). There have subsequently been various proceedings in different parts of the world by which GT, and more recently the debtor's Bahamian trustee in bankruptcy, have sought to recover funds in order to satisfy the judgment. GT has so far recovered about US$178m from the debtor or

trusts established by him, but that is only a small part of the total indebtedness.

2 The debtor is now resident in the Bahamas. On 29 June 2001 he was adjudicated bankrupt under the Bahamian Bankruptcy Act 1870. The bankruptcy was deemed to have commenced on 6 February 2001. GT's proof of debt was for a sum of the order of US$800m. On 30 July 2001 the first meeting of creditors was held and Mr Clifford Culmer, a partner in BDO Mann Judge of Nassau, was appointed as trustee in bankruptcy.

3 The debtor is the settlor in respect of two trusts governed by the law of the Cayman Islands. One is the Comfort Trust, which he established (under the name of the Chester Trust) under Bahamian law on 29 September 1992. On 30 December 1992 a corporate trustee resident in the Cayman Islands, Bank of Butterfield International (Cayman) Ltd, was appointed as trustee of the trust and on 12 February 1993 the trust's proper law was changed to that of the Cayman Islands, and its name was changed to its present name. The debtor is the principal beneficiary under this trust and the appellants are also beneficiaries. The other is the Eaglet Trust, established on 14 February 1992 and governed from its inception by Cayman law. The trustees are Pictet Trustee SA (a Swiss company) and Pictet Bank and Trust (Cayman) Ltd (a Cayman company). The appellant Mishal Al Sabah is the principal beneficiary under this trust.

4 The trustee in bankruptcy's case is that the two trusts own and control, through a network of companies, very valuable assets (the Comfort Trust alone is said to be worth over US$27m) which enable the debtor, despite his bankruptcy, to enjoy a life of luxury. On 31 August 1995 GT commenced proceedings in the Cayman Islands (cause No 271 of 1995) against the trustee of the Comfort Trust and various companies owned by the trustee, pleading proprietary claims. The pleadings have been extensively amended and the proceedings are still on foot. GT has also obtained summary judgment from the Grand Court of the Cayman Islands in effect converting its English money judgment into a Cayman money judgment. These Cayman proceedings are of no more than background relevance to the claim by the Bahamian trustee in bankruptcy, which is of central importance in this appeal.

The letter of request and subsequent proceedings

5 On 14 February 2002 the trustee in bankruptcy made an ex parte application to the Bahamian Grand Court for an order under section 122 of the Bankruptcy Act 1914 of the United Kingdom (or alternatively under the inherent jurisdiction) requesting aid from the Grand Court of the Cayman Islands. On 12 March 2002 Lyons J gave a short reasoned judgment (mainly concerned with section 122 of the Bankruptcy Act 1914) and made an ex parte order for a letter of request to be issued seeking assistance under three heads: (i) that Mr Culmer's appointment as trustee in bankruptcy of the property of the debtor should be recognised in the jurisdiction of the Cayman Islands; (ii) that the trustee should be granted "all general law powers and the statutory powers accorded to a trustee in bankruptcy in [the jurisdiction of the Cayman Islands] and in particular . . . the powers under section 107 of the [Cayman] Bankruptcy Law (1997 Revision)"; and (iii) that he should be granted such other powers as the Grand Court of the Cayman Islands thought fit.

A 6 Section 107 of the Bankruptcy Law (1997 Revision) of the Cayman Islands provides that any voluntary settlement (an expression which is widely defined) of property is to be void against the trustee in bankruptcy if the settlor is made bankrupt (i) within two years after the date of the settlement or (ii) within ten years after the date of the settlement unless (in the latter case) the beneficiaries can prove that the settlor was, when he made the settlement, able to pay all his debts without the aid of the property B comprised in the settlement (and that the settled property passed to the trustee on execution of the settlement). Although this enactment speaks of the settlement being "void" it is common ground that this should be interpreted as "voidable" in accordance with the decision of the English Court of Appeal in *In re Hart; Ex parte Green* [1912] 3 KB 6. If the Cayman trusts are to be set aside under section 107, that can be achieved only by an C order of a court of competent jurisdiction, prima facie the Grand Court of the Cayman Islands.

7 The Bankruptcy Act 1987 of the Bahamas contains (in section 71) provisions similar to those of section 107 of the Cayman statute but they are not identical. In particular, the power conferred by section 71 of the Bahamian statute is exercisable only if the bankrupt settlor was (apparently at the time of the settlement) a trader (within the meaning of a rather old- D fashioned statutory definition). Their Lordships heard no argument as to whether the debtor was at any time a trader within the meaning of the Bahamian statute and they express no view on the point. But it appears to have been one of the considerations which led the trustee in bankruptcy to seek a letter of request to the Cayman court. The other consideration may have been doubt as to whether the Cayman court would give effect to an E order of the Bahamian court setting aside a trust governed by Cayman law. Their Lordships express no view on that point either; it was mentioned in the course of the hearing but was not fully argued, and is of no direct relevance to the outcome of this appeal (its only relevance is that if the doubt is well-founded, it shows that the Bahamian trustee in bankruptcy, like the Scottish trustee in bankruptcy in *Galbraith v Grimshaw* [1910] AC 508, 510 may still "find himself . . . falling between two stools").

F 8 The Bahamian court's letter of request came before the Grand Court of the Cayman Islands on 15 March 2002, when Smellie CJ considered it ex parte. He made an immediate order (followed by a written judgment delivered on 27 March 2002) acceding to the letter of request and (in particular) granting the Bahamian trustee in bankruptcy the powers conferred by section 107. The main points in his judgment can be G summarised as follows: (i) that section 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands, and further or alternatively section 122 of the Bankruptcy Act 1914 of the United Kingdom, authorised the Grand Court to act on the letter of request; (ii) that the Grand Court should as a matter of discretion confer the section 107 powers, since any Cayman assets relevant to the bankruptcy were likely to be held in trust; and (iii) that the order could in any case be made under the court's inherent jurisdiction.

H 9 The matter then came before Henderson J inter partes on three days in September 2002. Henderson J also had before him an application to join the trustee in bankruptcy as a co-plaintiff in cause No 271 of 1995. He reserved judgment and handed down a written judgment on 8 November 2002. In relation to the letter of request Henderson J decided: (i) that the Chief Justice

had rightly exercised jurisdiction (although Henderson J took a rather different view as to the reasons); (ii) that the order should not be set aside on grounds of material non-disclosure (this is not an issue in the appeal to the Board); and (iii) that any further exercise of the Court's discretion should be postponed until after a full consideration of the evidence.

10 The appellants appealed to the Court of Appeal of the Cayman Islands and the appeal came before that court (Zacca P, Rowe and Taylor JJA) in July 2003. On 1 October 2003, the Court of Appeal (in a reserved judgment of the court delivered by Taylor JA) dismissed the appeal. The appellants now appeal to Her Majesty in Council with final leave granted on 5 December 2003. The principal issues in the appeal are as follows. (i) Was the Court of Appeal correct in its view that the Grand Court had jurisdiction under section 156 of the Bankruptcy Law (1997 Revision)? (ii) If not, did the Grand Court have jurisdiction under section 122 of the Bankruptcy Act 1914 of the United Kingdom (on the basis that it was not repealed by the Insolvency Act 1985) or under its inherent jurisdiction? (iii) If the Grand Court had jurisdiction under any of these routes, did it have power to confer the section 107 powers on a Bahamian trustee in bankruptcy?

The legislation

11 In considering these issues it is necessary to look closely at the terms and antecedents of a number of statutory provisions, including in particular section 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands and section 122 of the Bankruptcy Act 1914 of the United Kingdom. As the Court of Appeal recorded, it had had submissions covering enactments passed in the United Kingdom, Jamaica and the Cayman Islands over a period of more than 130 years, and the judgments at first instance and in the Court of Appeal reflect the care with which all the courts below have approached this difficult task. Their Lordships have also had the benefit of thorough research and admirable arguments from both sides; the depth of the research is particularly impressive in view of the severe damage and disruption which has unfortunately been suffered in the Cayman Islands as a result of the recent hurricane.

12 Before embarking on the detail of the legislation their Lordships think it desirable to set out some basic points about legislation in the imperial context. The earliest statute to which it is necessary to refer is the Bankruptcy Act 1869 (32 & 33 Vict c 71) of the United Kingdom. In the middle of the reign of Queen Victoria the British Empire was nearing its fullest geographical extent (although there was some later expansion, especially in Africa) and the establishment of local legislatures (dating back to the 1850s in the case of most states of Australia, to the 18th century in the case of most of the provinces of Canada, and to the early 17th century in the case of Bermuda) marked the beginnings of the long progress towards independent status within the Commonwealth. The enactment of the Colonial Laws Validity Act 1865 (28 & 29 Vict c 63) ("an Act to remove doubts as to the validity of colonial laws") reaffirmed the superior power of the Westminster Parliament but made clear that colonial laws could depart from any non-statutory rules of common law or equity. The 1865 Act did not in terms refer to the enactment of laws with extraterritorial effect. But most colonial legislatures had powers (granted either under the Royal

Prerogative, or by the Westminster Parliament) to make laws "for the peace, order and good government" of the territory in question and this implied (but did not clearly define) some territorial restrictions. This gave rise to many difficulties both before and after the 1865 Act: see generally D P O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 LQR 318. The 1865 Act has of course ceased to apply to independent members of the Commonwealth, the first repeals having been effected by the Statute of Westminster 1931. The balance of law-making authority, as between the Crown and the Westminster Parliament, was regulated (in relation to settled colonies) by the British Settlements Act 1887 (50 & 51 Vict c 54): see generally *Halsbury's Laws of England* 4th ed, (2003 Reissue) Vol 6, paras 821–823.

13 During the 19th century the English court was fairly ready to hold that an Act of the Westminster Parliament, especially if concerned with general rules of law, was intended to apply throughout the empire. So in *Callender, Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460, the Board held (at a time when Nigeria had no bankruptcy law of its own) that the general vesting provisions of the Bankruptcy Act 1869 of the United Kingdom (and not merely provisions about reciprocal enforcement) applied in Nigeria. But the Westminster Parliament's supreme legislative competence has in practice been more and more constrained by two factors. One has been an increasingly strong constitutional convention (eventually given statutory force, in relation to the Commonwealth countries to which it applied, by the Statute of Westminster 1931) not to interfere, unasked, in the laws of Commonwealth countries which enjoyed representative government. The other has been the courts' long-standing practice, in construing statutes of the Westminster Parliament, of presuming that their intended territorial extent is limited to the United Kingdom, unless it is clear that a wider extent is intended: see for instance the observations of Lord Russell of Killowen CJ in *R v Jameson* [1896] 2 QB 425, 430. This presumption is of long standing but (with increasingly precise drafting techniques) it appears to have become stronger over the years, and it has become common for an Act of the Westminster Parliament to contain power for all or part of its provisions to be extended to British territories by Order in Council. A detailed commentary on the current position as to the territorial extent of an Act of Parliament can be found in *Bennion, Statutory Interpretation*, 4th ed (2002), at pp 275–305.

14 At the time of the enactment of the United Kingdom Bankruptcy Act 1869 the Bahamas were a British colony acquired by settlement; Jamaica was a British colony acquired by conquest; and the Cayman Islands were a British colony acquired by settlement but governed (under the Cayman Islands Act 1863 (26 & 27 Vict c 31) of the Westminster Parliament) as a dependency of Jamaica. The Bahamas became fully independent in 1973; Jamaica became fully independent in 1962; and the Cayman Islands are still a British colony, now officially termed a British overseas territory. Before the 1863 Act the Cayman Islanders had magistrates and a parish meeting which exercised limited law-making powers. The effect of the 1863 Act was to confirm the existing arrangements so far as they went, but the islanders' institutions became subject to the jurisdiction of the Governor, legislature and Supreme Court of Jamaica. The law of Jamaica was in general to apply to the Cayman Islands. That state of dependency continued until 1959. It is

of central importance to the first issue, that is the construction of section 156 of the Cayman Bankruptcy Law.

15 The Bankruptcy Act 1869 of the United Kingdom provided principally for bankruptcies in England. The Scottish law of bankruptcy developed on very different lines and had its own statutes enacted by the Westminster Parliament (see generally Professor McBryde's work on [Scottish] *Bankruptcy*, 2nd ed (1995), at pp 2–4). Ireland also had its own statutes enacted at Westminster. Nevertheless the 1869 Act had some extraterritorial effect, as already noted. In particular, sections 73 to 77 contained provisions which provided in different ways for mutual recognition and assistance in respect of bankruptcy proceedings in other parts of the United Kingdom and throughout the British Empire. Section 74 is the most important for present purposes. It was re-enacted (with a small change of language to which neither side attached importance) as section 118 of the Bankruptcy Act 1883 (46 & 47 Vict c 52) and again re-enacted (without any change) in section 122 of the Bankruptcy Act 1914. Section 122 is in the following terms:

> "The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

16 The principal bankruptcy statute in force in the Bahamas is the Bankruptcy Act 1870 (33 Vict c 13). It did not contain any power comparable to section 74 of the United Kingdom Bankruptcy Act 1869 (the antecedent of section 122). But when he ordered the despatch of a letter of request, Lyons J was satisfied that section 122 applied in the Bahamas, having been specially mentioned in a Bahamian enactment (after the Bahamas became fully independent in 1973) entitled "Acts of the United Kingdom Parliament applying in or affecting the Bahamas otherwise than by virtue of an enactment of the Legislature of the Bahamas". The correctness of that conclusion is not an issue in this appeal.

17 The legislative history in Jamaica and the Cayman Islands is more complicated. The Jamaican Bankruptcy Law 1871 (Law 25 of 1871) did contain, in section 64, provisions similar but by no means identical to those of section 74 of the Bankruptcy Act 1869. Section 64 was in the following terms:

> "All the courts in bankruptcy, and the officers of such courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and may be carried into effect accordingly: And an order of any court in bankruptcy seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in

A regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

These provisions do not in terms have any extraterritorial effect. Bankruptcy law was administered in Jamaica by several district courts B whose jurisdiction was based on the residence or place of business of the debtor, with an appeal to the Supreme Court (see sections 60 and 62 of the 1871 Act). The Grand Court of the Cayman Islands did not have any jurisdiction in bankruptcy until the enactment (as a Jamaican statute) of the Cayman Islands Administration of Justice Law 1894 (c 18). Section 40 of that law provided:

C "The Grand Court shall have and exercise all the jurisdiction and powers in bankruptcy now vested in the Chief Court of Bankruptcy of Jamaica, save and except the jurisdiction now vested in the Supreme Court of Judicature of Jamaica as the Chief Court of Bankruptcy sitting as a Court of Appeal, but any such appeal shall lie to the full Court of the Supreme Court of Judicature of Jamaica, and all the bankruptcy laws and D rules now in force in Jamaica shall extend and apply to the Cayman Islands and to the said Grand Court."

The reference to the Chief Court of Bankruptcy of Jamaica is explained by changes made by sections 3 to 11 of the Jamaican Bankruptcy Law 1880 (c 32), which established the High Court of Justice as the Chief Court of Bankruptcy, and gave limited jurisdiction (where the estate of the debtor was E worth less than £200) to the resident magistrates' courts, with an appeal (in either case) to the Court of Appeal.

18 So after 1894 section 64 of the Jamaican Bankruptcy Law 1871 (by then re-enacted as section 161 of the Jamaican Bankruptcy Law 1880) still made sense, with a very limited degree of extraterritorial effect as between the Grand Court of the Cayman Islands and the various Jamaican courts with original jurisdiction in bankruptcy (the Court of Appeal of Jamaica F having jurisdiction to hear appeals from all of them). These statutory provisions remained in force unchanged throughout the first half of the 20th century. The Cayman Islands were still a dependency of Jamaica at the inception of the short-lived British Caribbean Federation. But the Cayman Islands and Turks and Caicos Islands Act 1958 repealed the Cayman Islands Act 1863 and provided for the Cayman Islands to have a new constitution, G granted by the Cayman Islands (Constitution) Order in Council 1959 (SI 1959/863). This provided for the Governor of Jamaica to be ex-officio the Governor of the Cayman Islands, with limited legislative powers conferred concurrently on the Governor with the advice and consent of the Cayman Legislative Assembly (on the one hand) and the legislature of Jamaica (on the other hand), with power being reserved to Her Majesty in Council to amend or vary the Order in Council.

H 19 The 1959 Order in Council was revoked by the Cayman Islands (Constitution) Order in Council 1962 (SI 1962/1646), which was intended to take effect on 6 August 1962, simultaneously with Jamaica's attainment of full independence under the Jamaica Independence Act 1962. The 1962 Order in Council was inadvertently not laid before Parliament and was

brought into force retrospectively by the Cayman Islands (Constitution) Order 1965 (SI 1965/1860). The present constitution was brought into force by the Cayman Islands (Constitution) Order 1972 (SI 1972/1101). Both the 1962 and the 1972 Constitutions conferred law-making power "for the peace, order and good government of the Islands" on the Administrator (later the Governor) with the advice and consent of the Legislative Assembly, with power reserved to Her Majesty in Council.

20 That completes the relevant constitutional history. But it is necessary to go back a little in time to the enactment of the Cayman Bankruptcy Law 1964. The general effect of the various constitutional instruments was to maintain existing laws in force in the Cayman Islands, subject to any necessary modifications. But with Jamaica's independence it was appropriate for the Cayman Islands to have their own body of statute law. That was the purpose of the Revised Edition (Laws of the Cayman Islands) Law 1960 (a Cayman enactment). It provided (in section 3) for the Governor to appoint commissioners to prepare a revised edition of the laws of the Cayman Islands and (in section 8) a Table of the Acts and Laws in force on 31 December 1963. The commissioners had power (in section 4) to make a variety of formal or verbal changes (no doubt in the interests of clarity, simplicity, uniformity and accuracy) but section 6 provided:

> "(1) The powers conferred upon the commissioners by section 4 of this Law shall not be taken to imply any power in them to make any alteration or amendment in the matter or substance of any Act or Law or part thereof.
>
> "(2) In every case where any such alteration or amendment is, in the opinion of the commissioners, desirable, the commissioners shall draft a Bill setting forth such alterations and amendments and authorising them to be made in the revised edition, and every such Bill shall, subject to the sanction of the Governor, be submitted to the Legislative Assembly and dealt with in the ordinary way."

Several amendments to the Jamaican Bankruptcy Law 1880 were made by the enactment of the Statute Law Revision (Amendments) Law 1963 which was passed by the Cayman Legislative Assembly (apparently under section 6 (2) of the 1960 Law) but no amendment of section 161 was made by those means. Such textual alterations as were made must have been made under the limited powers conferred by section 4 of the 1960 Law.

21 The commissioners' labours did in due course produce three volumes of statutes entitled "The Laws of the Cayman Islands 1963", with the Bankruptcy Law as chapter 7. It is still in force, with some amendments not material to this appeal, as the Bankruptcy Law (1997 Revision). There has never been any change to section 156 which (with the side note "Enforcement of warrants and orders of courts") is in the following terms:

> "All the courts in bankruptcy and the officers of such courts, shall act in aid of and be auxiliary to each other in all matters of bankruptcy and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and be carried into effect accordingly. An order of any court in bankruptcy seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise in regard to the

A matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

22 It will be apparent that most of the language of the section, like that of section 161 of the Jamaican Bankruptcy Law 1880, is close to that of section 122 of the Bankruptcy Act 1914 of the United Kingdom. But B whereas the United Kingdom statute applied to all British courts, the only extraterritorial operation of the Jamaican statute was very limited (and constitutionally unexceptionable), that is to the Cayman Islands as Jamaica's dependency. Under section 156 of the Cayman statute it is very hard to see what effect (extraterritorial or otherwise) could sensibly have been intended, since the Cayman Islands had only one court with C bankruptcy jurisdiction, and its Governor and Legislative Assembly had (at best) very limited power to legislate with extraterritorial effect.

The first issue: section 156

23 So their Lordships come to the first issue, the meaning of "all the courts in bankruptcy" at the beginning of section 156. It is, once the D background has been explained, a short point of statutory construction. The Court of Appeal noted four possible interpretations: (i) all United Kingdom and British courts (the view of the Chief Justice); (ii) all bankruptcy courts worldwide (the view of Henderson J); (iii) all bankruptcy courts in the Cayman Islands (of which there was only one, so that the provision would have no present application at all); and (iv) Cayman and Jamaican bankruptcy courts (a view which neither side put forward in the E Court of Appeal, and which the Court of Appeal regarded as untenable).

24 The Court of Appeal preferred the view of the Chief Justice. The court was reluctant to find that section 156 had no coherent present meaning, and was directed simply to the possibility of there being more than one Cayman court with bankruptcy jurisdiction at some time in the future (a possibility which would in any event have called for primary legislation). F The court attached little weight to the argument that the Governor and the Legislative Assembly had no general power of extraterritorial legislation by treating section 156 as a sort of declaratory repetition or re-enactment of section 122 of the Bankruptcy Act 1914 so as to provide a complete bankruptcy code for the Islands:

> G "We believe the proper view to be that a correct statement of prevailing law contained in an enactment will fall within the competence of the enacting body notwithstanding that such body does not itself have authority to make or change the law so stated—that such a practice is constitutionally unobjectionable, whether in state or provincial legislation, municipal by-laws, rules and regulations of administrative tribunals or other branches of government or by-laws or articles of a body H corporate created under statutory authority."

The court also relied (as did the respondents before the Board) on the contrast in language between "courts" in section 156 (and its Jamaican antecedents) and the singular "court" (defined as the Chief Court in Bankruptcy) in sections 157 and 158 (and their Jamaican antecedents).

25 Their Lordships readily understand why the Court of Appeal was anxious to interpret section 156, if possible, in a way that gives it a sensible present effect. But for the legislative history as summarised above the Court of Appeal's interpretation might have been possible, although to treat section 156 simply as a declaratory repetition of the United Kingdom provision would involve some remoulding of the statutory language. The section would have to be read as conferring on the Grand Court authority to send letters of request to United Kingdom courts and other British courts, and as placing it under a duty to respond to letters of request from such courts, while leaving the powers and duties of the other courts to be conferred or imposed by other legislation enacted in the United Kingdom or elsewhere in the Commonwealth.

26 But in their Lordships' view the history of the Jamaican legislation, and the way in which it has been transposed into Cayman legislation, make such an interpretation impossible. When the transposition took place the state of Jamaican law was that for nearly a century section 64 of the Bankruptcy Law 1871, and then section 161 of the Bankruptcy Law 1880, had provided a system of co-operation in bankruptcy matters which made sense in the domestic context of Jamaica. Section 122 of the Bankruptcy Act 1914 and its antecedents provided for mutual assistance between the Jamaican courts and the British courts. It is inconceivable that the commissioners appointed under the Revised Edition (Laws of the Cayman Islands) Law 1960 (who seem, from the contents of the Statute Law Revision (Amendments) Law 1963, to have been scrupulous about what might be regarded as amendments of substance) should have intended to make a significant change of substance without invoking the procedure in section 6 (2) of the 1960 Law. This aspect of the matter does not seem to have been raised in the Court of Appeal, which seems to have thought that the amendment to section 161 was included in the 1963 amending statute.

27 Their Lordships must therefore conclude that the commissioners cannot have understood the effect of this part of the Jamaican legislation. Had they done so they would have realised that there was no way in which it needed to be, or could sensibly be, transposed into a legal system under which there was only one bankruptcy court. Section 156 has no practical present effect in the Cayman Islands. Therefore the appellants succeed on the first issue.

The second issue: repeal of section 122

28 This issue is also an issue of statutory construction, the relevant statute being the Insolvency Act 1985 of the United Kingdom. The question is whether that Act repealed section 122 in its entirety, and across the whole range of its extent, or repealed it in relation to the United Kingdom but left it in force in relation to the Channel Islands, the Isle of Man, and all other parts of Her Majesty's Dominions (including fully independent Commonwealth countries) in which it was still in force. Although this too is in the end a short point of construction it is by no means an easy one. Counsel on both sides put forward some elaborate arguments representing the fruits of painstaking research. But the only sure conclusions that their Lordships can draw are that the drafting techniques of successive generations of parliamentary counsel have not been wholly uniform, and the reasons for variations in their techniques are often obscure.

29 The relevant provisions of the 1985 Act are as follows.

(i) Section 213 provided for mutual assistance between courts within different parts of the United Kingdom, and between its courts and those of a "relevant country or territory". It was the predecessor of section 426 of the Insolvency Act 1986, which is discussed below as part of the third issue.

(ii) Section 235(3): "The enactments mentioned in Schedule 10 to this Act are hereby repealed to the extent specified in the third column of that Schedule."

(iii) Section 236(2):

> "This Act shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes and for different provisions."

(iv) Section 236(3) provided that certain provisions of the Act do not extend to Scotland. Subsection (4) provided that with certain exceptions (including section 235 and the relevant parts of Schedule 10, Part IV) the Act does not extend to Northern Ireland.

(v) Section 236(5):

> "Her Majesty may, by Order in Council, direct that such of the provisions of this Act as are specified in the Order shall extend to any of the Channel Islands or any colony with such modifications as may be so specified."

(vi) Schedule 10, Part III (Bankruptcy repeals) included the following:

4 & 5 Geo 5, c 59	The Bankruptcy Act 1914	The whole Act, except sections 121 to 123.

(vii) Schedule 10, Part IV (Other repeals) included the following:

4 & 5 Geo 5, c 59	The Bankruptcy Act 1914	Sections 121 to 123.

30 The Secretary of State made two relevant commencement orders on 6 February 1986 and 10 November 1986 respectively. The Insolvency Act 1985 (Commencement No 2) Order 1986 (SI 1986/185) provided for the coming into force on 1 April 1986 of most of the provisions of section 213 and of Schedule 10 "except insofar as it relates to courts in the United Kingdom acting in aid of and being auxiliary to British courts elsewhere". The Insolvency Act 1985 (Commencement No 5) Order (SI 1986/1924) provided for the coming into force on 29 December 1986 (with a very few immaterial exceptions) of all the remaining provisions of the 1985 Act.

31 No Order in Council was made under section 236(5) extending any provision of the Insolvency Act 1985 to the Cayman Islands, nor has any such Order ever been made under section 442 of the Insolvency Act 1986 (which replaced section 236(5)). In particular, there has been no such extension of the repeal of section 122. The respondents rely on this simple point as their key argument. The appellants say that no extension of the repeal was necessary, since section 122 was repealed outright by the Insolvency Act 1985 itself. They contend that the presumption against extraterritorial operation of a United Kingdom statute does not apply (at

any rate with the same force) to a repeal. They point to other statutes (especially Statute Law Revision Acts and Statute Law (Repeals) Acts ranging from 1867 to 1995) in which clear words of exception were used—for instance, in section 2(3) of the Statute Law (Repeals) Act 1995:

> "this Act does not repeal any enactment so far as the enactment forms part of the law of a country outside the United Kingdom; but Her Majesty may by Order in Council provide that the repeal by this Act of any enactment specified in the Order shall on a date so specified extend to any of the Channel Islands or any colony."

They point to the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409), by which section 426 of the Insolvency Act 1986 was extended to Guernsey. This Order in Council did not include any express repeal of section 122. Similarly, Jersey and the Isle of Man have enacted their own provisions for mutual assistance (in article 48 of the Bankruptcy (Desastre) (Jersey) Law 1990 and section 1 of the Manx Bankruptcy Act 1988 respectively) without any express repeal of section 122.

32 The Court of Appeal did not find it necessary to reach a definite conclusion on this point, although it appears to have been inclined towards the view that section 122 had not been repealed in relation to the Cayman Islands. This inclination seems to have been based partly on the decision of the Full Court of the Supreme Court of Victoria in *Ukley v Ukley* [1977] VR 121, 124–125, which attached great weight to the power to extend the relevant statute (the Evidence (Proceedings in other Jurisdictions) Act 1975) by Order in Council (although not to Victoria) and concluded, at p 131, after a full discussion of the authorities, that there is "no sufficient reason for distinguishing between a statute which repeals an earlier statute and one which amends it". Mr Dicker, for the appellants, sought to distinguish this case because Victoria, unlike the Cayman Islands, had full self-government at the time when the 1975 Act was passed. Mr Popplewell, for the respondents, was right in commenting that the position of the Cayman Islands is really an a fortiori case.

33 It is surprising that there should be any room for doubt as to whether an important provision of primary legislation has or has not been fully repealed by a modern statute which appears to have been drafted skilfully and with close attention to detail. It is particularly noteworthy that in section 236(4) the draftsman has painstakingly excepted certain repeals (all affecting Ireland) from the general provision that the Act does not extend to Northern Ireland.

34 After carefully considering all the competing arguments their Lordships have come to the conclusion that the Insolvency Act 1985 did not repeal section 122 in its application outside the United Kingdom. Section 236(4) (the provision about Irish repeals) and section 236(5) (the power for Her Majesty by Order in Council to extend any of the provisions of the Act to certain territories outside the United Kingdom) strongly support the natural reading of section 235(3) and Schedule 10. The only possible drafting defect was that parliamentary counsel omitted (presumably as unnecessary) precautionary formulae (such as that used in the 1995 Act mentioned in para 31 above) which have been used from time to time, both before and since the 1985 Act, by other parliamentary counsel. That carries little weight as against the matters just mentioned. Nor can

much weight be attached to the fact that there may have been an oversight (or a deliberate reliance on implied repeal) in subsequent instruments affecting the Channel Islands and the Isle of Man. Therefore the respondents succeed on the second issue.

35 The respondents relied in the alternative, on the second issue, on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope (see *Dicey & Morris, Conflict of Laws*, 13th ed (2000), vol 2, pp 1181–2, 1186–3) and the inherent jurisdiction of the Grand Court cannot be wider.

The third issue: section 107

36 The conclusion that section 122 of the Bankruptcy Act 1914 remains in force in the Cayman Islands leads to the third issue, that is the nature and width of the jurisdiction that it confers on the Grand Court. In particular, does it authorise the Grand Court to exercise in favour of the Bahamian trustee in bankruptcy a special statutory power which might not be available to him (because of the "trader" requirement) if the trusts in question were governed by Bahamian law and the trustees were resident in the Bahamas and facing proceedings in the Bahamian court?

37 Mr Popplewell has urged the Board to give an affirmative answer to that question. He has pointed to the alternatives spelled out in the latter part of section 122: "such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions." He has submitted that this equates the receipt and acceptance of a letter of request with a hypothetical bankruptcy in the receiving territory, with consequences described as follows by Chadwick J in *In re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, 626, a case on section 426 of the Insolvency Act 1986:

> "The scheme of subsection (5) appears to me to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by the domestic court to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request, notwithstanding that on this hypothesis, those are matters which would not, or might not, otherwise fall within its jurisdiction by reason of some foreign element."

Rattee J agreed with that passage in *In re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636, 655, and both decisions were referred to with approval by the Court of Appeal in *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, 511–515.

38 To this Mr Dicker replied that these are all recent authorities on section 426 of the Insolvency Act 1986, which is in different and wider terms than section 122, and that the Court of Appeal was in error in treating them

as having any relevance to section 122. It is therefore appropriate to set out the relevant provisions of section 426:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> "(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

Subsection (10) contains a wide definition of "insolvency law". Subsection (11) defines "relevant country or territory" as any of the Channel Islands, the Isle of Man, and any country or territory which the Secretary of State designates by statutory instrument.

39 Mr Dicker submitted that section 122 (like its statutory predecessors, but unlike section 426) conferred an essentially auxiliary jurisdiction, which granted new remedies but did not create new rights. The High Court of Australia said as much (in relation to section 118 of the Bankruptcy Act 1883 of the United Kingdom) in *Hall v Woolf* (1908) 7 CLR 207, 212. Moreover in *Galbraith v Grimshaw* [1910] AC 508, 511–512 Lord Macnaghten said:

> "It may have been intended by the legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English court, no doubt, is bound to carry out the orders of the Scottish court, but in the absence of special enactment the Scottish court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English court pending at the time of the Scotch sequestration."

40 *Galbraith v Grimshaw* was primarily concerned with section 117 of the Bankruptcy Act 1883. What the House of Lords actually decided was that where a Scottish sequestration (that is, bankruptcy) occurred about a fortnight after an English garnishee order nisi, the judgment creditor prevailed over the trustee in bankruptcy, although the result would have been different if both the attachment and the bankruptcy had occurred in the same jurisdiction (whether England or Scotland). The attachment in England had not been completed, but the fact that it had started meant that the garnished debt was no longer "free assets" of the bankrupt. But in referring to the court's auxiliary function Lord Macnaghten must have had in mind section 118.

A **41** The general tenor of his opinion is adverse to the notion of a hypothetical bankruptcy in the receiving territory, as the operation of section 426 has been described in the recent authorities already mentioned. In *The Law of Insolvency*, 3rd ed (2002), at p 773, Professor Ian Fletcher has criticised *Galbraith v Grimshaw* as a

> "somewhat unsophisticated, if not disingenuous, decision, which
B purports to disallow any possibility that the rules of law in force in one jurisdiction may enjoy effect elsewhere by virtue of rules of private international law in force in the other countries concerned",

and he suggests that it is overdue for reconsideration. The decision has also been described as "unfortunate" in *Anton, Private International Law*, 2nd ed (1990), at p 734.

C **42** Section 122 was given a cautious interpretation by Farwell J in *In re Osborn*; *Ex p Tree* [1931–32] B & CR 189, a case in which an Isle of Man trustee in bankruptcy was seeking the assistance of the English court in relation to the bankrupt's immovable property in England. *In re Osborn* is one of very few reported English cases on the operation of section 122. It has since been cited in many overseas cases in relation to the degree of
D discretion which the receiving court has in applying the apparently mandatory terms of section 122 (or comparable overseas enactments). Another of the rare English cases on section 122 is *In re A Debtor (Order in Aid No 1 of 1979), Ex p Viscount of the Royal Court of Jersey* [1981] Ch 384, 399, 400 in which Goulding J (after noting the striking differences between insolvency laws in England and Jersey) said:

> E "The word 'bankruptcy' in section 122, if indeed it refers at all to *process* of bankruptcy, must, in my judgment, be construed in a wide sense, for the section is designed to produce co-operation between courts acting under different systems of law, and it would be much restricted if extended only to jurisdictions which reproduce all the main features of English procedure. Dodd J took much the same view of a similar provision in the Bankruptcy (Ireland) Amendment Act 1872: see *In re*
> F *Bolton* [1920] 2 IR 324, 327."

43 In addition to *Hall v Woolf* 7 CLR 207 and *Ukley v Ukley* [1977] VR 121 their Lordships were referred to a number of other Australian authorities, the most important of which are *In re Ayres; Ex p Evans* (1981) 34 ALR 582 and on appeal *Ayres v Evans* (1981) 39 ALR 129; and *Radich v*
G *Bank of New Zealand* (1993) 116 ALR 676. These cases are of limited assistance since they are concerned with section 29 of the Bankruptcy Act 1966 of the Commonwealth of Australia, which although similar in its general scope to both section 122 and section 426, is not in identical terms to either. The key provisions of section 29 are in subsections (2) and (3):

> "(2) In all matters of bankruptcy, the court: (a) shall act in aid of and be
> H auxiliary to the courts of the external territories, and of prescribed countries, that have jurisdiction in bankruptcy; and (b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.
>
> "(3) Where a letter of request from a court of an external territory, or of a country other than Australia, requesting aid in a matter of

bankruptcy is filed in the court, the court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction."

In *In re Ayres* the Federal Court of Australia was largely concerned with the aspect of indirect enforcement of the revenue laws of a foreign country (the New Zealand Inland Revenue Department was a major creditor of the bankrupt). There are passing references to the judgments in *Hall v Woolf* and *Galbraith v Grimshaw* but the main issue was as to the mandatory nature of the court's response to a letter of request.

44 *Radich's* case 116 ALR 676 was concerned with whether a debtor, already bankrupt in New Zealand, should be made subject to a further sequestration order in Australia. It was held on appeal that the Australian court had erred in exercising its discretion to bring about a second bankruptcy. The Federal Court was critical of *Hall v Woolf*, Einfeld J, at p 683, saying that it had produced a "virtual nonsense" and Drummond J, at p 692, referring to "unsatisfactory aspects of the reasoning" in it. But all three Justices regarded it as a decision on unusual facts (involving a change of domicile in the course of the bankruptcy). Drummond J said of section 29(3), at p 695:

"The jurisdiction the Australian court has under section 29(3) is a wide one . . . The Australian court is not limited in providing assistance to a foreign court to cases in which the Australian and the foreign court have powers that mirror each other. If there is a 'matter of bankruptcy' within section 29(3) before the foreign court, the Australian court, in response to a request for aid, can exercise any of the powers it has under the Bankruptcy Act 1966 if that same matter had arisen in Australia, being powers the exercise of which will provide assistance to the foreign court in the circumstances of the particular case."

So here the Federal Court saw section 29(3) as importing a hypothetical bankruptcy in the receiving state.

45 Their Lordships see some force in the criticisms which have been made of *Hall v Woolf* 7 CLR 207 and *Galbraith v Grimshaw* [1910] AC 508. The distinction between "rights" and "remedies" is not, in the context of auxiliary jurisdiction in bankruptcy, marked by a bright line (though their Lordships cannot accept Mr Popplewell's submission that even the debtor himself, before his bankruptcy, had some inchoate right to have his own trusts set aside). Section 122 is expressed in terms of exercising jurisdiction; section 29(3) is expressed in terms of exercising powers; section 426(5) is expressed in terms of applying insolvency law. That is not in their Lordships' view a sound basis for concluding that section 426 has conferred different and wider powers on the court which receives a letter of request. The Court of Appeal in *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, 515 did not take that view. Moreover there is nothing in the report of the Cork Committee on Insolvency Law and Practice (1982) (Cmnd 8558) to suggest that section 426 was intended to make a large extension in the court's auxiliary jurisdiction in bankruptcy otherwise than in a geographical sense (that is, by extending its scope to any "relevant country or territory"): see Chapter 49, especially paras 1909–1913.

A **46** For these reasons their Lordships conclude, despite Mr Dicker's skilful submissions in support of the appeal, that the jurisdiction conferred by section 122 is, in the Cayman Islands and the other territories in which it remains in force, essentially as wide as that conferred by section 426. Therefore the respondents succeed on the third issue.

47 In reaching this conclusion their Lordships have not overlooked the express provision in section 426(5) requiring the court to have regard to the B rules of private international law. If asked to exercise its powers under section 426 the English court may find it necessary to consider whether the requesting court has properly exercised jurisdiction over a debtor with no obvious connection with its territory, and it might also, in some circumstances, have to take account of the general principle against enforcement of the public laws of another country. But that was true of C section 122 also: see the judgment of the Court of Appeal of Guernsey in *In re Tucker (A Bankrupt)* (unreported) 27 September 1988. Considerations of private international law may be material in subsequent proceedings which the Bahamian trustee in bankruptcy takes in the Grand Court. But their Lordships have no reason to suspect that there will be any real doubt about the debtor's sufficient connection with the Bahamas, where he is permanently resident. Moreover the larger of the trusts in question, the D Comfort Trust, was originally governed by Bahamian law, and the switch to the Cayman Islands seems to have taken place when the English proceedings against the debtor were already imminent. Their Lordships have no criticism of the observations made by the Court of Appeal as to the Grand Court's eventual exercise of discretion in this matter.

48 Their Lordships will therefore humbly advise Her Majesty that this E appeal should be dismissed with costs.

Solicitors: Alan Taylor & Co; Baker & McKenzie.

P M M

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H

Exhibit 7

AWB Geneva SA & Anor v North America Steamships Ltd, Canada (in bankruptcy).

[2007] EWHC 1167 (Comm)

Queen's Bench Division (Commercial Court).
Field J.
Judgment delivered 17 May 2007.

Anti-suit injunction – Canadian defendant party to forward freight swap agreements containing exclusive English jurisdiction clause – Defendant became insolvent and trustee appointed – Trustee affirmed forward freight agreements – Trustee filed petition under Companies' Creditors Arrangement Act of Canada seeking relief in respect of forward freight agreements – Claimants sought declarations that events of default had occurred under agreements and interim anti-suit injunction to restrain application to Canadian court – Trustee's application to Canadian court not in breach of exclusive English jurisdiction clause.

The claimants sought an anti-suit injunction to restrain insolvency proceedings in Canada in relation to the defendant Canadian company (NASL).

The first claimant, AWB, and the second claimant, Pioneer, had entered into a number of forward freight swap agreements (FFAs) with NASL for the year 2007. Each of the 2007 FFAs was contained in a standard form written confirmation which incorporated the 1992 ISDA Master Agreement (Multicurrency – Cross Border (without Schedule)). The confirmation contained an English law and exclusive jurisdiction clause.

NASL began entering into FFAs on its own account in 2005. In 2006 it executed numerous FFAs as seller with various counterparties ('the 2006 FFAs'). Four of those contracts were with AWB. Unfortunately for NASL, throughout 2006 the settlement rate rose rather than fell and by the end of the year the 2006 FFAs were significantly out of the money. The result was that by late November 2006 NASL was insolvent. On 29 November 2006 it filed an assignment in bankruptcy pursuant to the Bankruptcy and Insolvency Act of Canada under which all of its property vested in a trustee. By 31 December 2006 NASL owed approximately US$47.34 million under the 2006 FFAs and had accounts receivable of approximately US$6.2 million.

The trustee affirmed the 2007 FFAs on behalf of the bankruptcy estate. The trustee also filed a petition under the Companies' Creditors Arrangement Act of Canada (the CCAA) proposing a plan of reconstruction to be binding on all creditors. The draft order sought by the trustee under the CCAA prevented a party to a forward freight swap agreement with NASL refusing to perform any

obligations or make any payment to NASL under any such FFA contracts as a result of the insolvency of NASL, the initiation of the proceedings or the non-payment of amounts by NASL under such FFA contracts.

The trustee sought that relief because if AWB and Pioneer were disentitled from maintaining that they were free from any obligation to make payments to NASL under the 2007 FFAs by reason of NASL's bankruptcy, the trustee estimated that by the end of 2007, AWB would owe US$12,526,626 and Pioneer US$9,822,884.41 under those agreements, subject to any applicable set-off in favour of AWB in relation to the 2006 FFAs. That estimate was based on a change in the direction of the settlement rate which had begun to move down.

The claimants issued a claim form seeking against NASL declarations that events of default had occurred under the 2007 FFAs and that by reason thereof neither AWB nor Pioneer had any obligation to make any payment to NASL under the 2007 FFAs; payment to AWB of US$ 2,507,333.03; and a permanent injunction restraining NASL from making or proceeding with any application or claim for relief relating to the enforceability of the 2007 FFAs in any court other than the English High Court and, in particular, proceeding with the application to the Canadian court for the relief sought in the draft order. The claimants then sought an interim anti-suit injunction on the basis that the trustee was bound by the exclusive English jurisdiction clause.

Held, **refusing an injunction and staying the claims:**

1. The trustee's application to the Canadian court was not a breach of the exclusive jurisdiction clause. The exclusive jurisdiction clause applied where one of the parties was seeking a judicial determination on the rights or obligations of one or both of them existing under the contract. In applying to the Canadian court under the CCAA, the trustee was not seeking such a determination. Rather, it was seeking relief in insolvency proceedings that was intended to prohibit various counterparties, including AWB and Pioneer, from relying on certain contractual rights which they might otherwise be entitled to rely on. In other words, the petition against NASL was not an attempt by the trustee to assert NASL's contractual rights against AWB and Pioneer under the 2007 FFAs but was an application to the Canadian court to apply the free standing statutory regime of the CCAA.

2. The position would be the same if it was NASL which was applying to the Canadian court under the CCAA. Such an application would not constitute a breach of the jurisdiction clause nor any other breach of the 2007 FFAs, for NASL did not covenant not to become insolvent or to make its own voluntary assignment in bankruptcy; nor did it promise only to be made bankrupt or go into liquidation in England, nor to take any steps in its bankruptcy that might

prejudice the ability of AWB and Pioneer to enforce their rights under the 2007 FFAs. By way of contrast, if the trustee were to commence court proceedings against AWB and Pioneer to enforce the 2007 FFAs, it would be bound, at least as a matter of English law, by the exclusive jurisdiction clause in the sense that it could not enforce NASL's FFA contractual rights without at the same time accepting AWB's and Pioneer's right to rely on the jurisdiction clause.

3. The trustee's application under the CCAA was not unconscionable or oppressive or vexatious. Both AWB and Pioneer knew or had the means of knowing that NASL carried on business and was incorporated in Canada. Accordingly, it was entirely predictable that if NASL were to become insolvent during the currency of the 2007 FFAs, the insolvency would fall to be dealt with under the applicable Canadian legislation and it was a common feature of insolvency regimes that contractual rights could be overridden.

The following cases were referred to in the judgment:

Air Canada, Re (2004) 47 CBR (4th) 177.
Algoma Steel Inc, Re (2001) 30 CBR (4th) 1.
Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux (1890) 25 QBD 399.
Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112.
Doman Industries, Re (2003) 41 CBR (4th) 29.
Felixstowe Dock & Railway Co v United States Lines Inc [1989] 1 QB 360.
Hongkong Bank v Chef Ready Foods Ltd (1990) 4 CBR (3rd) 311.
Jay Bola, The [1997] 2 Ll Rep 279.
Mazur Media Ltd v Mazur Media GmbH [2004] 1 WLR 2966.
Norcen Energy Resources Ltd v Oakwood Petroleums Ltd (1988) 72 CBR (NS) 1.
OT Africa Line Ltd v Magic Sportswear Corp [2005] 1 CLC 923.
Playdium Enterprises Corp, Re (2001) 31 CBR (4th) 302.
Stelco Inc, Re (2005) 15 CBR (5th) 288.
T Eaton Co, Re (1997) 46 CBR (3d) 293.
Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (*The Hari Bhum*) [2004] 2 CLC 1189.
Youell v Kara Mara Shipping Co Ltd [2000] CLC 1058.

Ali Malek QC and David Quest (instructed by Reed Smith Richards Butler LLP) for the claimants.

Robin Dicker QC and Stephen Robins (instructed by Holman Fenwick & Willan) for the defendant.

JUDGMENT

Field J: Introduction

1. The principal issue raised in these applications is whether a party to a contract governed by English law and subject to the exclusive jurisdiction of the English High Court can found on these provisions to restrain the counterparty's foreign trustee in bankruptcy from seeking an order in foreign insolvency proceedings that certain conditions precedent to liability under the contract should cease to apply.

2. The first claimant ('AWB') and the second claimant ('Pioneer') are incorporated in Switzerland and the British Virgin Islands respectively. The defendant ('NASL') was incorporated under the British Columbia Company Act in 1992 and had its head office and principal place of business in Vancouver, British Columbia, Canada. NASL is party to a number of Forward Freight Swap Agreements ('FFAs') which cover the period 1 January 2007 to 31 December 2007 with monthly settlement dates. Two of these agreements are with AWB; another is with Pioneer. These three agreements are collectively referred to hereafter as 'the 2007 FFAs'.

3. The parties to an FFA are known as 'Buyer' and 'Seller'. The Seller agrees to pay a 'Settlement Sum' to the Buyer if the actual freight rate according to specified market indices ('the Settlement Rate') is higher than the agreed 'Contract Rate' on a specified future date ('the Settlement Date'). The Buyer on the other hand agrees to pay the Seller a Settlement Sum if the Settlement Rate is lower than the Contract Rate on the Settlement Date.

4. Each of the 2007 FFAs is contained in a standard form written confirmation which incorporates the 1992 ISDA Master Agreement (Multicurrency – Cross Border (without Schedule) ('the Master Agreement'). Clause 16 of the confirmation provides:

> 'Pursuant to Section 13(b) of the Standard Agreement, this Agreement shall be governed by and construed in accordance with English law and shall be subject to the exclusive jurisdiction of the High Court of Justice in London, England.'

5. Under Section 2(a)(iii) of the Master Agreement the obligation on each party to pay sums owing on the Settlement Date is subject to the condition precedent that no Event of Default has occurred and is continuing with respect to the other party. Amongst the defined Events of Default is Bankruptcy, which under Section 5(vii) occurs, inter alia, where a party: (1) is dissolved; (2) becomes insolvent or is unable to pay its debts; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or any other relief under any bankruptcy or insolvency law which results in a judgment or order or the entry of an order for relief; (5) has a resolution passed for its winding-up, official management or liquidation; and

A (6) seeks or becomes subject to the appointment of an administrator of other similar official for all or substantially all of its assets.

6. NASL began entering into FFAs on its own account in 2005. In 2006 it executed numerous FFAs as Seller with various counterparties ('the 2006 FFAs'). Four of these contracts were with AWB. Unfortunately for NASL, throughout 2006 the Settlement Rate rose rather than fell and by the end of the year the 2006 FFAs were significantly out of the money. The result was that by late November 2006 NASL was insolvent. On 29 November 2006 it filed an assignment in bankruptcy pursuant to the Bankruptcy and Insolvency Act of Canada under which all of its property vested in Wolrige Mahon Limited ('the Trustee'), as trustee.

7. By 31 December 2006 NASL owed approximately US$47.34 million under the 2006 FFAs and had accounts receivable of approximately US$6.2 million.

8. At the first meeting of creditors held on 5 January 2007 the Trustee's appointment was approved and four Inspectors were appointed to assist in the administration of the Estate. On 8 January 2007 the Inspectors authorised the Trustee to affirm the 2007 FFAs but the Trustee declined to take this step unless it was clear that it would not incur any personal liability by doing so. Accordingly, the Trustee applied to the Supreme Court of British Columbia ('the Canadian Court') seeking declarations that it was not obliged to affirm the FFAs in order to take the benefit of them and, if it did affirm them, its liability would be limited to the realisable value of the Bankrupt's property, less the Trustee's proper fees and disbursements. In a reserved judgment handed down on 28 February 2007, Tysoe J held that: (i) the Trustee was required to affirm the 2007 FFAs in order to take the benefit of them and thereby assure the other party that it will not be treated as an unsecured creditor in respect of the obligations it performs after the date of the bankruptcy; and (ii) affirmation of the 2007 FFAs by the Trustee would not itself make the Trustee personally liable in respect of NASL's obligations thereunder so long as the Trustee affirmed on behalf of the bankrupt estate and not in its personal capacity. This judgement is the subject of an appeal by AWB and Pioneer who opposed the Trustee's application. So far no date has been set for the hearing of this appeal

9. On 5 March 2007 the Trustee affirmed the 2007 FFAs on behalf of the bankruptcy estate. In the meantime, on 20 February 2007, the Trustee had filed a petition under the Companies' Creditors Arrangement Act of Canada ('the CCAA'). The purpose of this Act is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business, see *Hongkong Bank v Chef Ready Foods Ltd* (1990) 4 CBR (3rd) 311, at para. 10.

10. Under the CCAA, a plan of reconstruction is binding on all creditors if the plan is approved by a majority of creditors representing two thirds in value of the claims of each class of creditors and is sanctioned by the Court. The Court will grant

its sanction if: (i) there has been strict compliance with all statutory requirements and adherence to all previous orders of the court; (ii) nothing has been done or purported to be done that is not authorised by the CCAA; and (iii) the plan is fair and reasonable, see *Re Algoma Steel Inc* (2001) 30 CBR (4th) 1. Further, the exercise of the court's discretion must be guided by the scheme and object of the CCAA and by the legal principles that govern corporate law issues, see *Re Stelco Inc* 15 CBR (5th) 288, at para. 26.

11. Accordingly, in broad terms, the CCAA provides a regime that corresponds to the combined effect of the provisions of UK insolvency law relating to administrations (Schedule B1 of the *Insolvency Act* 1986 ('the 1986 Act')) and compromises or schemes of arrangement (Part 1 of the 1986 Act providing for company voluntary arrangements, and section 425 of the *Companies Act* 1985 ('the 1985 Act')).

12. Section 11(4) of the CCAA empowers the Court to make an order staying 'proceedings' taken or that might be taken in respect of the company. 'Proceedings' has been construed to include extra-judicial conduct that could impair the ability of the debtor company to continue in business. In *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd* (1988) 72 CBR (NS) 1, the Court restrained a joint venture party of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement. In *Re T Eaton Co* (1997) 46 CBR (3d) 293, the Court restrained tenants in shopping centres from terminating leases on the basis of co-tenancy clauses requiring the debtor company's store to stay open. And in *Re Playdium Enterprises Corp* (2001) 31 CBR (4th) 302, the Court restrained a party from relying on its contractual right to object to an assignment.

13. In *Re Doman Industries* (2003) 41 CBR (4th) 29 Tysoe J explained the purpose of such stays in these terms:

> 'In my view, there are numerous purposes of stays under s. 11 of the CCAA. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganise or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganise or restructure its financial affairs. … [A] further purpose is to prevent the frustration of the reorganisation or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period.'

14. It is clear from the evidence of the Trustee's expert on Canadian insolvency law, the Hon James M Farley QC, a former Justice of the Superior Court of Ontario, that stays are commonly granted under section 11(4) of the CCAA to restrain counterparties to contracts with the debtor company from relying on any pre-CCAA

A plan breaches of those contracts committed by the debtor company that would allow those counterparties to exercise remedies against the debtor company. Mr Farley gives examples of such orders in his report. In two of these the order provided that no person who is a party to any contract or lease to which the debtor company is a party may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder by reason of any defaults or events of default arising out of the insolvency of the applicant.[1]

15. The first step in the CCAA process is an application to the Court for an Initial Order. If the reconstruction plan is approved by the necessary majorities of creditors and sanctioned by the Court, the Court may make a Final Order.

16. Paragraphs 21 and 22 of the draft Initial Order sought by the Trustee read:

> '[21] THIS COURT ORDERS no party to any agreement with NASL respecting forward freight swap agreements ("FFA Contracts") may refuse to perform any obligations or make any payment to NASL under any such FFA Contracts as a result of (a) the insolvency of NASL (b) the assignment in bankruptcy by NASL (c) the appointment of the Trustee or Monitor in respect of NASL (d) the inability of NASL to pay its debts (e) the initiation of these proceedings or any other proceeding or matter related to or arising out of the insolvency of NASL or (f) the non-payment of amounts by NASL under such FFA Contracts (subject to any rights of set off).
>
> [22] THIS COURT ORDERS that notwithstanding paragraphs 17 and 21 herein, AWB Geneva SA and Pioneer Metal Logistics, BVI may, in respect of the FFA Contracts between each of them and NASL for the contract period from January, 2007 to December, 2007 inclusive … refrain from making any payment to NASL until January 1, 2008, unless such FFA Contract or Contracts are terminated by them, in accordance with the terms of such contracts, which termination is specifically permitted.'

17. The Trustee seeks the relief spelled out in paragraph 21 of the draft Initial Order because if AWB and Pioneer are disentitled from maintaining that they are free from any obligation to make payments to NASL under the 2007 FFAs by reason of NASL's bankruptcy, the Trustee estimates that by the end of 2007, AWB will owe US$12,526,626 and Pioneer US$9,822,884.41 under these agreements, subject to any applicable set-off in favour of AWB in relation to the 2006 FFAs. This estimate is based on a change in the direction of the Settlement Rate which is now moving down so that by the end of March 2007, absent any reliance on Section 2(a)(iii) of the Master Agreement, AWB owed NASL US$1,063,118.05 and Pioneer US$823,962.04 under the 2007 FFAs.

18. Paragraph 21 of the draft Initial Order is part of an overall plan by the Trustee: (i) to preserve and realise existing tax losses; (ii) to convert NASL's debt to equity so

that the company ceases to be insolvent; (iii) a Final Order having been obtained from the Court, to seek to enforce the 2007 FFAs against AWB and Pioneer in the Chancery Division of the English High Court pursuant to section 426 of the 1986 Act with the benefit of the Final Order.

19. Both Mr Farley and Mr Douglas I Knowles QC, the claimants' Canadian law expert, agree that the Canadian Court has jurisdiction to make an Initial and a Final Order containing paragraphs 21 and 22 of the proposed draft order. Mr Farley also expresses the view that the proposed provisions of the Initial and Final orders are consistent with the policies and principles of the CCAA and are not uncommonly given in CCAA proceedings. Mr Knowles, on the other hand, says that an order in the terms of paragraph 21 would be unique. He recognises that the CCAA may be legitimately used to facilitate liquidation but says that section 11(4) of the CCAA is used as a shield to protect the debtor company whilst it is endeavouring to reorganise its affairs and this is not how the subsection is being used in the Trustee's petition. In his view, there is a serious question whether the Canadian Court would make an order containing paragraphs 21 and 22, inter alia, for the following reasons: (i) NASL has terminated its employees, closed its facilities and ceased carrying on business and there is no indication that it intends revive its business; (ii) NASL has no remaining assets available for creditors except the potential claims under FFAs; (iii) NASL does not need access to payments under the 2007 FFAs in order to pursue any restructuring efforts; (iv) the 2007 FFAs are governed by English law and subject to the exclusive jurisdiction of the English courts; and (v) the CCAA process is being used as a sword and not a shield.

20. The hearing of the Trustee's petition under the CCAA is due to take place on 15 June 2007. On 26 March 2007 NASL by the Trustee undertook to this court not to proceed with the CCAA petition before 1 June 2007.

21. On 19 March 2007 the claimants issued a Claim Form with the permission of Steel J seeking against NASL: (i) declarations under Part 8 CPR that Events of Default under the 2007 FFAs have occurred with respect to NASL and that by reason thereof neither AWB nor Pioneer has any obligation to make any payment to NASL under the 2007 FFAs; (ii) payment to AWB of US$ 2,507,333.03; and (iii) a permanent injunction restraining NASL from making or proceeding with any application or claim for relief relating to the enforceability of the 2007 FFAs in any court other than the English High Court and, in particular, proceeding with the application to the Canadian Court for the relief sought in paragraph 21 of the draft Initial Order. The final hearing of this claim is listed for 24 July 2007.

22. On 26 March 2007, AWB and Pioneer issued an application for an interim anti-suit injunction in the terms sought in the Part 8 Claim to hold the position until the Part 8 Claim has been determined. This is the first of the three applications before the court. The second is an application by the claimants for the joinder of the Trustee to the Part 8 proceedings as second defendant on the ground that it is a necessary and

proper party. The third is an application by NASL that the claimants' Part 8 Claim be stayed and/or for a declaration that this court has no jurisdiction to determine that claim.

The claimants' application for an anti-suit injunction

23. In *OT Africa Line Ltd v Magic Sportswear* [2005] 1 CLC 923, Longmore LJ said:

> '30. It is not now a controversial question whether, in a normal case, an anti-suit injunction should be granted, if a party to an exclusive jurisdiction agreement, in breach of that agreement begins proceedings in a jurisdiction other than the one agreed.
>
> 31. As a broad proposition of law, an anti-suit injunction may be granted where it is oppressive or vexatious for a defendant to bring proceedings in a foreign jurisdiction but *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 emphasised that the mere fact that the English court refused a stay of English proceedings on the grounds of *forum non conveniens* did not itself justify the grant of an injunction to restrain foreign proceedings. The doctrine of comity requires restraint since (a) another jurisdiction may take the view that the courts of that jurisdiction are an equally (or even more) appropriate forum than the English court and (b) any anti-suit injunction can be perceived as an, at least indirect, interference with such foreign court. Even so an anti-suit injunction may be granted if the defendant's conduct in launching or continuing the foreign proceedings is, in fact, oppressive or vexatious as the defendant's conduct was held to be in the *Aerospatiale* case itself.
>
> 32. In the case of exclusive jurisdiction clauses, however, comity has a smaller role. It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.
>
> 33. The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in breach of contract. The normal remedy for this breach of contract is the grant of an injunction to restrain the continuance of proceedings unless it can be shown that damages are an adequate remedy; but damages will not usually be an adequate remedy in fact, since damages will

not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective *fora*. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction.'

24. Mr Malek QC for the claimants accepted that if there is to be an anti-suit injunction, it must be against the Trustee and not NASL because the CCAA proceedings in the Canadian Court are being prosecuted by the Trustee and not NASL. He submitted that the Trustee is bound by the choice of law and exclusive jurisdiction provisions found in clause 16 of the 2007 FFAs. In support of this submission he cited *The Jay Bola* [1997] 2 Ll Rep 279 where the Court of Appeal upheld the grant of an anti-suit injunction restraining insurers from suing in their own name in Brazil on voyage charters that contained a London arbitration clause. The insurers were not entitled to enforce their rights under the voyage charters without recognising the obligation to arbitrate in London. To litigate in Brazil was therefore to act unconscionably and the equitable remedy of an injunction would lie. Mr Malek also cited *Youell v Kara Mara Shipping Co Ltd* [2000] CLC 1058 where Aikens J applied the reasoning in The Jay Bola when granting an anti-suit injunction restraining proceedings on policies of insurance in Louisiana brought under the Direct Action Statute where those proceedings were in defiance of an exclusive jurisdiction clause.

25. Relying on *The Hari Bhum* [2004] 2 CLC 1189 (at para. 55), Mr Malek submitted that the question whether the Trustee was acting in breach of clause 16 in seeking the proposed Initial Order should be decided by English law and when characterising the CCAA proceedings the court should have regard to the substance not the form. Characterised in this way, said Mr Malek, the Trustee's application to the Canadian Court was an application for a determination that the claimants have no defence to claims under the 2007 FFAs and as such is a clear breach of clause 16.

26. Mr Malek also relied on: (i) *Gibbs v Societe Industrielle des Metaux* (1890) 25 QBD 399 where the Court of Appeal held that the discharge of a contractual obligation in a liquidation in France would not be recognised in England where the contract was governed by English law; (ii) *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966 where Lawrence Collins J declined to grant a stay of proceedings where one of the parties was in liquidation in Germany and the contract sued on conferred exclusive jurisdiction on the English court; and (iii) *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] 1 QB 360 where Hirst J continued a *Mareva* injunction in the face of a restraining order made by the US Bankruptcy Court.

27. In conclusion, Mr Malek submitted that the Trustee's application to the Canadian Court was an unconscionable breach of clause of 16 and should be restrained by an interim injunction until the Part 8 Claim had been determined.

28. Is the Trustee's application to the Canadian Court a breach of clause 16 as Mr Malek so vigorously contended? In my opinion it is not. The exclusive jurisdiction

element of clause 16 applies, in my judgement, where one of the parties is seeking a judicial determination on the rights or obligations of one or both of them existing under the contract. In my view, in applying to the Canadian Court under the CCAA, the Trustee is not seeking such a determination. Rather, it is seeking relief in insolvency proceedings that is intended to prohibit various counterparties, including AWB and Pioneer, from relying on certain contractual rights which they might otherwise be entitled to rely on. In other words, the petition against NASL is not an attempt by the Trustee to assert NASL's contractual rights against AWB and Pioneer under the 2007 FFAs but is an application to the Canadian Court to apply the free standing statutory regime of the CCAA.

29. The position would be the same if it was NASL which was applying to the Canadian Court under the CCAA. Such an application would not constitute a breach of clause 16 nor any other breach of the 2007 FFAs, for NASL did not covenant not to become insolvent or to make its own voluntary assignment in bankruptcy; nor did it promise only to be made bankrupt or go into liquidation in England, nor to take any steps in its bankruptcy that might prejudice the ability of AWB and Pioneer to enforce their rights under the 2007 FFAs.

30. By way of contrast, if the Trustee were to commence court proceedings against AWB and Pioneer to enforce the 2007 FFAs, it would be bound, at least as a matter of English law, by the exclusive jurisdiction clause in the sense that it could not enforce NASL's FFA contractual rights without at the same time accepting AWB's and Pioneer's right to rely on the jurisdiction clause. It is for that reason that the Trustee intends to sue on the FFAs in England on an application under section 426 of the 1986 Act after the making of a Final Award.

31. I am also of the view that the Trustee's application under the CCAA is not unconscionable or oppressive or vexatious. Both AWB and Pioneer knew or had the means of knowing that NASL carried on business and was incorporated in Canada. Accordingly, it was entirely predictable that if NASL were to become insolvent during the currency of the 2007 FFAs, the insolvency would fall to be dealt with under the applicable Canadian legislation and it is a common feature of insolvency regimes that contractual rights can be overridden. Thus the consequences of liquidation in the UK include: (i) the claims of a creditor under a contract (to the extent that they are capable of sounding in money) are converted into a right to prove for a dividend; (ii) a liquidator may give notice under section 178 of the 1986 Act disclaiming an unprofitable contract or property thereby unilaterally terminating the contract and converting any claim by the counterparty into a claim for damages; (iii) all mutual claims, debts and other mutual dealings are by rule 4.90 of the *Insolvency Rules* 1986 made the subject of mandatory and automatic set-off, notwithstanding anything in the contract to the contrary; and (vi) a company voluntary arrangement under Part 1 of the 1986 Act or a scheme of arrangement under section 425 of the 1985 Act, if approved by creditors and either sanctioned or upheld by the court (as the case may be), can modify the contractual rights of a dissenting minority of creditors.

32. It has also to be borne in mind as Mr Dicker QC for NASL and the Trustee pointed out that not only will the English Court recognise the existence of NASL's bankruptcy and the restructuring proceedings under the CCAA since these are occurring in NASL's place of incorporation, but also it will regard itself as under a duty to give such aid and assistance to the foreign court as it is able to give. This duty is a matter of common law (see e.g. *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 at 117) and statute (see e.g. the *Cross Border Insolvency Regulations* 2006). Indeed, under section 426(4) of the 1986 Act the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom are obliged to assist the courts having the corresponding jurisdiction not only in any other part of the United Kingdom but also in any relevant country or territory, and Canada has been designated a relevant country.

33. Nor do I think that the decisions in *Gibbs* or *Mazur Media Ltd* or *Felixstowe Dock & Railway Co* stand in the way of refusing the claimants' application. As to *Gibbs*, I agree with Mr Dicker that it does not follow from the mere fact that an English court will not recognise the discharge of a contractual obligation in foreign liquidation proceedings that the court will grant an anti-suit injunction to restrain a party to the contract from bringing such foreign proceedings. There is also force in Mr Dicker's submission that, in any event, the common law rule in *Gibbs* will not apply to prevent the English court from recognising and giving effect to the Canadian plan of reconstruction and Final Order on the Trustee's proposed application under s. 426 of the 1986 Act. This is because under that provision the court can apply foreign insolvency law in an appropriate case and if it does so on the Trustee's application the effect of the foreign law on the 2007 FFAs would operate in accordance with and pursuant to English law. In other words, by virtue of the governing English law, including, as part of that law, s. 426, the foreign order will affect the 2007 FFAs.

34. As to *Mazur Media Ltd* the question was whether the action for breach of contract by Mazur Ltd against Mazur GmbH could be more suitably dealt with within German insolvency proceedings of a very different nature than the CCAA proceedings in this case. The decision is therefore of little if any assistance to the claimants. And *Felixstowe Dock & Railway Co* involved a situation far removed from that now before the court and is a decision that has been authoritatively criticised[2] and is unlikely to be followed today.

35. Accordingly, notwithstanding clause 16 and the features of the Trustee's CCAA application that cause Mr Knowles to question whether the Canadian Court would make an Initial Order and a Final Order containing the proposed paragraph 21, I am of the opinion that this court should not grant the injunction sought. Instead, the Trustee should be left free to apply to the Canadian Court in proceedings in which the claimants have a right to be heard on whether the proposed plan is fair and reasonable having regard to all relevant considerations, including clause 16 and the scheme and object of the CCAA.

The claimants' application to join the Trustee as a second defendant and NASL's application disputing jurisdiction and/or seeking a stay of the Part 8 proceedings

36. My decision to refuse the claimants' application for an interim anti-suit injunction means that there is no basis for the claim for a permanent injunction. This leaves the claim for declaratory relief and the money claim. As to the former, given the refusal to grant an anti-suit injunction, there is no point in the court hearing this claim unless and until the Canadian Court declines to make the proposed Initial Order or declines to make the proposed Final Order. The declaratory relief claim should therefore be stayed. As to the money claim, I think it plain that this should be permanently stayed, leaving AWB to prove for this admitted sum in NASL's bankruptcy.

37. The court has already exercised jurisdiction over NASL and on good grounds so far as the declaratory relief claims are concerned; and in my judgement, the Trustee is plainly a necessary and proper party in respect of these claims. Against the possibility that the Canadian Court will decline to make the proposed Initial Order or Final Order, I propose to grant the claimants' application to join the Trustee as a second defendant and to refuse NASL's jurisdictional challenge. However, as I have said, the claims for declaratory relief will be stayed until further order.

(*Order accordingly*)

NOTES

1 *Air Canada, Re* (2004) 47 CBR (4th) 177; *Algoma Steel Inc, Re* (2001) 30 CBR (4th) 1.
2 See e.g. Sir Peter Millett in Int. Insolv. Rev., Vol. 6: 99-113 (1997) at 107–108.

Exhibit 8

Case 17-2992, Document 1094-2, 05/09/2018, 2299298, Page64 of 111

COURT OF APPEAL

12–13 June; 18 July 2007

AWB (GENEVA) SA
PIONEER METALS LOGISTICS CO LTD BVI
v
NORTH AMERICA STEAMSHIPS LTD
WOLRIDGE MAHON LTD

[2007] EWCA Civ 739

Before Lord Justice CHADWICK,
Lord Justice LATHAM and
Lord Justice THOMAS

Conflict of laws — Insolvency — Defendant becoming insolvent in Canada — Defendant's trustee preparing application for declaration as to obligations of claimants under contracts with the defendant — Whether English court should grant anti-suit injunction to restrain trustee's action.

The claimants, AWB and Pioneer, were incorporated in Switzerland and the British Virgin Islands respectively. They entered into six forward freight swap agreements with NASL, a company incorporated in Vancouver, British Columbia. The swaps were made subject to the ISDA Master Agreement. Under those agreements NASL agreed to pay a settlement sum to the claimants if the actual freight rate was higher than the contract rate on a specified future date.

The swaps and the Master Agreement contained exclusive jurisdiction clauses. Clause 13(b) of the Master Agreement stated: "With respect to any suit or action relating to this Agreement ('proceedings'), each party irrevocably: (i) submits to the jurisdiction of the English courts, if this Agreement is governed by English law . . . " The swaps stated that "Pursuant to section 13(b) of the Standard Agreement, this Agreement shall be governed by and construed in accordance with English law and subject to the exclusive jurisdiction of the High Court of Justice in London, England . . . "

The agreements were not favourable to NASL, and on 29 November 2006 it filed for bankruptcy in Canada, owing some US$41 million. NASL's property vested in a Trustee. On 20 February 2007 the Trustee filed a petition under the Companies' Creditors Arrangement Act of Canada (CCAA). Subsequently the Trustee affirmed the swaps.

It was estimated that in 2007 the rates would work in favour of NASL, with the effect that the claimants would together owe some US$20 million to NASL. Accordingly, the Trustee sought an order from the Canadian courts seeking to prevent the claimants from relying on breaches of the contracts prior to NASL's insolvency plan and also seeking to prevent them from denying liability for sums becoming owing to NASL in 2007.

In the present proceedings the claimants sought an anti-suit injunction against the Trustee preventing the making of the Canadian application. They also sought a declaration to the effect that NASL had defaulted under the swap agreements. The claimants argued that there had been a default by NASL and that they were no longer obliged to make any further payments under the swaps, and that, because the Trustee did not accept that argument and contested the validity of certain clauses of the ISDA Master Agreement, the English court should make a declaration to the effect that the claimants were under no further obligation. The claimants also argued that if the Canadian court made an order, the effect would be to deprive the claimants of their contractual defence under the swaps and they would become debtors in Canada to NASL, and accordingly an anti-suit injunction should be granted. NASL and the Trustee denied that there had been any default under the swaps so that the effect of the proceedings in Canada would be to remedy the position as to the past and ensure there was no ongoing event of default, and the exclusive jurisdiction clause did not in any event extend to bankruptcy proceedings.

The trial judge, Field J, refused an anti-suit injunction and stayed the action for a declaration. He held that the insolvency proceedings relating to NASL in Vancouver were equivalent to English administration proceedings, and that there was no breach of the jurisdiction clause because it applied only where only one of the parties was seeking a determination of their rights and obligations under the contract. He also held that the application was not unconscionable, oppressive or vexatious. He further held that the English court would be under a duty, under section 426 of the Insolvency Act 1986, to recognise any order made by the Canadian courts in the insolvency proceedings. Field J finally stayed the claimants' action for a declaration as to the meaning of the swap agreements. The claimants appealed against the refusal of the anti-suit injunction and the declaration.

———*Held*, by CA (CHADWICK, LATHAM and THOMAS LJJ) that the appeal against the refusal to grant an anti-suit injunction would be refused but the appeal against the stay of the English action for a declaration would be upheld.

(1) An anti-suit injunction would be refused.

(a) The proceedings in Canada under the CCAA were outside the exclusive jurisdiction clauses. Those proceedings did not relate to a dispute under the contract but were part of insolvency proceedings and the issues that arose within them were governed by Canadian law. The Canadian court was concerned with issues of insolvency and not with issues that related to the contractual obligations under the agreement (*see* para 27).

(b) Whether any relief that might be granted had any effect on the contractual obligations under the swaps was a matter to be determined after the Canadian court had made its decision, as the question of the effectiveness of any order made by the Canadian court was governed by English law as the proper law of the swaps. It was not appropriate for the English court at this stage to express any view as to the effect of the order of the Canadian court on the

parties' contractual rights and whether its order would be recognised (*see* paras 28 and 32).

(2) The claimants' action for a declaration would not be stayed. The challenge made by the Trustee to the meaning of the swaps involved a contention that certain clauses of the ISDA Master Agreement were ineffective. The ISDA Master Agreement was widely used in all types of derivative transaction on the international markets and thus played an important role in the efficient functioning of the international financial markets and their financial stability. The Trustee's contentions could, if correct, have ramifications for the financial markets. The sooner the issues raised were determined, the better. It would also be very helpful to the judge considering the proposal of the Trustee in the Canadian CCAA proceedings to have the decision on the interpretation of the ISDA Master Agreement by the Commercial Court which had the jurisdiction to adjudicate on those issues in accordance with English law. If the Trustee was correct that the Master Agreement had the effect for which it contended, then when considering the reasonableness of the plan under the CCAA, the judge would know that the clauses were ineffective by their proper law. If, on the other hand, the Trustee was wrong then the judge would know that the clauses were effective by the proper law of the contract and would be in a better position to consider the Trustee's proposals. He would be able, in the knowledge that the clauses in issue were valid by their proper law, to have regard to the potential effect of a Canadian court approving the order proposed by the Trustee in the wider context of derivative transactions made on the terms of the ISDA Master Agreement (*see* paras 37 and 38).

The following cases were referred to in the judgment:

Adams v National Bank of Greece and Athens SA (HL) [1961] AC 255;

Capital Prime Properties plc v Worthgate Ltd [2000] 1 BCLC 647;

Charter Reinsurance Co Ltd v Fagan (HL) [1996] 2 Lloyd's Rep 113;

Gibbs v La Société Industrielle et Commerciale des Métaux (CA) (1890) LR 25 QBD 399;

Leyland DAF Ltd v Automotive Products plc (CA) [1994] 1 BCLC 245;

National Bank of Greece and Athens SA v Metliss (HL) [1958] AC 509;

Vita Food Products Inc v Unus Shipping Co Ltd (PC) (1939) 63 Ll L Rep 21;

Wight v Eckhardt Marine GmbH (HL) [2004] 1 AC 147.

This was an appeal by the claimants against the decision of Field J, [2007] EWHC 1167 (Comm), refusing an anti-suit injunction against the defendant and its Trustee preventing them from bringing proceedings in Canada, and staying the claimants' application for declaratory relief on the meaning of swap agreements.

Ali Malek QC and David Quest, instructed by Reed Smith Richards Butler LLP, for the claimants; Robin Dicker QC and Stephen Robins, instructed by Holman Fenwick & Willan, for the defendants.

The further facts are stated in the judgment of Thomas LJ.

Wednesday, 18 July 2007

JUDGMENT

Lord Justice THOMAS:

The issues and the decision of the court

1. The parties to this action are international traders who entered into Forward Freight Swap contracts (swaps) on terms governed by the International Swaps and Derivatives Association (ISDA) Master Agreement. Two issues arise: (1) whether the jurisdiction clause which provides for the exclusive jurisdiction of the English courts entitles the claimants to an anti-suit injunction preventing the trustee of bankruptcy of the first defendant from pursuing certain relief in Canadian insolvency proceedings; and (2) whether an action in the Commercial Court for a declaration as to the meaning and effectiveness of certain of the standard terms of the ISDA Master Agreement which are governed by English law should be stayed pending those insolvency proceedings. The Commercial judge, Field J, refused the anti-suit injunction and stayed the proceedings for a declaration in the Commercial Court. He refused permission to appeal. The application for permission was referred to the court with the hearing to follow immediately if permission was given.

2. At the conclusion of the hearing, in view of a pending hearing in Canada on 15 June 2007, the court gave its decision:

(i) Permission to appeal against the refusal of the anti-suit injunction was refused on the grounds that the proceedings in Canada were not within the scope of the clause.

(ii) Permission to appeal against the stay was granted and the appeal allowed on the grounds

that it was important for the Commercial Court to determine, at a hearing fixed for 24 July 2007, the dispute as to the meaning of the ISDA Master Agreement. This was governed by English law and it would also be helpful to the court in Canada hearing the bankruptcy proceedings to know the decision of the Commercial Court on the meaning of the Master Agreement. The court stated that it would give more detailed reasons in judgments that would be handed down.

3. I now give my detailed reasons.

The swaps

4. The parties to the swaps were:

(i) The first claimant (AWB), a company incorporated in Switzerland and carrying on business in Geneva. It is the subsidiary of an Australian wheat trading company.

(ii) The second claimant, (Pioneer) a company incorporated in the British Virgin Islands and carrying on business in Beijing. It is a subsidiary of Pioneer Iron and Steel Group and specialises in providing dry bulk ship chartering and operating services.

(iii) The first defendant (NASL), a company incorporated in British Columbia. It carried on business in Vancouver as a shipbroker and ship charterer.

5. During 2006 AWB, as seller, entered into six swaps with NASL, as buyer; four of these covered the period October to December 2006 and two the period January to December 2007. Pioneer entered into one swap with NASL for the period January to December 2007. Under swaps of this type, the parties agree on a route, a settlement date or dates and a contract rate for the route. They also agree upon the method of calculating a market rate, known as the "settlement rate" for the route; this is normally calculated by reference to rates on the Baltic Exchange Index. On specified monthly dates known as "the settlement date", a settlement sum is calculated as the difference between the settlement rate and the contract rate multiplied by the specified contract quantity. If the settlement rate is greater than the contract rate on that date the seller pays the buyer the settlement sum and vice versa, if the contract rate exceeds the settlement rate. The parties are, in effect, hedging future movements in the freight market against their views of the way in which the market will move.

6. Each of the swaps was made subject to the ISDA Master Agreement. Each of the swaps was also made by the express terms of each swap and the terms of the ISDA Master Agreement subject to English law and jurisdiction in the following terms:

Clause 16 of the swap:

Pursuant to section 13(b) of the Standard Agreement, this Agreement shall be governed by and construed in accordance with English law and subject to the exclusive jurisdiction of the High Court of Justice in London, England . . .

Clause 13(b) of the ISDA Master Agreement

With respect to any suit, action or Proceedings relating to this Agreement ("proceedings"), each party irrevocably:

(i) submits to the jurisdiction of the English courts, if this Agreement is governed by English law . . .

7. Only two terms of the ISDA Master Agreement are relevant to the dispute between the parties as to the meaning and effectiveness of the swaps under English law:

Clause 2(a)(iii)

Each obligation of each party under section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated, and (3) each other applicable condition precedent specified in this Agreement.

Clause 5

(a) *Events of Default.* The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:

(i) *Failure to Pay or Deliver.* Failure by the party to make, when due, any payment under this Agreement or delivery under section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party.

. . .

(vii) *Bankruptcy.* The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:

. . .

(2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

(3) makes a general assignment, arrangement or composition with or for the benefit of its creditors;

. . .

(6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets.

The movement in the market

8. NASL entered into the swaps as seller because it believed the market rate would decline over the term of the contracts; in fact, during 2006, the rates increased significantly and, as a result, NASL became obliged to make significant payments under the swaps. On 29 November 2006 NASL became insolvent. By the end of the year NASL had incurred liabilities under the swaps of approximately US$47 million against moneys due to it of approximately US$6 million.

9. As regards the swaps between NASL and AWB, under the four agreements in respect of 2006, payments from NASL to AWB amounted in total to just over US$2.5 million; notice of default was served by AWB in respect of the outstanding amounts on 20 November 2006 and 17 January 2007.

10. However, in 2007, the market moved in NASL's favour. In respect of the AWB and Pioneer swaps for January and February 2007 approximately US$2.8 million would be due to NASL and, if the market does not change, a total sum of US$12.5 million could be due to NASL by the end of 2007 from AWB (less the credit due for the 2006 swaps) and US$9.8 million from Pioneer.

11. The position taken by AWB and Pioneer is that they are not liable to make any payments under the swaps that cover 2007, as, under the terms of clause 2(a)(iii), it is a condition precedent to the performance of their obligations that no event of default has occurred and is continuing. They contend that events of default have occurred under clause 5(a)(i) and 5(a)(vii)(2), (3) and (6) as a result of NASL's failure to pay and NASL's bankruptcy. As set out at para 15(i) below, NASL and the second defendant (the Trustee) dispute this.

The events relating to NASL's bankruptcy

12. The material events of NASL's bankruptcy can be briefly summarised:

(i) On 29 November 2006 NASL filed an assignment in bankruptcy under the Bankruptcy and Insolvency Act Canada; under the provisions of that Act all of its property vested in the Trustee.

(ii) A meeting of creditors took place on 5 January 2007. The Trustee's appointment was approved and inspectors appointed to assist in the administration of NASL's estate.

(iii) On 8 January 2007 the inspectors authorised the Trustee to affirm the 2007 swaps, but the Trustee declined to do this unless it was clear that it would not incur any personal liability by doing so. An application was made to the Supreme Court of British Columbia seeking appropriate declarations. The application was heard by Tysoe J.

(iv) Tysoe J in a judgment delivered on 28 February 2007 held that it was necessary for the Trustee to affirm the swaps in order to take the benefit of them, as it would thereby assure the other party that it would not be treated as an unsecured creditor in respect of the obligations it performed after the date of the bankruptcy. He also held that the affirmation of the 2007 swaps by the Trustee would not make the Trustee personally liable in respect of NASL's obligations, so long as the Trustee affirmed on behalf of the bankrupt estate and not in its personal capacity. AWB and Pioneer opposed the Trustee's application under a reservation of jurisdiction and are now appealing against that judgment.

(v) On 5 March 2007 the Trustee elected, on behalf of the estate of NASL, to affirm the swaps and notified AWB and Pioneer of this.

(vi) On 20 February 2007 the Trustee filed a petition under the Companies' Creditors Arrangement Act of Canada (CCAA). The Trustee asserted that the petition was part of a plan by the Trustee to preserve and realise existing tax losses, convert NASL's debt into equity and enforce the 2007 swaps against Pioneer and AWB. Under the petition, the Trustee stated:

(a) NASL had estimated liabilities of US$63 million against its principal asset of about US$17 million due under swaps of which US$10.5 million related to the 2007 swaps of AWB and Pioneer.

(b) The swaps contained provisions to the effect that the counterparty to the contract might be relieved of its obligation to pay NASL as a result of the bankruptcy of NASL and other insolvency-related defaults under the swaps.

(c) The sum of US$17 million due under the swaps would be uncollectible unless the Trustee was able to file proceedings under the CCAA and in effect cure the insolvency defaults under the various swaps by way of a compromise with the creditors of NASL, so that NASL would be rendered solvent. This

could be done if the Trustee was able to obtain an order from the court prohibiting AWB and Pioneer from relying on insolvency defaults under the various swaps which constituted the receivables of NASL or an order waiving those defaults.

(d) It therefore sought an initial order; para 21 of the draft of that order was in the following terms:

> THIS COURT ORDERS that no party to any agreement with NASL respecting forward freight swap agreements ("FFA Contracts") may refuse to perform any obligations or make any payment to NASL under any such FFA Contracts as a result of (a) the insolvency of NASL (b) the assignment in bankruptcy by NASL (c) the appointment of the Trustee or Monitor in respect of NASL (d) the inability of NASL to pay its debts (e) the initiation of these proceedings or any other proceeding or matter related to or arising out of the insolvency of NASL or (f) the non-payment of amounts by NASL under such FFA Contracts (subject to any rights of set off).

The proceedings in the Commercial Court

13. AWB and Pioneer commenced these proceedings on 19 March 2007 and sought an interim anti-suit injunction on 26 March 2007. They also sought to join the Trustee as a party; the order for joinder was made by the judge. Before us, NASL and the Trustee were represented by the same legal team.

14. In their application before the judge and before this court, AWB and Pioneer contended:

(i) As there has been an event of default, they were no longer obliged to make any further payments under the swaps as, by the terms of clause 2(a)(iii), the obligation was subject to a condition precedent that no event of default had occurred and was continuing.

(ii) As the Trustee did not accept this, a declaration should be made by the court that events of default have occurred and were continuing; that AWB and Pioneer were therefore not obliged to make any payment to NASL under the swaps.

(iii) If the Canadian court made an order in the terms of para 21 of the draft initial order, the effect would be to deprive them of their contractual defence under the swaps. They would therefore become debtors in Canada to NASL for very large sums. Effect might then be given to that decision if the Trustee sought to enforce the order in England under section 426 of the Insolvency Act 1986 or in other jurisdictions.

(iv) An anti-suit injunction should therefore be granted restraining NASL and the Trustee from proceeding with their claim for relief in British Columbia sought under para 21 of the draft initial order. The injunction was limited solely to that paragraph as that paragraph was not relief that was the ordinary consequence of a company being insolvent, as it was an attempt to saddle these two companies with significant liabilities, contrary to the express terms of a standard form international agreement, for the benefit of NASL's other creditors.

15. NASL and the Trustee:

(i) Made clear in the evidence and skeleton argument served on their behalf that they do not accept the contentions put forward by AWB and Pioneer as to the meaning and effect of the terms of the ISDA Master Agreement under English law, their proper law. When asked in the course of argument what their position was, counsel made it clear that the Trustee had not finally decided whether to oppose the declaration sought by AWB and Pioneer as to the meaning and effect of the ISDA standard terms as a matter of their proper law, but the Trustee's position was that:

(a) There had not been an event of default under the swaps; the effect of the proceedings in Canada would be to remedy the position as to the past and ensure there was no ongoing event of default.

(b) The provisions of clauses 2 and 5 of the ISDA Master Agreement were ineffective in so far as they purported to relieve a party of his duty to perform the contract when the other party was insolvent; they constituted a fraud on the operation of bankruptcy provisions.

(ii) Contended that it was inappropriate to grant an anti-suit injunction on a number of grounds but in particular:

(a) The jurisdiction clause did not extend to the bankruptcy proceedings in Vancouver.

(b) It was a recognised principle of international insolvency that the appropriate forum for bankruptcy proceedings was Canada as NASL was a Canadian company. It was proper therefore to apply to a court to take the steps contemplated in Canada in connection with a scheme of arrangement and to seek the assistance of the English court to enforce it in due course.

Canadian law

16. Before the judge evidence of Canadian law was provided by the Hon James M Farley QC, the retired supervising judge of the Superior Court of

Ontario Commercial List where insolvency proceedings were heard, and Douglas I Knowles QC a practitioner in Vancouver specialising in insolvency throughout Canada.

17. The findings made by the judge in relation to the material provisions of the Canadian law of insolvency in paras 9 and 10, 12 to 15 and 19 of his judgment were not in issue before us and can be briefly summarised:

(i) There is more than one insolvency regime in Canada; the two relevant regimes were the bankruptcy proceedings under the Bankruptcy and Insolvency Act and restructuring proceedings under the CCAA; they were distinct.

(ii) The purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors and debtors as an alternative to bankruptcy and thus to enable insolvent companies to continue in business.

(iii) A plan of reconstruction under the CCAA is binding on all creditors if approved by specified majorities of creditors by value in each class and the court; the court has to be satisfied of a number of matters including that the plan is fair and reasonable. The judge drew a comparison at para 11 of his judgment with English law; AWB and Pioneer did not accept that this was correct. It is not necessary to consider for present purposes whether the judge was correct or not.

(iv) The Canadian court is empowered to stay proceedings which have been taken or might be taken in respect of the company; stays can be granted to restrain a counterparty to a contract with the company from relying on prior breaches committed by the company which would permit the counterparty to exercise a remedy against the debtor. The Canadian courts have made orders which provided that no party to a contract with the company can refuse to perform or terminate a contract by reason of a default or event of default arising out of the insolvency of the company.

(v) The initial order sought by the Trustee was the first step in the CCAA process; if the plan was approved, then the court would make a final order. It was within the jurisdiction of the Canadian court to make an order in the terms of para 21 of the initial order sought by the Trustee, but there was a disagreement between the experts as to whether such an order would be made; the evidence of the expert called by AWB and Pioneer was that the making of such an order would be unique for several reasons, including that the CCAA would be used to defeat the effect of the events of the default clause and thereby use the CCAA as a sword rather than a shield.

18. It is important to note that whilst AWB is an actual creditor of NASL in the insolvency, Pioneer is merely a contingent creditor. Unless the market moves in favour of Pioneer it will cease to be a contingent creditor.

19. There was a dispute between the parties as to whether AWB and Pioneer had submitted to the jurisdiction of the Canadian courts for the purpose of the bankruptcy and CCAA proceedings; this was not an issue for this court to determine at this stage and it is therefore unnecessary to deal with this matter.

The decision of the judge

20. The judge decided that there was no breach of the jurisdiction clause at paras 28 and 29 of his judgment:

> The exclusive jurisdiction element of clause 16 applies, in my judgment, where one of the parties is seeking a judicial determination on the rights or obligations of one or both of them existing under the contract. In my view, in applying to the Canadian court under the CCAA, the Trustee is not seeking such a determination. Rather, it is seeking relief in insolvency proceedings that is intended to prohibit various counterparties, including AWB and Pioneer, from relying on certain contractual rights which they might otherwise be entitled to rely on. In other words, the petition against NASL is not an attempt by the Trustee to assert NASL's contractual rights against AWB and Pioneer under the 2007 [swaps] but is an application to the Canadian Court to apply the free standing statutory regime of the CCAA.
>
> The position would be the same if it was NASL which was applying to the Canadian court under the CCAA. Such an application would not constitute a breach of clause 16 nor any other breach of the 2007 [swaps], for NASL did not covenant not to become insolvent or to make its own voluntary assignment in bankruptcy; nor did it promise only to be made bankrupt or go into liquidation in England, nor to take any steps in its bankruptcy that might prejudice the ability of AWB and Pioneer to enforce their rights under the 2007 [swaps].

21. The judge also held that the application by the Trustee under the CCAA was not unconscionable or oppressive or vexatious. AWB and Pioneer knew, or had the means of knowing, that NASL carried on business and were incorporated in Canada; accordingly it was predictable that if NASL were to become insolvent, the insolvency would fall to be dealt with under the applicable Canadian legislation; it was a common feature of insolvency regimes that contractual rights could be overwritten. He also considered that not only would the English court recognise the insolvency proceedings

in Canada as NASL were incorporated there, but it would consider itself under a duty both at common law and under section 426 of the Insolvency Act 1986 to give such aid and assistance to the foreign court as it could give.

Issues (1): The scope of the jurisdiction clause and the claim to an anti-suit injunction

22. I therefore turn to the first question that arose — whether the proceedings under the CCAA are within the scope of the jurisdiction clause and if so whether an anti-suit injunction should be granted.

23. In approaching the question as to whether the proceedings in Canada are within the scope of the clause, it is important to distinguish between that issue of construction and issues of the recognition and enforcement of any order that may be made in those proceedings in England and Wales. The latter, as it will be necessary to make clear, arose neither in the application before the judge nor in this appeal. It does not follow that, if the proceedings under the CCAA are not within the jurisdiction clause, this conclusion has any effect on the question of the recognition of those proceedings or the enforcement of any order made.

(a) Matters that were common ground

24. There were a number of uncontroversial submissions made by AWB and Pioneer:

(i) Each of the swaps contained an exclusive jurisdiction clause. The Trustee abandoned the reservation made in the skeleton argument.

(ii) The construction of the exclusive jurisdiction clause and clauses 2 and 5 of the ISDA Master Agreement (as incorporated into the swaps) were governed by English law as was the effect of those clauses in this jurisdiction.

(iii) The Trustee by affirming the contracts took the contracts subject to the jurisdiction clause

(b) The application of the clause to the CCAA proceedings

25. AWB and Pioneer contended that the relief sought in the CCAA proceedings by the Trustee in para 21 of the draft initial order was not directed at protecting NASL's estate or maintaining the *status quo*. Although the Trustee had made clear that the Canadian court was not being asked to rule on the existing rights and obligations of the parties under the swaps, that court was being asked to create new rights by preventing AWB and Pioneer from relying on existing rights. Any new rights could only be contractual rights. The action of the Trustee in seeking the relief under para 21 was therefore to be characterised not as action in respect of insolvency, but as a matter which affected the contract and so was within the jurisdiction clause:

(i) NASL had no ongoing business.

(ii) The purpose of the Trustee was not to restructure the company.

(iii) The Trustee was not seeking to preserve the estate from its creditors, but was seeking to make a claim against AWB and Pioneer.

(iv) It was in fact trying to impose liabilities on Pioneer which was not a creditor of the company by making it a debtor.

(v) It was not seeking to ensure that AWB had to bring into account any debts it might owe NASL, but to expose it to significant liabilities it would not otherwise have.

It was, in short, an attempt to rewrite the contractual obligations and therefore fell within the jurisdiction clause.

26. I cannot accept the submission. Clearly, if the proceedings in Canada were proceedings which related to a dispute under the contract, then that would be characterised as a contractual issue and subject to the exclusive jurisdiction clause which I accept is wide in its scope.

27. However that is not the nature of the proceedings in Canada. Those proceedings are part of insolvency proceedings and the issues that arise within them are governed by Canadian law. The issues encompassed within insolvency proceedings are wide. AWB and Pioneer accepted that those included questions of whether claims should be recognised and admitted in the insolvency, the relative priority among creditors, avoidance of pre-insolvency transfers as preferences and fraudulent transfers. In my view, the scope of the insolvency proceedings extends to the present claim for relief in Canada as it is relief sought within the proceedings. AWB is a creditor and Pioneer is, at present, a contingent creditor. They are therefore within the potential jurisdiction of the insolvency proceedings and accept that the Canadian court can, in relation to certain insolvency issues, exercise its jurisdiction. It is, in my view, a matter for the Canadian court to decide on the relief that it is prepared to grant within the scope of those proceedings as it is concerned with issues of insolvency and not with issues that relate to the contractual obligations under the agreement. The application in relation to the exercise of its insolvency jurisdiction is therefore not within the clause.

28. Whether any relief that may be granted has any effect on the contractual obligations under the swaps is a matter to be determined after the Canadian court has made its decision, as the question of the effectiveness of any order made by the Canadian court is governed by English law as the proper law of the swaps. It is to this entirely separate question that it is necessary briefly to turn.

(c) The effect on the swaps of any plan approved by the Canadian courts

29. Issues relating to the effect on the swaps and the recognition by the courts here and elsewhere of any orders made by the Canadian court in giving effect to any plan approved by the Canadian court will arise if and when the Trustee seeks to enforce the orders in this jurisdiction or seeks the assistance of the court in relation to a plan approved by the court in Canada. It is then that the issue as to the effect, if any, on the swaps will fall to be determined.

30. Many issues were canvassed in the skeleton arguments and in oral argument as to effect of any order made in the Canadian proceedings on the swaps in this and other jurisdictions. Some were uncontroversial:

(i) The validity of foreign legislative provisions which seek to modify or annul the provisions of the contract must be judged by the provisions of the proper law. As was said in *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) 63 Ll L Rep 21:

> If a court has before it a contract good by its own law or the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law.

(ii) There are numerous examples of the courts of England and Wales holding that the provisions of a foreign law were ineffective in varying a contract governed by English law: *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 (pages 526 and 529), *Adams v National Bank of Greece and Athens SA* [1961] AC 255 (pages 274, 282 and 286).

31. However there were a number of matters where there was a considerable dispute between the parties; three of the principal matters can be briefly summarised:

(i) It was contended by AWB and Pioneer that a decision under the CCAA to grant relief in the terms of para 21 of the draft initial order would not affect the rights under the swaps. The issue as to whether the obligations were modified as a result of any plan approved by the Canadian court was to be characterised as a matter of contract and so governed by English law as the proper law of the contract: *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147. Any order made in the terms sought would be ineffective under English law in modifying any rights under the swaps. The Trustee, on the other hand, contended that any plan which included an order in the terms of para 21 of the draft initial order would have the effect of overriding the rights under the swaps, as the court would be carrying out an administrative (or delegated legislative) function rather than one of an adjudicative nature and would thereby be entitled to create new rights. In giving effect under section 426 to any such order, an English court would be applying English law as giving assistance under section 426 was part of English law and therefore the order could take effect under the proper law of the contract.

(ii) AWB and Pioneer relied on *Gibbs v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399. The Court of Appeal (Lord Esher MR, Lindley and Lopes LJJ) held in that case that a French company which was party to a contract governed by English law was not discharged from liability under the contract by the operation of French insolvency law; the other party was not bound by the law of a country to which they had not agreed to be bound. This remained good law: passages in *Dicey, Morris and Collins on the Conflicts of Laws* at pages 1450, 1523 and 1592 to 1597 were relied on. It was, however, submitted by the Trustee that this decision would no longer prevent an English court from recognising and giving effect to any plan of reconstruction made by the courts in Canada under the CCAA; the effectiveness upon an insolvency of the clauses in issue in the ISDA Master Agreement were governed by insolvency law and not the proper law of the contract. The trustee relied also on the provisions of European Union law (including Council Regulation (EC) No 1346/2000) in support of its contention. The judge expressed the view at para 33 of his judgment that there was force in this submission. AWB and Pioneer contended that it was the proper law of the contract that continued to govern these issues; they referred to Fletcher, *Insolvency in Private International Law,* 2nd Edition at para 2.85 and submitted that the judge was wrong.

(iii) It was contended by AWB and Pioneer that the judge was also wrong in the conclusion which he reached that the regime under the CCAA, including the relief being sought under para 21 of the draft initial order, was comparable with similar regimes under English law; in particular, he was wrong in his conclusion in relation to the specific relief sought that it was a common feature of insolvency regimes that contractual rights could be overridden. There was reference to *Charter Reinsurance Co Ltd v Fagan* [1996] 2 Lloyd's Rep 113, *Leyland DAF Ltd v Automotive Products plc* [1994] 1 BCLC 245 and *Capital Prime Properties plc v Worthgate Ltd* [2000] 1 BCLC 647. It would therefore be inappropriate for the court in England to give assistance under section 426.

32. These issues simply do not arise on this appeal; they relate to the effect of any order of the Canadian court on the contractual rights and the recognition an English court might give to such an order. They do not arise now as the Canadian court has yet to consider the proposals put forward by the Trustee. It would therefore be inappropriate now to express a view on the various submissions made. For the same reason, I express no view on the correctness or otherwise of the views expressed by the judge on these issues; the issues did not arise for decision before him.

33. As the proceedings under the CCAA in Canada are not within the scope of the clause, the further issue as to whether the court should exercise its discretion to grant an anti-suit injunction does not arise.

34. For these reasons I therefore considered that permission to appeal on the issue relating to the jurisdiction clause should be refused.

Issue (2): The determination of the meaning of the swaps

35. At para 15(i), I set out the position of the Trustee in relation to the interpretation of the swaps. Mr Cheevers, a licensed trustee in bankruptcy who acts for the Trustee, stated in his witness statement that, as he considered that the proceedings under the CCAA would have an overriding effect it was considered the more efficient course and the one in the best interests of creditors not to seek to have the contractual issues determined at this stage, but for the matters to be resolved in the CCAA proceedings in accordance with and by the operation of various provisions of Canadian insolvency law. The view was put forward by Mr Farley QC (who provided expert evidence on behalf of the Trustee) that it would appear likely that a Canadian court would regard the provisions in clauses 2 and 5 of the ISDA Master Agreement as entitling it to invoke the principle of "fraud upon the bankruptcy law" on a public policy basis; that would be because the insolvent estate would be deprived of a valuable asset which would otherwise be available to creditors.

36. The Commercial judge was of the view that, as he had refused to grant an anti-suit injunction, there would be no point in the Commercial Court hearing the claim for a declaration as to the meaning of the swaps until after the Canadian court had declined to make the proposed initial draft order or final order. The Trustee contended that the judge was right, not only for this reason, but also because under Canadian law there was an automatic stay of all proceedings against NASL; it would in all the circumstances be the better course to stay these proceedings in England in the same way pending the resolution of the CCAA proceedings in Canada. It would not be right for the court to make any declaration or determination of the rights under the swaps until an application was made under section 426.

37. I do not agree. The challenge made by the Trustee to the meaning of these swaps involves a contention that certain clauses of the ISDA Master Agreement are ineffective. The ISDA Master Agreement is widely used in all types of derivative transaction on the international markets and thus plays an important role in the efficient functioning of the international financial markets and their financial stability. The Trustee's contentions could, if correct, therefore have ramifications for the financial markets. The sooner the issues raised are determined, the better.

38. In my view, it would also be very helpful to the judge considering the proposal of the Trustee in the Canadian CCAA proceedings to have the decision on the interpretation of the ISDA Master Agreement by the Commercial Court which has the jurisdiction to adjudicate on these issues in accordance with English law. If the Trustee is correct that the Master Agreement has the effect for which it contends, then when considering the reasonableness of the plan under the CCAA, the judge will know that the clauses are ineffective by their proper law. If, on the other hand, the Trustee is wrong then the judge will know that the clauses are effective by the proper law of the contract and be in a better position to consider the proposal in para 21 of the initial draft order as part of his assessment of the reasonableness of the plan. He will be able, in the knowledge that the clauses in issue are valid by their proper law, to have regard to the potential effect of a Canadian court approving para 21 of the draft initial order proposed by the Trustee in the wider context of derivative transactions made on the terms of the ISDA Master Agreement.

39. It is for these reasons I considered that permission should be granted and the appeal allowed on this issue.

The cross appeal

40. NASL and the Trustee sought permission to cross-appeal on the basis that, as the judge had found that the claims for declarations were unnecessary and premature, he should have declined to exercise jurisdiction under CPR Rule 11(1) in respect of NASL and should have found that the Trustee was not a necessary and proper party. It follows from the view I have expressed that the Commercial Court should hear the claim for the declaration that the application for permission to

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cross-appeal made by NASL and the Trustee should be refused.

Lord Justice LATHAM:

41. I agree.

Lord Justice CHADWICK:

42. I also agree.

Exhibit 9

Banco Nacional de Cuba v Cosmos Trading Corp

COURT OF APPEAL, CIVIL DIVISION
SIR RICHARD SCOTT V-C, SWINTON THOMAS AND ROBERT WALKER LJJ
8, 9 NOVEMBER 1999

Winding up – Foreign company – Jurisdiction – Company removing assets from jurisdiction before petition presented – Assets transferred at undervalue to central bank of foreign state as part of reorganisation of state banking arrangements – Company having no assets or trading connection within jurisdiction when petition presented but continuing to trade in place of incorporation and worldwide – Debt on which petition based having no connection with England – Whether petition should be struck out – Factors to be considered by court in exercising its discretion.

The respondent bank (BNC) was incorporated in Cuba in 1948 as the central bank of the Republic of Cuba and in 1960 became the only bank operating in Cuba combining the roles of state central bank and commercial bank for the republic. In 1997 as part of the restructuring of the Cuban economy the Cuban government created a new central bank (BCC) to take over the central bank function previously discharged by BNC. Thereafter BNC continued to carry on commercial banking activities in Cuba on behalf of the state. Among its assets BNC owned most of the shares in an English commercial bank (HIB) which it agreed to transfer to BCC at par value for £12,995,500 as part of the reorganisation of the Cuban government banking arrangements. Although under the agreement payment was expressed in sterling, the price was paid in Cuban pesos at the official Cuban exchange rate which valued the Cuban peso at $1. The commercial exchange rate was 30 pesos to the dollar and as a result the price actually paid in sterling terms was only £433,317. The petitioner, a Panamanian company with an office in Madrid which was owed a substantial sum by BNC, presented a petition for an order to wind up BNC, having obtained leave to serve the petition outside the jurisdiction. However, by the time the petition was presented the HIB shares which, while they were held by BNC represented the only asset within the jurisdiction, were no longer vested in BNC. BNC had never carried on business and had no office within the jurisdiction. The judge set aside the leave and struck out the petition. The petitioner appealed contending that the substantial purpose of the transfer of the HIB shares was to defeat creditors and that, if a winding-up order were to be made, the liquidator could prosecute the claims under s 238 or s 423 of the Insolvency Act 1986.

Held – The making of a winding-up order against a foreign company with no assets within the jurisdiction and no trading connection which was continuing to trade in its country of incorporation and elsewhere worldwide was thoroughly undesirable. The court should only make such an order in exceptional circumstances and where there was exceptional justification for

doing so. In the present case any claims under s 238 or s 423 of the 1986 Act made by the liquidator would be against BCC which was protected against various types of action against it by the State Immunity Act 1978. Furthermore, if the court ordered BCC to pay monetary compensation to BNC such an order would be unenforceable since a winding-up order against the central bank of a foreign state would be barred by s 14(2) of the 1978 Act. In any event, if it were not barred, the court would not as a matter of discretion make such an order because it would interfere with the functions of the central bank in the exercise of sovereign authority and would be impossible to enforce outside the jurisdiction. It followed that the only benefit for BNC creditors that could be derived from a winding up of BNC was the public relations benefit of obtaining an order for payment by BCC of a sum of money. Such benefit was too light in the balance to outweigh the substantial reasons for not making a winding-up order in the circumstances of the present case. Accordingly the appeal would be dismissed.

Cases referred to in judgments

Eloc Electro-Optieck and Communicatie BV, Re [1981] 2 All ER 1111, [1982] Ch 43, [1981] 3 WLR 176.

International Westminster Bank plc v Okeanos Maritime Corp [1987] BCLC 450, [1987] 3 All ER 137, sub nom *Re a company* (*No 00359 of 1987*) [1988] Ch 210, [1987] 3 WLR 339.

Latreefers Inc, Re, Stocznia Gdanska SA v Latreefers Inc [1999] 1 BCLC 271.

Real Estate Development Co, Re [1991] BCLC 210.

Interlocutory appeal

Cosmos Trading Corp (Cosmos) appealed from the judgment of Neuberger J given on 17 July 1998 whereby he (i) set aside the leave obtained by Cosmos from the registrar to serve outside the jurisdiction a winding up petition presented by Cosmos against Banco Nacional de Cuba (BNC), a company incorporated in Cuba, (ii) restrained Cosmos from advertising the petition, and (iii) struck out the petition as an abuse of process. The facts are set out in the judgment.

Leslie Kosmin QC and *Philip Gillyon* (instructed by *Holman Fenwick & Willan*) for Cosmos.

Richard Sheldon and *William Trower* (instructed by *Clifford Chance*) for BNC.

SIR RICHARD SCOTT V-C. This is an appeal against the judgment of Neuberger J given on 17 July 1998. The appellant is Cosmos Trading Corp (Cosmos). The respondent is the Banco Nacional de Cuba (BNC).

On 7 April 1998 Cosmos presented a winding-up petition against BNC. BNC is incorporated and has its main offices in Cuba. As leave to serve the petition out of the jurisdiction was necessary, leave was obtained from the registrar.

Neuberger J's order of 17 July 1998 did three things: it set aside the leave to serve outside the jurisdiction; it restrained Cosmos from advertising the petition; and it struck out the petition as an abuse of process.

There were two main grounds for the strike out. First, the judge concluded that BNC had insufficient connection with this jurisdiction to justify a winding up in this country. Second, the judge concluded that a winding up in this jurisdiction would not produce any sufficient benefit to the petitioner and other creditors of BNC. He concluded that the petition, if it were to be proceeded with, would be bound to fail and he, therefore, struck it out.

Cosmos has appealed. The relevant facts and the background to the petition are fully set out in the judgment of the learned judge. It is not necessary for me to repeat them in any great detail and I will do so only to the extent that is necessary in order to explain the issues and my conclusions on those issues.

BNC was incorporated in 1948 as the Central Bank of the Republic of Cuba. Under a 1960 Cuban government decree BNC became the only bank operating in Cuba. It combined the roles both of state central bank and commercial bank for the republic.

Among its assets BNC owned the shares in an English company, Havana International Bank Ltd (HIB). HIB is a commercial bank carrying on banking activities in London. The share capital of HIB consisted of 130,000 shares of £100 each. 129,995 of the shares were held by BNC.

In May 1997, as part of the restructuring of the Cuban economy following the collapse of the Soviet Union, the Cuban government created a new central bank, Banco Central de Cuba (BCC). BCC was intended to take over the central bank function previously discharged by BNC. Some of the evidence in the case indicates that at the time of this reconstruction Cuba was burdened by very heavy international debts and that a substantial proportion of these international debts were debts of BNC.

Since the restructuring in 1997, BNC has continued to carry on commercial banking activities in Cuba relating to trading activities of the Cuban state. It appears that back in 1977 or thereabouts BNC had an office in London, but since that time, and thereapart, it has never carried on business or had any offices in this country.

As part of the reorganisation of its central bank the Cuban government took steps to arrange for the transfer from BNC to BCC of the 129,995 shares in HIB. On 16 June 1997 an agreement was signed whereby BNC agreed to sell the HIB shares to BCC for £12,999,500. This was the par value of the shares. So far as it is known no valuation of the HIB shares preceded this arrangement. It was not, it appears, a commercial transaction; it was part of the reorganisation of the banking arrangements of the Cuban state.

The agreement of 16 June 1997 was in Spanish. The inferences I have drawn are that it was drawn up by Cuban lawyers in Cuba.

The HIB shares were not actually transferred into the name of BCC for a while; nor was any actual consideration paid until 25 February 1998 when the shares were transferred and a sum was paid. The price of £12,995,500, which had been expressed in the agreement in sterling, was not paid in sterling but was paid in Cuban pesos. For this purpose the official Cuban exchange rate was applied to the sterling price. The official Cuban exchange rate treats one Cuban peso as having parity with $US 1. So the price actually paid was 21,722,164.50 pesos. The commercial rate of exchange is, according to the evidence, approximately 30 Cuban pesos to the US dollar so at commercial exchange rates the price for the HIB shares actually paid by

BCC was, in sterling terms, equivalent not to £12,995,000, but to only £433,317. However, as I have already said, the arrangement for the agreement between BCC and BNC was not a commercial agreement; it was an arrangement forming part of the restructuring of the Cuban banking system.

On 25 February 1998 BCC became registered in the books of HIB as the owner of the 129,995 shares.

The agreement of 16 June 1997 was expressed to be subject to the Bank of England consenting to the transfer. That consent was given on 16 February 1998. The transfer of the shares followed very soon thereafter.

Cosmos is a Panamanian company. It has an office in Madrid. It entered into commercial financial agreements with BNC in order to provide for the shipment to Cuba of goods from European ports in Spain and Italy. The shipping agreements were in Spanish. Payment under the shipping agreements was to be made by unconfirmed letters of credit issued by BNC in Havana payable in Deutschmarks.

On 19 December 1997 Cosmos served a statutory demand on BNC for payment of DM 2,136,194.98 plus interest. Leave to serve the statutory demand on BNC out of the jurisdiction had been given on the previous day.

It is not in dispute that a substantial sum is owing by BNC to Cosmos. Whether the amount I have mentioned is agreed as being the exact amount of the debt I do not know, but there is no dispute that there is a substantial debt that is owing.

The service of the statutory demand appears to have been followed by negotiations between the parties, but the negotiations did not lead to any agreement. On 7 April 1998 Cosmos presented a petition in this jurisdiction for an order for BNC to be wound up.

The HIB shares had, while they were held by BNC up to 25 February 1998, represented assets of BNC in this jurisdiction. There had been at one time a debt owing by HIB to its holding company, BNC. It appears from HIB's accounts as at 31 December 1996 and 1997 that the debt was somewhat under £48,000.

By the date on which the petition was presented, the HIB shares were no longer vested in BNC. Prior to that date, according to affidavit evidence sworn by Mr Patton on behalf of BNC, the debt owing by HIB to BNC no longer existed. BNC had, and has, no other assets in this jurisdiction. That is the background to the winding-up petition.

On the application of BNC Neuberger J held the hearing in private. It was represented that if the advertisement for the petition was to be restrained, public knowledge of the petition derived from the court hearing should be avoided. The application for a hearing in private was made again to us when the appeal commenced yesterday. We acceded to the application for the same reasons as Neuberger J had done. However, considering the matter overnight it seemed to us that the way in which the argument had gone indicated that there was no sufficient reason to continue the hearing in private. Accordingly, today we have sat in public and this judgment is being delivered in public.

The courts of this country have jurisdiction (using the word 'jurisdiction' in the broad sense) to make winding-up orders against foreign companies. Foreign companies are for company law purposes treated as unregistered

companies. Section 221(1) of the Insolvency Act 1986 provides that 'any unregistered company may be wound up under this Act.' I emphasise the word 'may'. Whether the power should be exercised in respect of a foreign company is a matter of discretion depending on the facts of the case. In a number of cases judicial guidance has been given as to when the discretion should and when it should not be exercised in relation to foreign companies. It is clear and common ground that the court should not exercise its jurisdiction in respect of a foreign company where there is no connection whatever between the foreign company and this jurisdiction, other than the decision of the petitioning creditor (which would be present in every case) to present a winding-up petition here.

Recent judicial statements as to the correct approach to petitions to wind up foreign companies are to be found in the judgment of Knox J in *Re Real Estate Development Co* [1991] BCLC 210, and in the judgment of Lloyd J in *Re Latreefers Inc, Stocznia Gdanska SA v Latreefers Inc* [1999] 1 BCLC 271. *Re Real Estate Development Co* was a case in which a petition was presented to wind up a Kuwaiti company. The petition was based on the judgment of a French court, which had been registered in the High Court here. The Kuwaiti company had transferred shares registered in its name in an English company (it was a 'holding' company holding foreign assets but it was an English company) to another Kuwaiti company for a nil consideration. The Kuwaiti company had no assets in England. But it was said that the share transfer had been made with intent to defraud creditors and could be set aside if the Kuwaiti company were to be the subject of a winding-up order in this jurisdiction. Although the company had no present assets in England it would, so it was argued, obtain assets in England through the successful prosecution of the claim to set aside the share transfer for nil consideration. Knox J dismissed the petition. As to the principles to be applied, he said ([1991] BCLC 210 at 217):

> '. . . there are three core requirements as Mr Pelling [for the petitioner] described them: (1) that there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction; (2) that there must be a reasonable possibility if a winding-up order is made, of benefit to those applying for the winding-up order; (3) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction. The proposition that there has to be a sufficient connection with this jurisdiction prompts the question, sufficient for what? The perhaps rather circular answer I would give to that question is, sufficient to justify the court setting in motion its winding-up procedures over a body which prima facie is beyond the limits of territoriality. That has two significant consequences in the context of the present case. First, it seems to me to be necessary, where there is no asset within the jurisdiction at the presentation of a petition, to establish a link of genuine substance between the company and this country. In the absence of assets, that will normally have to consist of activities carried on by the company within the jurisdiction although in

common with Nourse J in the *Eloc* case (*Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111, [1982] Ch 43) I do not find it necessary to hold that is an essential.' a

A little later in his judgment he said (at 217):

'Throughout the investigation into whether the court has jurisdiction, the aim is to discover a sufficient connection with this jurisdiction and b that is as true in relation to the potential beneficiaries as it is in relation to the company which it is sought to wind up.'

In *Re Latreefers Inc*, *Stocznia Gdanska SA v Latreefers Inc* [1999] 1 BCLC 271 at 277 Lloyd J cited and applied the three core requirements set out by c Knox J in his judgment. The facts of Knox J's case, *Re Real Estate Development Co* [1991] BCLC 210, have something in common with the facts of the present case. Knox J said (at 222):

'In my judgment, overall, this petition fails on the ground that a d sufficient connection with this jurisdiction has not been shown. The only links that are relied on are, first, the judgment on a French loan transaction made between a French banker and a Kuwaiti borrower obtained in Paris and registered here under the Foreign Judgments (Reciprocal Enforcement) Act 1933. Secondly, an asset locally situated in England in the shape of 98 shares of Shillington, with non-UK directors, e a non-UK business, and non-UK assets and, thirdly, the possibility of an action in the English court under s 172 of the Law of Property Act 1925 to set aside that share transfer. As regards the latter, it seems to me to suffer from the difficulty that the respective claims in the case before Peter Gibson J, *International Westminster Bank plc v Okeanos Maritime Corp* [1987] BCLC 450, [1987] 3 All ER 137 (sub nom *Re a company (No 00359 of 1987)* [1988] Ch 210) suffered, that is to say, just as f proceedings under ss 213 and 214 of the Insolvency Act 1986 are not to be treated as an asset at the time of the presentation of the winding-up petition, so also a prospective action by the liquidator under s 172 of the Law of Property Act 1925 falls not to be treated as an asset locally situated at the date of the winding-up petition. And every other factor g that I can discern is foreign. The company is Kuwaiti, the petition is French. The company has never traded in this country, nor has it been shown to my satisfaction that there is a sufficient nexus between this country and those who might benefit from the making of a winding-up order.' h

The argument that the s 172 claim referred to by Knox J would, after the winding-up order had been made, produce assets for the company is mirrored by the argument by Cosmos in the present case. Mr Kosmin, counsel for Cosmos, directs attention to the transfer of the HIB shares from i BNC to BCC. He submits that the circumstances surrounding the transfer justify the conclusion that it was a transfer at a very substantial undervalue. The sterling value of the price actually paid was significantly less than the

true value of the company. He suggests also that an inference can be drawn that the timing of the completion of the transfer was an attempt to defeat and frustrate the presentation of a winding-up petition.

Neuberger J was of the view that claims brought by a liquidator of BNC under s 238 or s 423 of the Insolvency Act 1986 would have reasonable prospects of success. Mr Sheldon for BNC has submitted that, whatever might be the position in regard to a claim based on undervalue, a s 238 claim, there is insufficient in this case to justify the proposition that an arguable case under s 423 has been shown. Mr Sheldon has concentrated on the s 423 requirement that at least a substantial purpose of the transaction must be a purpose to defeat creditors. He points to a volume of evidence about the bank restructuring motive that led to the transfer of the HIB shares from BNC to BCC, and suggests that there is no evidence from which an arguable case of a purpose to defeat BNC's creditors can be constructed.

He may be right about that. I do not think it necessary for me to express any conclusion one way or the other on that point. I am, however, satisfied that there is a clear case of transfer at an undervalue. I do not see at the moment what answer there could be, if a winding-up order were made, to a claim based on s 238 of the 1986 Act. That, too (though perhaps expressed in rather less firm terms), was the view to which Neuberger J came. But the recognition that that may be so does not, in my judgment, go very far in justifying the taking by the courts of this country of jurisdiction to wind up a foreign company. The connection between BNC and this country is minimal. The only connection is that BNC was formerly the owner of assets in this country, the HIB shares, and was formerly owed some money by HIB.

It is not in dispute that at the time the petition was issued BNC owned no assets at all in this country. The debt on which the petition was based has no connection at all with this country. BNC has not, at least since 1978, traded in this country or had any offices in this country. BNC has done nothing to suggest that it has accepted in any respect the benefits or burdens of the laws of this country. Further, it is important to note that BNC is still a trading company. It has representative offices in Zurich, Madrid, Mexico City and Luanda, as well as in its country of incorporation.

In my opinion, the courts of this country should hesitate very long before subjecting foreign companies with no assets here to the winding-up procedures of this country. Of course if a foreign company does have assets in this country, the assets may need to be distributed among creditors, and a winding-up order here, sometimes ancillary to a principal winding up in the place of incorporation of the foreign company, may be necessary. But a winding-up order here, while the foreign company continues to trade in its country of incorporation and elsewhere in the world, is in my view thoroughly undesirable. I would not say a winding-up order in those circumstances could never be right, but I do say that exceptional circumstances and exceptional justification would be necessary. After all, if we presume to make a winding-up order in respect of a foreign company which is continuing to trade in its place of incorporation and elsewhere in the world, where will our winding-up order be recognised? What effect will it have? These questions are difficult to answer and, absent some international convention regarding the winding up of foreign companies, I think no satisfactory answer can be given.

It is, moreover, somewhat of a weakness in our own winding-up law that it is not possible to have a winding up of a foreign company limited to its activities and assets in this jurisdiction. It has been held on a number of occasions, and is clear law, that once a winding-up order is made in this jurisdiction it purports to have worldwide effect. Hence the problems that arise if the order is made in respect of a foreign company that is continuing to trade. In any event, BNC has no assets in this jurisdiction and even a winding-up order limited to this jurisdiction would not help Cosmos.

Mr Kosmin has pressed the point that BNC should not be permitted success in preventing the making of a winding-up order by the device of removal of its assets from this country before the petition can be presented. He argues that if a winding-up order were to be made, the liquidator could prosecute the claims under s 238, or perhaps also s 423, of the 1986 Act.

But what then would be the result? The claims would be claims against BCC. BCC is the central bank of Cuba. It is protected from various types of action against it by provisions of the State Immunity Act 1978. The combination of ss 13(2) and 14(4) of the 1978 Act produce the result (and this is accepted by Mr Kosmin) that the court on an application under s 238 or s 423 could not order BCC to re-transfer the HIB shares. It is said that the court could order BCC to pay monetary compensation to BNC. Mr Kosmin argues that such an order in favour of BNC in liquidation and against BCC would represent a significant benefit to the creditors of BNC, including Cosmos. I am dubious that that would be so. I can see no realistic ground at all for supposing that the Cuban government or BCC would recognise the authority of the English court-appointed liquidator of BNC to prosecute the claim and to require payment from BCC. And why should they do so? BNC would be continuing to carry on business under its Cuban management as a separate entity under Cuban law. BNC in its Cuban guise would not be a party to the litigation in England which led to the order. So why should the Cuban government or BCC recognise the authority of the English-appointed liquidator or the need to obey the English court order?

It was suggested in argument before Neuberger J (and to some extent though somewhat faintly before us) that if BCC did not pay up in response to an order for payment made by an English court, a winding-up order could be obtained in England against BCC. This proposition is in my view, with due respect to Mr Kosmin, a ludicrous one. BCC is the central bank of Cuba. Mr Kosmin argued that a winding-up order against a central bank was not barred by s 13(2) of the 1978 Act. That may or may not be right. A winding up is not a process for the enforcement of a judgment: see s 13(2)(b) (at any rate in the ordinary sense of the meaning of that expression). But a winding-up order against the central bank of a foreign state would in my judgment be barred by s 14(2). In any event, even if the language of s 14(2) were thought not quite to cover a petition for a winding-up order against a central bank, I regard it as inconceivable that a court would, as a matter of discretion be willing to make such an order. The order would interfere with the functions of the central bank in the exercise of sovereign authority in a variety of different ways. Moreover, the winding-up order would be impossible to enforce anywhere outside this jurisdiction.

It follows, in my view, that the only benefit for BNC creditors that could be derived from a winding up of BNC would be the public relations benefit of obtaining an order for payment by BCC of a sum of money. I can see no practicable means by which such an order could be enforced against BCC. The public relations benefit of that order is, in my judgment, much too light in the balance to outweigh the substantial reasons why the courts of this country should not make winding-up orders against foreign companies with no assets here and with no trading connection with this country and even more so foreign companies which are continuing to trade.

In my judgment, for the reasons I have given, the winding-up petition is bound to fail. In my view Neuberger J came to the right conclusion and I would dismiss this appeal.

SWINTON THOMAS LJ. I agree.

ROBERT WALKER LJ. I also agree.

Appeal dismissed. Leave to appeal refused.

Mary Rose Plummer Barrister.

Exhibit 10

Banque Indosuez SA v Ferromet Resources Inc

CHANCERY DIVISION
HOFFMANN J
30 APRIL 1992

Insolvency proceedings – Foreign insolvency proceedings – Interlocutory injunction – Whether interlocutory injunctions restraining the defendants from dealing with certain property should be discharged – Whether proprietary claim could be asserted over account where the balance was negative – Claim that assets subject to the injunctions belonged beneficially to Texan company against which a bankruptcy petition had been filed in Texas – Whether injunctions should be discharged on the ground that the US Bankruptcy Code provided for a stay on any act to obtain possession of the Texan company's property.

Pursuant to a facility letter Banque Indosuez SA (the bank) made advances to Inc, a Texan company, to fund purchases of metal for onward sale. At the same time as Inc purchased metal it entered into hedging transactions and paid any profits from those transactions into its account with the bank. By a general security agreement, Inc granted the bank a continuing security interest in various assets including 'all rights to receive the payment of money' and 'all of its inventory in all of its forms'. In 1990 Inc caused UK plc to be incorporated and thereafter UK plc entered into some of the hedging transactions instead of Inc. The bank claimed that the profits from these transactions continued to be treated as part of its security. Nevertheless, the bank was concerned as to the adequacy of its security and on 30 October 1991, following negotiations, the bank, UK plc and CD, a metal broker, entered into a tripartite agreement whereby UK plc agreed to open a separate account for all hedging transactions entered into for the purpose of hedging purchases financed by the bank and granted the bank security over the account. The bank claimed that the tripartite agreement created a charge in its favour in respect of the proceeds of UK plc's account with CD, to secure the indebtedness of Inc. Alternatively, the bank claimed that by virtue of its charge under the general security agreement it was entitled to the proceeds of the hedging contracts entered into by UK plc with CD and with Brandeis, another metal broker, since those proceeds belonged beneficially to Inc. In addition, the bank claimed to be entitled to metal in the possession of Alloys, another subsidiary of Inc, which metal had been pledged by Inc to the bank pursuant to a general pledge agreement. The bank obtained ex parte injunctions against UK plc restraining it from dealing with any assets arising out of its trading with CD or with Brandeis and against Alloys restraining it from dealing with the metal in its possession. On 17 March 1992 the bank (amongst others) filed in Texas for the involuntary bankruptcy of Inc under ch 11 of the United States Bankruptcy Code. UK plc sought the discharge of the interlocutory injunctions on the grounds that (1) the tripartite agreement did not constitute a separate pledge by UK plc of its own assets to secure the debts of Inc, and (2) in so far as the bank was attempting to enforce the general security agreement, against assets of Inc it was acting in breach of the stay under s 362 of the United

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States Bankruptcy Code on any act to obtain possession of Inc's property. Alloys made the same point in relation to the enforcement of the general pledge agreement against the Inc metal in its possession.

Held – (1) Even if the bank's argument that UK plc acted in breach of trust by failing in accordance with the tripartite agreement to put the profits from an aluminium hedging transaction in a separate account so that they were held on trust by way of charge for the bank, the bank could not assert a proprietary claim over UK plc's account with CD to give effect to the interest it should have had under the charge, as the balance in UK plc's account with CD was negative and there was therefore no chose in action against which such a claim could be made. The bank's only remedy would be a personal claim for damages against UK plc for breach of trust in disposing of assets which should have been kept in the separate account but that claim did not entitle the bank to an injunction restraining UK plc from dealing with its assets. Such an injunction would only be granted if there was evidence showing that UK plc intended to dissipate its assets in order to prevent the bank from enforcing its claim. There was no such evidence.

(2) The claims that the assets subject to the injunctions belonged beneficially to Inc and fell under the general security agreement and/or the general pledge agreement were claims against the property of Inc and subject to the stay under § 362 of the US Bankruptcy Code. The court would do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas. In exercising the discretion to grant or refuse injunctive relief the court would take into account the fact that the proceedings had not been authorised by the US Bankruptcy Court. In those circumstances, the injunctions would only be maintained if the court were satisfied that any assets recovered in these proceedings would be made subject to the ch 11 administration and the injunctions were necessary to prevent some dissipation which would be to the prejudice of the bank's rights under United States bankruptcy law. Only if these conditions were satisfied would the court then examine the balance of convenience in accordance with *American Cyanamid Co v Ethicon Ltd*. On the facts, the bank could be adequately and sufficiently protected by applications in the ch 11 proceedings and accordingly the injunctions would be discharged.

Case referred to in judgment

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL.

Motions

By two motions heard together, the defendants, Ferromet Resources Inc and Ferromet Resources (UK) plc in the first action, and Ferromet Alloys Ltd in the second action, applied to discharge interlocutory injunctions which the plaintiff in both actions, Banque Indosuez SA, had obtained against them. The facts are stated in the judgment.

Michael McParland (instructed by *Binks Stern*) for the defendants.
Sebastian Neville-Clarke (instructed by *Speechly Bircham*) for the plaintiffs.

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HOFFMANN J. These are motions to discharge interlocutory injunctions which the plaintiff, a French bank trading in London, obtained against defendants in two actions. The first defendant in the first action (Inc) is a Texas company which trades in scrap and other metals. It owes the bank in excess of $US7m under a credit facility. This indebtedness was secured by a charge under Texas law over various of Inc's moveable and intangible assets. The bank claims that by virtue of this charge it is entitled to the proceeds of certain metal dealing transactions in the name of the second defendant in the first action (UK plc) which it says belong beneficially to Inc. It claims on the same basis to be entitled to some actual metal held by the defendant in the second action (Alloys) which belongs beneficially to Inc and is also the subject of an independent pledge agreement. In addition, the bank claims to be entitled to the proceeds of UK plc's metal dealing account with Charles Davis (Metal Dealers) Ltd (Charles Davis) by virtue of a separate tripartite agreement dated 30 October 1991 which it says created a charge in its favour to secure the indebtedness of Inc. The injunctions, which were obtained ex parte, prevent the defendants from dealing with the subject matter of the bank's claims.

The credit facility was granted by a facility letter dated 1 November 1988 and expressed to be governed by English law. It provided for the giving of security in the form of a general security agreement expressed to be governed by Texas law and executed on 2 November 1988. It granted the bank a 'continuing security interest' in various assets which included 'all rights to receive the payment of money' and all rights of Inc in 'all of its inventory in all of its forms'. The bank's evidence is that pursuant to this facility it made advances to Inc for the purpose of enabling it to make purchases of physical metal for onward sale. At the same time, Inc would enter into hedging transactions with brokers on the London Metal Exchange and, if any profits were made on these transactions, Inc would direct them to be paid into its account with the bank.

At the beginning of 1990, Inc caused UK plc to be incorporated. Thereafter it was UK plc which entered into some at least of the hedging transactions on the LME. But the bank says that the potential profits (if any) on these hedging transactions continued to be treated as part of its security and UK plc regularly supplied it with statements which reflected the separate and combined positions of both companies: Inc in respect of its physical transactions, and UK plc on the LME, so that the bank could calculate its overall exposure. In other words, the transactions of both companies were treated as a single business.

The bank says that in February 1991 it became concerned about the adequacy of its security and after discussions with Inc and UK plc, negotiated an arrangement under which the profits on any hedging of purchases financed by the bank would be paid into a separate account maintained by UK plc with Charles Davis. The bank was to have a charge over any sums to the credit of UK plc in this account as security for its advances to Inc. The negotiations took a long time and culminated in the tripartite agreement to which I have already referred. It was made between the bank, UK plc and Charles Davis and executed on 30 October 1991. It recites that 'the company', which is defined to mean UK plc, 'is or may from time to time in the future become indebted to the bank in respect of purchases of metals financed by the bank.' It goes on to recite that 'the company' intended to hedge 'its' exposure on unsold metal positions on the LME by buying options or futures and had agreed to grant the bank a security interest over such hedging transactions. The agreement itself then provides that

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UK plc will open a separate account for all hedging transactions entered into 'for the purpose of hedging metal purchases made by the company and financed by the bank'. The bank is granted security over the separate account to secure repayment of all moneys due or to become due to the bank arising out of facilities provided for the purchase of metals 'by the company', ie by UK plc.

In October 1991 the bank agreed to provide Inc with a letter of credit facility to buy some aluminium in Venezuela. In anticipation of this transaction proceeding, UK plc entered into hedging transactions with Charles Davis. In fact the purchase went off and Inc never drew upon the letter of credit. But the hedging transactions generated a profit. There followed a dispute between the bank and UK plc over whether this profit should have gone into a separate account subject to the bank's charge. According to the bank, UK plc claimed that as the letter of credit had never been used, the transaction had not been financed by the bank and therefore nothing needed to be put in the separate account. Meanwhile Inc plunged deeper into financial difficulties and in the middle of March the bank and four other banks which had granted facilities to Inc were considering whether to file for the involuntary bankruptcy of Inc under ch 11 of the US Bankruptcy Code.

It was in these circumstances that the bank made its first ex parte application to Ferris J on 17 March 1992. There was no affidavit in support but what counsel told the judge was later verified by an affidavit by Mr Nancarrow, the bank's account officer responsible for the facility. He said that the bank regarded itself as entitled under the tripartite agreement to the profit on the aluminium hedging transactions. He had been told by a former employee of UK plc that the profit had been $1.8m and that $580,000 of this money had been due to be paid on 19 February 1992. He also said that Mr Whyte, the president of Inc and chairman of UK plc, had revealed that the issued share capital of UK plc had recently been sold by Inc to another company called Ferromet Group plc. He regarded this as an attempt to defeat the bank's security rights. Ferris J made an order restraining UK plc from dealing with any assets arising out of its trading with Charles Davis and requiring it to state on affidavit what had happened to the $580,000 or its proceeds.

Later on the same day, 17 March, the five banks (including the plaintiff) filed in the US Bankruptcy Court for the Southern District of Texas for the involuntary bankruptcy of Inc under ch 11. The effect under § 362 of the US Bankruptcy Code was to impose an automatic stay on any proceedings against Inc or any act to obtain possession of or exercise control over its property. In accordance with principles which would be equally applicable in this country, the stay would be regarded by a United States court as operating world-wide.

On 24 March 1992 the bank made a second ex parte application in the first action, this time to Mervyn Davies J. It had discovered that in November 1991 UK plc had entered into hedging contracts with another LME broker called Brandeis (Brokers) Ltd (Brandeis). It claimed that the proceeds of these contracts might belong beneficially to Inc and that unless restrained, UK plc might dissipate them before this question could be determined. Mervyn Davies J, granted an order restraining UK plc from dealing with any assets arising out of its trading with Brandeis.

The second action concerns metal held by Alloys, another English subsidiary of Inc. The metal is subject to a general pledge agreement dated 12 June 1991 made between Inc and the bank. On 17 June 1991 Alloys wrote to the bank

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acknowledging that it held the metal to the order of the bank and acknowledged that it had been pledged by Inc. There is no dispute that Inc is the beneficial owner. On 25 March 1992 the bank asked for possession of the metal and was refused. The action claims delivery and the injunction granted ex parte by Ferris J restrains Alloys from dealing with the metal pending determination of the bank's claim.

UK plc applies to discharge the injunctions on two grounds. First, it says that the bank has no arguable claim to any of the assets in its name except so far as they can be identified as beneficially owned by Inc and subject to the general security agreement. In particular, it says that the tripartite agreement does not constitute a separate pledge by UK plc of its own assets to secure any debts of Inc. Secondly, it says that so far as the bank is attempting to enforce the general security agreement against assets of Inc, it is acting in breach of the stay under § 362 of the US Bankruptcy Code. As a matter of comity, this should not be allowed. Alloys makes the same point in relation to the enforcement of the general pledge agreement against the Inc metal in its possession.

I have already rehearsed what the bank says was the purpose of the tripartite agreement and what its terms actually were. If the bank is right about the purpose, the agreement singularly fails to reflect it. It says not a word about the separate account with Charles Davis being security for the indebtedness of Inc. It does not mention Inc at all. On its face, the separate account is there to secure the indebtedness of UK plc in respect of advances made by the bank to UK plc to finance the purchase of metal. But the bank says that if one looks at the negotiations and the surrounding circumstances, it is clear that the agreement has been mistakenly drafted. It was never contemplated that the bank would be financing purchases of physical metal by UK plc. It was intended that the purchases would be made, as before, by Inc and hedged by UK plc. Therefore the agreement can be rectified to reflect the common intention that the separate account was to secure the existing and future indebtedness of Inc.

It is common cause that the bank never advanced any money to UK plc to buy metal and there is nothing to suggest that anyone ever contemplated it would do so. In fact there is no evidence that the bank financed any metal transaction after the execution of the tripartite agreement except the abortive letter of credit for the Venezuelan aluminium to which I have referred. Having regard to these facts, I think that the bank must have a seriously arguable case for the rectification of the tripartite agreement. But this only gets the bank part of the way. The only money which according to the evidence should arguably have been put into the separate account and made subject to the charge is the profit on the aluminium hedging. There is no evidence of any other hedging profit arising out of purchases financed by the bank. But there is, as I have mentioned, a dispute over whether even the aluminium profits can be said to arise out of the hedging of purchases 'financed by the bank'. I think that the point is arguable. But there seems to me a respectable case for saying that since the letter of credit was never drawn down, the bank did not finance any purchase.

Mr Neville-Clarke, for the bank, says that if the bank is right about the aluminium hedging profits, UK plc should have held them in a separate account, where they would have been held on a trust by way of charge for the bank. In fact UK plc did not establish a separate account and thereby acted in breach of trust. The result, says Mr Neville-Clarke, is that the bank has a proprietary

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claim over the whole of UK plc's account with Charles Davis to give effect to the interest it should have had under the charge.

For the purposes of this motion, I am willing to travel thus far with Mr Neville-Clarke's submission. But a proprietary claim cannot survive the destruction of the whole of the property over which it is being asserted, which in this case is a credit balance in favour of UK plc with Charles Davis. Mr Whyte, in compliance with the order of Mervyn Davies J requiring UK plc to depose to what had happened to the $580,000 payment it was supposed to have received from the aluminium hedging, said that UK plc had received $100,000 on 25 February 1992. Otherwise, its dollar account with Charles Davis (as of 29 February 1992) was $317,000 in credit and its sterling account £31,000 in debit. Since then, on being given notice of the injunction, Charles Davis closed out all UK plc's open contracts and the present result is that its dollar account is $66,000 in credit and its sterling account £61,000 in debit. It thus has a combined negative balance. It appears to me to follow that there is no chose in action owed by Charles Davis against which the bank can assert any proprietary claim. Nor can such an asset be recreated by future dealings. The bank's only remedy (on the assumption that all its earlier submissions are correct) is a personal claim for damages for breach of trust in disposing of assets which should have been kept in the separate account.

Such a personal claim does not in my judgment entitle the bank to an injunction in respect of UK plc's current account with Charles Davis or for that matter any other assets of UK plc. The only basis on which an injunction could be granted is the Mareva jurisdiction and it does not appear to me that sufficient grounds exist for the grant of a Mareva injunction. There is nothing to show that UK plc intends to dissipate its assets in order to prevent the bank from enforcing its claim. All that it wants to do is to continue its metal trading. Of course that might result in the disappearance of assets, but it is well established that a Mareva injunction cannot be used to prevent a company from carrying on its ordinary business, even if that is likely to involve a risk that the assets may be lost.

I have dealt first with the claim under the tripartite agreement because it is predicated on the assumption that the assets in question belong to UK plc but were charged to the bank to secure the indebtedness of Inc. The enforcement of such a charge would involve no conflict with the ch 11 proceedings in Texas because the claim is being pursued against UK plc and not Inc and does not concern any assets of Inc which would otherwise be available for its reconstruction. But the position is very different when one turns to the alternative basis for the bank's claim to injunctions, namely that the assets belong beneficially to Inc and fall under the general security agreement and/or the general pledge agreement. Such claims are in my judgment against the property of Inc and subject to the stay under United States law. Mr Neville-Clarke submitted that certain aspects of the relief claimed in the writ did not infringe the stay and this may be technically correct. But the interlocutory injunctive relief can only have been granted to protect a claim by the bank to the property subject to the injunction and this would in my judgment fall within § 362.

This court is not of course bound by the stay under United States law but will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under ch 11. This court has jurisdiction to make interlocutory orders for the

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preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court but no such assistance has been requested here. So far as the evidence shows, these proceedings are the individual act of a single creditor and, if successful, would enable that creditor to secure some of Inc's assets outside the United States bankruptcy process. Mr Neville-Clarke said that these proceedings had been taken with the consent of the other banks but a private sharing arrangement of that kind is no substitute for administration in accordance with the law of the jurisdiction seised of the bankruptcy.

In exercising the discretion as to whether to grant or refuse injunctive relief, I therefore think that I should take into account the fact that the proceedings have not been authorised by the United States court. I think that this is particularly significant in a case in which the United States proceedings have been initiated by, among others, the bank itself. In my view the only justification for maintaining the injunctions in these circumstances would be, first, if I was satisfied that any assets recovered in the proceedings would be made subject to the ch 11 administration and secondly, if action without the authority of the United States court was necessary to prevent some dissipation of assets which would be to the prejudice of the bank's rights under the United States bankruptcy law. If these conditions were satisfied, it would then be necessary to examine the balance of convenience in accordance with the *Cyanamid* guidelines (see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396).

Having regard to these considerations, I do not think that the maintenance of the injunctions can be justified. The claim that UK plc holds the proceeds of all its LME dealings in trust for Inc is not a particularly strong one. The tripartite agreement, assuming it to have been intended to do what the bank says, suggests that the bank had little confidence in this view and wanted a direct charge, at any rate over the separate account, created by a document to which UK plc was a party. In the case of the Charles Davis account, there appear to be no assets on which the injunction can bite. The credit in the Brandeis account is relatively small and in any case it is not clear to me that the money standing to the credit of UK plc with Brandeis represents the proceeds of hedging of deals by Inc rather than the proceeds of transactions done by UK plc on its own account. On the other hand, the effect of the injunctions is in practice to prevent UK plc from carrying on its ordinary business. In the case of Alloys, the metal is admitted to belong beneficially to Inc and there is really no evidence to suggest that Alloys intends to do anything to put it beyond the reach of the United States court. In my judgment, therefore, the bank can be adequately and sufficiently protected by applications in the ch 11 proceedings which it has started in Texas. If the United States court requires the assistance of this jurisdiction, I am sure our courts will be willing to help. But I see no need for independent action. The injunctions will be discharged.

Order accordingly.

P Magrath Esq Barrister

Exhibit 11

A

Chancery Division

Bilta (UK) Ltd (in liquidation) and others *v* Nazir and others (No 2)

[2012] EWHC 2163 (Ch)

B 2012 July 17, 18; 30 Sir Andrew Morritt C

Company — Fraud — Knowledge of company — Company's claim for conspiracy to defraud — Whether defence of ex turpi causa non oritur actio available to company's directors or those alleged to have conspired with them

Insolvency — Winding up — Fraudulent trading — Statutory provision making persons party to fraudulent trading liable to contribute to company's assets — C *Whether having extraterritorial effect — Insolvency Act 1986 (c 45), s 213*

The first and second defendants were the sole directors of the first claimant, a company incorporated in England and registered for the purposes of VAT. The company purchased carbon credits on the Danish Emissions Trading Agency from traders carrying on business outside the United Kingdom, including the sixth defendant, a company incorporated in Switzerland whose sole director was the seventh defendant. Accordingly the purchases were zero-rated for VAT. The second D and third claimants, the company's liquidators, claimed that a conspiracy existed to injure and defraud the company by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive the company of its ability to meet its VAT obligations on such trades and that the defendants were knowingly parties to the business of the company with intent to defraud creditors and for other fraudulent purposes, and should therefore be ordered under section 213 of the Insolvency Act 1986[1] to contribute to the company's assets. The sixth and seventh E defendants applied for orders that the claim be summarily dismissed against each of them on the grounds that (1) the claim by the company was precluded by an application of the maxim ex turpi causa non oritur actio, (2) the liquidators' claim for fraudulent trading under section 213 of the 1986 Act was bound to fail because the section had no extraterritorial effect, and (3) both claims were outside the jurisdiction of the court because they constituted the enforcement of a revenue debt of a foreign state.

F On the application—

Held, refusing the application, (1) that where a company was or was likely to become insolvent the requirement to consider and act in the interests of creditors was imposed on the company's directors; that the conspiracy alleged had been aimed at the company and the relevant duty owed to the company was that of the first and second defendants and extended to the protection of creditors' interests; that the defence of ex turpi causa non oritur actio was not available to the first and second G defendants as a defence to any of the claims made against them for dishonest breaches of fiduciary duty; that there was no basis on which the defence could be available to those who had fraudulently conspired and dishonestly assisted in the breaches of the first and second defendants' duties as directors; and that, accordingly, even though the sixth and seventh defendants were one step removed from the first and second defendants, the defence of ex turpi causa non oritur actio was not available to then either (post, paras 28, 32, 33, 36, 37, 38, 48).

H *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, HL(E) distinguished.

(2) That the object of section 213 of the Insolvency Act 1986 was "any person"; that there was no reason to confine the operation of the section to those within the jurisdiction where a company was involved in trade across state boundaries and that

[1] Insolvency Act 1986, s 213: see post, para 39.

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trade was designed to defraud its creditors; that the section conferred on the court a discretion as to what order to make in the recovery of assets, wherever they might be, or for compensation for the benefit of the company in liquidation, whether resident in the United Kingdom or elsewhere; and that, accordingly, section 213 was of extraterritorial effect (post, para 44).

In re Paramount Airways Ltd [1993] Ch 223, CA applied.

(3) That the claimants were not seeking the enforcement directly or indirectly of a revenue claim; and that, accordingly the court had jurisdiction to entertain the claim (post, para 47).

Per curiam. The fact that there is a claim against the sixth and seventh defendants both at common law and under section 213 of the Insolvency Act 1986 is no reason for extending the defence of ex turpi causa non oritur actio so as to provide a defence to the claim by the company. There will be cases in which a company is defrauded to the detriment of creditors but is not being wound up. There is no risk of any of the malefactors benefiting from any judgment which the company or the liquidators may obtain (post, para 48).

The following cases are referred to in the judgment:

Blain, Ex p; In re Sawers (1879) 12 Ch D 522, CA
Carman v Cronos Group SA [2005] EWHC 2403 (Ch); [2006] BCC 451
Clark v Oceanic Contractors Inc [1983] 2 AC 130; [1983] 2 WLR 94; [1983] 1 All ER 133
Greener Solutions Ltd v Revenue and Customs Comrs [2012] UKUT 18 (TCC); [2012] STC 1056, UT
Hampshire Land Co, In re [1896] 2 Ch 743
Howard Holdings Inc, In re [1998] BCC 549
Inland Revenue Comrs v Begum [2010] EWHC 1799 (Ch); [2011] BPIR 59
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602; [1972] 1 All ER 1210; [1977] 1 Lloyd's Rep 73
Kota Tinggi (Johore) Rubber Co Ltd v Burden (Note) [1970] 1 WLR 388
Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43; [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2010] 1 All ER (Comm) 220; [2009] 2 Lloyd's Rep 473, HL(E)
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980, CA
Selangor United Rubber Estates Ltd v Cradock (No 4) [1969] 1 WLR 1773; [1969] 3 All ER 965
Stocznia Gdanska SA v Latreefers Inc (No 2) [2001] 2 BCLC 116, Lloyd J and CA
Stone & Rolls Ltd v Moore Stephens [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125; [2009] 2 Lloyd's Rep 537, HL(E)
VGM Holdings Ltd, In re [1942] Ch 235; [1942] 1 All ER 224, CA
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250, CA

The following additional cases were cited in argument:

Bank of Credit and Commerce International SA, In re (No 15); Morris v Bank of India [2005] EWCA Civ 693; [2005] 2 BCLC 328, CA
Belmont Finance Corpn Ltd v Williams Furniture Ltd [1979] Ch 250; [1978] 3 WLR 712; [1979] 1 All ER 118, CA
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; [1995] 3 WLR 413; [1995] 3 All ER 918, PC

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A **APPLICATION**

In September 2009 the second and third claimants, Kevin John Hellard and David Anthony Ingram, as the provisional liquidators of the first claimant, Bilta (UK) Ltd ("Bilta"), commenced proceedings in Bilta's name against the defendants, Muhammad Nazir, Chetan Copra, Pan I Ltd, Aman Ullah Khan, Sheikh Zulfiqar Mahmood, Jetivia SA, Urs Brunschweiler,
B Trading House Group Ltd (a company incorporated in the British Virgin Islands) and Muhammad Fayyaz Shafiq (also known as Fayyaz Shafiq Rana), alleging conspiracy to injure and defraud Bilta. On 25 November 2009 Bilta was compulsorily would up and the second and third claimants were appointed liquidators. The proceedings were amended on 13 October 2011 to include claims under section 213 of the Insolvency Act 1986 for
C fraudulent trading. The first and second defendants were the sole directors of Bilta, the fourth and fifth defendants were the directors of the third defendant, and the seventh defendant was the sole director of the sixth defendant.

By an application notice issued on 22 December 2011 the sixth and seventh defendants sought orders that the claim be summarily dismissed against each of them on the grounds that (1) the claim made by Bilta was
D precluded by an application of the maxim ex turpi causa non oritur actio, (2) the claim under section 213 of the 1986 Act had to fail because that section had no extraterritorial effect, and (3) both claims were outside the jurisdiction of the court because they constituted the enforcement of a revenue debt of a foreign state. By the time of the hearing of the application none of the defendants save the sixth, seventh and ninth was participating in
E the proceedings.

The facts are stated in the judgment.

Alan Maclean QC and *Colin West* (instructed by *Macfarlanes LLP*) for the sixth and seventh defendants.

Christopher Parker QC and *Rebecca Page* (instructed by *Gateley LLP*) for the claimants.

F The other defendants did not appear and were not represented.

The court took time for consideration.

30 July 2012. **SIR ANDREW MORRITT C** handed down the following judgment.

G *Introduction*

1 A European Emissions Trading Scheme Allowance ("EUA"), commonly known as a "carbon credit", authorises the holder to emit one tonne of carbon dioxide. Carbon credits are of value to those whose industrial activities give rise to such emissions. They are traded on recognised exchanges and elsewhere. Until 31 July 2009 the supply of such
H credits was standard-rated for the purposes of VAT, since then they have been zero-rated.

2 Between 22 April and 21 July 2009 Bilta (UK) Ltd ("Bilta"), a company incorporated in England and registered for the purposes of VAT, traded in the purchase and sale of EUAs on the Danish Emissions

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Trading Agency. In that period it bought and sold in excess of 5·7m EUAs for some €294m. The following were the relevant features of those trades:

(a) The purchases were from traders carrying on business outside the UK, including Jetivia SA ("Jetivia") a company incorporated in Switzerland, and were therefore zero-rated for purposes of VAT.

(b) The sales were to persons in the UK registered for the purposes of VAT, including Pan 1 Ltd ("Pan"), none of whom had any use for an EUA in the conduct of its business, such supplies being subject to VAT at the standard rate.

(c) The price payable by Pan and the other purchasers net of VAT was less than that paid by Bilta to Jetivia and the other suppliers and was paid to them in full directly or through Bilta.

(d) Consequently Bilta was unable to pay the VAT due on its supplies because it had made no profit and the proceeds of its sales had been paid away to the overseas traders.

3 Between 8 September 2009 and 20 January 2011 HMRC raised eight assessments on Bilta for VAT in the aggregate amount of £38m none of which were paid. On 29 September 2009 Messrs Hellard and Ingram ("the Liquidators") were appointed provisional liquidators of Bilta and commenced the proceedings now before me in the name of Bilta. On 25 November 2009 Bilta was compulsorily wound up and the Liquidators were so appointed. The proceedings were amended on 13 October 2011 to include claims by the liquidators under section 213 of the Insolvency Act 1986.

4 Thus the claimants in this action are Bilta and the Liquidators. The first and second defendants are the sole directors of Bilta, Mr Nazir and Mr Chopra. Mr Chopra owned all the issued shares in Bilta. The third to fifth defendants are Pan and its two directors Mr Khan and Mr Mahmood. The sixth and seventh defendants are Jetivia and its sole director Urs Brunschweiler ("Mr Brunschweiler"). The eighth defendant Trading House Group Ltd ("THG"), a company incorporated in the British Virgin Islands, was, like Jetivia, a seller of EUAs to Bilta. The amended particulars of claim, to which I shall refer in greater detail later, allege that the defendants (1) conspired to injure and defraud Bilta, and (2) were knowingly parties to the carrying on of the business of Bilta with intent to defraud the creditors of Bilta and other fraudulent purposes. The claimants seek to recover £38,733,444 with compound interest and costs.

5 Save for the ninth defendant, Mr Shafiq only Jetivia and Mr Brunschweiler are now participating in the proceedings. By an application notice issued on 22 December 2011 they sought orders that the claim be summarily dismissed against each of them on the grounds that (1) the claim made by Bilta is precluded by an application of the maxim ex turpi causa non oritur actio, (2) the claim of the Liquidators under section 213 of the Insolvency Act 1986 must fail because that section has no extraterritorial effect and (3) both claims are outside the jurisdiction of this court because, vis-à-vis Jetivia and Mr Brunschweiler, they constitute the enforcement of a revenue debt of a foreign state. I will consider those three points in due course. First it is necessary to consider the amended particulars of claim in greater detail and the recent decision of the House of Lords in

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Stone & Rolls Ltd v Moore Stephens [2009] AC 1391 on which counsel for Jetivia and Mr Brunschweiler placed much reliance in relation to the first point.

The amended particulars of claim

6 Paragraphs 1–13 set out the facts, substantially as I have already summarised them. The conspiracy is alleged in paragraph 14 in the following terms:

> "14(a) During at least the period 22 April 2009 to 21 July 2009 a conspiracy existed to defraud and injure a company (and thereby to engage in fraudulent trading with an intention to defraud and injure that company) by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive that company of its ability to meet its VAT obligations on such trades namely to pass the money (which would otherwise have been available to that company to meet such liability) to accounts off-shore, including accounts of Jetivia and THG ('the Conspiracy').
>
> "(b) As the conspirators knew, the fraudulent scheme involved breaches of fiduciary duty by a director or directors of such company.
>
> "(c) Bilta was the defrauded company. This claim concerns Bilta's purchase and sale of EUAs between 22 April 2009 and 21 July 2009.
>
> "(d) The parties to the conspiracy included Mr Brunschweiler and Jetivia . . .
>
> "(e) It is not known on what date or dates the conspiracy was formed."

7 The fraudulent scheme referred to in paragraph 14(b) is described in detail in paragraph 15. So far as concerns Jetivia and Mr Brunschweiler it is alleged that:

> "15(1)(a) Mr Brunschweiler and Jetivia agreed to supply Bilta with EUAs, and to enter into documentation which showed Jetivia as having supplied Bilta even though in a number of cases the EUAs had been transferred direct to a First Line Buffer (see paragraph 22(8) below), for onward sale, knowing that Bilta would not be paying the VAT due on its onward sales.
>
> "[(b)–(e)]
>
> "(2) Bilta would then sell the EUAs on (or, where Bilta had not itself received the EUAs, produce paperwork showing the EUAs to have been sold on) at a price inclusive of VAT. In at least 46 cases Bilta sold the EUAs at a price which was less (net of VAT) than it had paid. Bilta sold to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the First Line Buffers'), which they were only able to do because Bilta had sold for a price net of VAT less than it had paid, (save that on at least 25 occasions Pan 1 immediately sold on at a loss—see Schedule 1). The First Line Buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.
>
> "(3) The First Line Buffers would themselves often sell on to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the Second Line Buffers') (which they were only able to do because Bilta had sold for a price net of VAT less than it had

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paid). (Sometimes the First Line Buffers would sell onto the Second Line Buffers at a loss.) The Second Line Buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.

"(4) The money payable to Bilta by its purchasers (inclusive of the VAT element) would almost all be paid by the purchasers either (a) to Bilta and then paid by Bilta to Jetivia or (b) directly to Jetivia or to THG, or (c) to offshore accounts the account-holders of which have yet to be identified.

"(5) Jetivia's participation in the fraudulent scheme was not limited to transactions in which Bilta actually acquired EUAs from Jetivia . . . (a) In a good number of transactions Jetivia . . . entered into paperwork with Bilta which showed that Bilta had acquired and sold on EUAs from Jetivia . . . which EUAs the Registry showed as being transferred from . . . Jetivia directly to Bilta's purchaser or through a different intermediary company before transfer to Bilta's purchaser or through a different intermediary company before transfer to Bilta's purchaser (see paragraph 22(8) below). (b) Jetivia . . . would receive payments directly from the First Line Buffers depriving Bilta of the means of meeting its VAT liabilities.

"(6) The First Line Buffers included Pan 1 . . . The aforementioned First Line Buffers' participation in the fraudulent scheme was not limited to transactions in which EUAs were actually transferred at the Registry. In a good number of transactions the aforementioned First Line Buffers produced paperwork for the sale or purchase of EUAs when no transfer of EUAs was made at the Registry.

"(7) The design and effect of the fraudulent scheme was to render Bilta insolvent and unable to discharge its VAT liability.

"(8) The First Line Buffers and the Second Line Buffers (and the directors of each) knowingly participated in the fraudulent scheme and were parties to the Conspiracy."

8 Paragraphs 16–21 relate, respectively, to Bilta's lack of credit, the Danish Emissions Trading Agency registry, the amounts involved and the unpaid assessments to VAT made on Bilta. Paragraph 22 alleges that the trading by Bilta was neither bona fide nor consistent with legitimate commercial trading. Substantial particulars of that allegation are set out in sub-paragraphs (1)–(15).

9 Paragraphs 23–25B make specific allegations against Jetivia. Paragraph 23 alleges, with substantial particulars contained in sub-paragraphs (1)–(14), that the pattern of trading by Jetivia with or involving Bilta was not bona fide or consistent with legitimate commercial trading and, it should be inferred, was undertaken in furtherance of the conspiracy. The extent of that trading, as alleged in sub-paragraph (4), was €60m all of which was received by Jetivia from Bilta or from the purchasers from Bilta. Paragraph 24 asserts facts from which it is alleged that the court should infer that Jetivia knew that its dealings with Bilta were dishonest and part of a "missing trader" fraud. Paragraphs 25–25B assert facts in support of the allegations previously made.

10 Paragraphs 26–41 contain comparable allegations against THG, Pan and other buyers of EUAs from Bilta and the connections between all

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participants in the alleged conspiracy. Paragraphs 42–50 summarise the claims against Mr Nazir and Mr Chopra. So far as relevant they assert:

> "42. At all material times Mr Nazir and Mr Chopra as the directing will and mind of Bilta failed to file any VAT return in respect of the period 1 April to 31 July 2009 on behalf of Bilta nor have they caused Bilta to account to HMRC for any sum in respect of the VAT charged on the Sales.
>
> "43. In directing Pan 1 to pay the entirety or substantial part of the purchase price (including that element attributable to VAT) to parties other than Bilta, and in paying over its receipts to third parties without retaining the VAT element for payment to HMRC Mr Nazir and Mr Chopra as the directing will and mind of Bilta were depriving it of funds with which to discharge its liabilities, including its VAT liability in relation to the Sales.
>
> "44. At all material times Mr Nazir and Mr Chopra owed fiduciary duties to act in the way they considered in good faith, would be most likely to promote the success of Bilta for the benefit of its members as a whole.
>
> "45. Pursuant to and in furtherance of the Conspiracy Mr Nazir and Mr Chopra, in breach of the aforesaid duties, conducted the Company's affairs as set out in paragraphs 11 to 43 above. The dishonest breaches of fiduciary duty were the deliberate arranging of the Company's affairs such that no part of its VAT liabilities would be discharged. The effect of the said trading arrangements as set out was that Bilta incurred VAT liabilities in respect of the Sales in the sum of not less than £38,733,444.04 none of which has been paid to HMRC. Mr Nazir and Mr Chopra failed to apply Bilta's funds for the purpose of discharging its lawful liabilities."

11 Paragraphs 57–64 contain the claims against Jetivia and Mr Brunschweiler. The latter is alleged to be the directing mind and will of Jetivia in paragraph 57. Paragraphs 58–60 assert liability as parties to the conspiracy and under section 213 of the Insolvency Act 1986. Paragraphs 61–64 allege:

> "61. Further or in the alternative, Jetivia is liable to Bilta in equity for knowing receipt in the amount of the sums it received from Pan 1.
>
> "62. Further or in the alternative, Jetivia and/or Mr Brunschweiler are liable to account to Bilta in equity for dishonestly assisting breaches of fiduciary duty by Mr Nazir and/or Mr Chopra. They knowingly and dishonestly assisted in the diversion of book debts due to Bilta or, alternatively, the VAT element thereof away from it.
>
> "63. Jetivia and Mr Brunschweiler knew or were reckless as to the fact that the receiving of payments by Jetivia from Pan 1 would lead to Bilta being unable to discharge its VAT liability . . .
>
> "64. Jetivia and/or Mr Brunschweiler are liable to account for the sum of £38,733,444·04 for dishonestly assisting each of Mr Nazir and/or Mr Chopra's breaches of fiduciary duty."

Stone & Rolls Ltd v Moore Stephens

12 In this case Moore Stephens, a firm of chartered accountants, was the auditor of Stone & Rolls Ltd ("Stone"). Ostensibly the director of Stone was a resident in Sark and its entire share capital was vested in a company

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registered in the Isle of Man. In fact it was under the sole control of Mr Stojevik as the beneficial owner of the shares and an attorney of the sole director. Under such control Stone fraudulently extracted money from a Czech bank. Details of the fraud are sufficiently summarised in the judgment of Langley J quoted by Rimer LJ at [2009] AC 1391, para 6. The money thereby obtained was applied for the purposes of Mr Stojevik, not those of Stone. Judgment for damages for deceit was obtained by the bank against Stone which it could not meet. Stone was wound up and proceedings against the auditors were commenced by the liquidator. In those proceedings Stone alleged that in breach of its duties in both contract and in tort the auditors had negligently failed to detect various aspects of the fraudulent scheme with the result that the activities of Mr Stojevik continued, Stone fraudulently extracted further money from the Czech bank and thereby incurred further liability which it could not satisfy. The loss claimed was, in substance, the additional liability incurred after the end of each audit period in which it was alleged that the frauds should have been discovered. Moore Stephens applied to the court to have the claim struck out or summarily dismissed on the basis that it was barred by the maxim ex turpi causa non oritur actio. The turpis causa relied on was the fraud practised on the Czech Bank, see the argument of counsel for Moore Stephens at [2009] AC 1391, 1444C–D. Langley J refused to do so and dismissed the application. Moore Stephens successfully appealed to the Court of Appeal. Stone then appealed to the House of Lords. That appeal was, by a majority (Lord Phillips of Worth Matravers, Lord Brown of Eaton-under-Heywood and Lord Walker of Gestingthorpe) dismissed. The minority (Lord Scott of Foscote and Lord Mance) considered that the appeal should be allowed. It is necessary to refer to all five speeches in some detail.

13 It is convenient to start with that of Lord Walker. After setting out the facts and describing the issue he noted at para 131 that the main area of dispute was whether the criminal acts and intentions of Mr Stojevik should be attributed to Stone. He concluded at para 136 that Stone was primarily, not merely vicariously, liable to the Czech bank for the frauds of Mr Stojevik. In a long section (paras 137–168) under headings of "The *Hampshire Land* principle" (see *In re Hampshire Land Co* [1869] 2 Ch 743), "Sole actors and secondary victims" and "The modern cases", Lord Walker pointed out at para 161 that:

> "In this appeal, by contrast, the issue is the attribution to S & R of a dishonest state of mind. Where that is the issue the notion of a one-man company does become meaningful, as *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 demonstrates. In this context I would treat the expression as covering cases where there is one single dominant director and shareholder (such as Mr Tan in *Royal Brunei*, Mr Golechha in *Berg Sons & Co Ltd v Mervyn Hampton Adams* [2002] Lloyd's Rep PN 41, or Mr Stojevic in the present case) even if there are other directors or shareholders who are subservient to the dominant personality (such as Mr Tan's wife in *Royal Brunei*, the inactive solicitor-director in *Berg*, or S & R's nominee directors). I would also treat it as covering cases where there are two or more individual directors and shareholders acting closely in concert, such as the anonymised directors in *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 or Mr Chappell and Mr Palmer

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in *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68. It may be simplest to propose a test in negative terms, on the lines of what Hobhouse J said in *Berg,* that is a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned."

14 After considering various US cases Lord Walker concluded in para 167:

". . . In the case of a one-man company (in the sense indicated above) which has deliberately engaged in serious fraud, I would follow *Royal Brunei* (and the strong line of United States and Canadian authority) in imputing awareness of the fraud to the company, applying what is referred to in the United States as the 'sole actor' exception to the 'adverse interest' principle."

15 In para 168 Lord Walker added:

"In particular I would apply the 'sole actor' principle to a claim made against its former auditors by a company in liquidation, where the company was a one-man company engaged in fraud, and the auditors are accused of negligence in failing to call a halt to that fraud . . . On the assumption that the auditors did owe a duty of care to S & R, it was a duty owed to that company as a whole, not to individual shareholders, or potential shareholders, or current or prospective creditors, as this House decided in *Caparo Industries plc v Dickman* [1990] 2 AC 605. If the only human embodiment of the company already knew all about its fraudulent activities, there was realistically no protection that its auditors could give it."

16 Lord Walker then considered the position of "secondary victims". He concluded in paras 173–174:

"173. . . . There is in my opinion a clearer and firmer basis on which to determine what (if any) significance to give to the notion of a company being the secondary victim of the fraud (aimed at a third party) of one or more of its directors. It is necessary to keep well in mind why the law makes an exception (the adverse interest rule) for a company which is a primary victim (like the Belmont company, which was manipulated into buying Maximum at a gross overvaluation). The company is not fixed with its directors' fraudulent intentions because that would be unjust to its innocent participators (honest directors who were deceived, and shareholders who were cheated); the guilty are presumed not to pass on their guilty knowledge to the innocent. But if the company is itself primarily (or directly) liable because of the 'sole actor' rule, there is ex hypothesi no innocent participator, and no one who does not already share (or must by his reckless indifference be taken as sharing) the guilty knowledge. That is consistent with the analysis by Rix J in *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262. In that case Mr Browne was not the directing mind of JDW, which was not a one-man company; Rix J accepted that the position might have been different if it had been.

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"174. I would therefore limit my ground of decision in this appeal to the proposition that one or more individuals who for fraudulent purposes run a one-man company (in the sense described above) cannot obtain an advantage by claiming that the company is not a fraudster, but a secondary victim."

17 Finally, on this aspect of the appeal Lord Walker considered whether the liquidation of the "one man company" made any difference. He concluded, at para 184:

"It was argued for the appellants that the public policy defence should not bar claims brought by a company in insolvent liquidation, where the creditors were innocent parties who had been defrauded by Mr Stojevic. If that were right, it would create a very large gap in the public policy defence, since most fraudsters (individual and corporate) become insolvent sooner or later and have liabilities to those whom they have defrauded. Mr Brindle conceded that if Mr Stojevic had carried out his frauds directly (and not through a one-man company) neither he nor his trustee in bankruptcy could have resisted the public policy defence. That conclusion was reached by Langley J [2008] Bus LR 304, para 65(2) and is clearly correct (see Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156). There is no good reason to apply a different rule to a company in liquidation. Apart from special statutory claims in respect of misfeasance, wrong trading and so on, it cannot assert any cause of action which it could not have asserted before the commencement of its liquidation, as Mr Brindle concedes. That is especially true in the context of the duties of an auditor, which are not owed to a company's creditors."

18 Lord Brown of Eaton-under-Heywood was of the same opinion. He concluded at para 201 that in the case of a one man company the company can be in no better position than the one man, and the liquidator in no better position than either of them, to resist the ex turpi causa defence.

19 Lord Phillips of Worth Matravers described at para 14 the fallback submission of counsel for Moore Stephens to be that where there is no human embodiment of the company other than the fraudster attribution of his fraud to the company is inevitable. In para 18 he summarised his conclusions in the following six propositions:

"(1) Under the principle of ex turpi causa the court will not assist a claimant to recover compensation for the consequences of his own illegal conduct.

"(2) This appeal raises the question of whether, and if so how, that principle applies to a claim by a company against those whose breach of duty has caused or permitted the company to commit fraud that has resulted in detriment to the company.

"(3) The answer to this question is not to be found by the application of *Hampshire Land* or any similar principle of attribution. The essential issue is whether, in applying ex turpi causa in such circumstances, one should look behind the company at those whose interests the relevant duty is intended to protect.

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A "(4) While in principle it would be attractive to adopt such a course, there are difficulties in the way of doing so to which no clear resolution has been demonstrated.

"(5) On the extreme facts of this case it is not necessary to attempt to resolve those difficulties. Those for whose benefit the claim is brought fall outside the scope of any duty owed by Moore Stephens. The sole person B for whose benefit such duty was owed, being Mr Stojevic who owned and ran the company, was responsible for the fraud.

"(6) In these circumstances ex turpi causa provides a defence to the claim."

20 Thus, in his fifth proposition Lord Phillips agreed with Lords Walker and Brown. He returned to this aspect of the appeal in paras 67 and 68 C where he said:

"67. For the reasons that I have already given, I consider that the real issue is not whether the fraud should be attributed to the company but whether ex turpi causa should defeat the company's claim for breach of the auditor's duty. That in turn depends, or may depend, critically on whether the scope of the auditor's duty extends to protecting those for D whose benefit the claim is brought.

"68. One fundamental proposition appears to me to underlie the reasoning of Lord Walker and Lord Brown. It is that the duty owed by an auditor to a company is owed for the benefit of the interests of the shareholders of the company but not of the interests of its creditors. It seems to me that here lies the critical difference of opinion between Lord E Walker and Lord Brown on the one hand and Lord Mance on the other. Lord Mance considers that the interests that the auditors of a company undertake to protect include the interests of the creditors."

21 Lord Phillips returned to this aspect of the case in para 86 where he said:

"The scope of Moore Stephens' duty is not directly in issue on this F appeal. What is in issue is whether ex turpi causa provides a defence to S & R's claim that Moore Stephens was in breach of duty. That is not, however, a question that I have been able to consider in isolation from the question of the scope of Moore Stephens's duty. I have reached the conclusion that all whose interests formed the subject of any duty of care owed by Moore Stephens to S & R, namely the company's sole will and G mind and beneficial owner Mr Stojevic, were party to the illegal conduct that forms the basis of the company's claim. In these circumstances I join with Lord Walker and Lord Brown in concluding that ex turpi causa provides a defence."

22 In order to appreciate the full import of the speeches of those in the majority, in particular Lord Phillips, it is helpful to refer briefly to the speech H of Lord Mance. Lord Mance considered at para 263 that Moore Stephens's argument and the majority conclusion overlooked a critical distinction between a company which is solvent and a company which is insolvent at the audit date. After dealing with two other submissions he returned to this point at para 265 where he said:

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> "The fact that S & R was insolvent at each audit date is, in contrast, in my opinion critical. The powers of directors and shareholders in circumstances of insolvency or potential insolvency are qualified (as described in paras 235–240 above). The issue as between the company and its auditors is whether the auditors' duty to the company extends, like the directors', beyond the protection of the interests of shareholders in a situation where the auditors ought to have detected that the company was (in fact, as a result of the fraud which the auditors ought to have discovered) insolvent. Despite the immense and highly skilled attention that the appeal has had generally, both prior to and during its presentation before the House, I fear that the centrality of this point may have been a little obscured by the spread of argument over other issues . . ."

A B C D E F G H

He concluded at para 271 that Moore Stephens could not invoke the maxim ex turpi causa or deny causation by reference to the knowledge of and involvement in the fraud of Mr Stojevic if Moore Stephens ought, with proper skill and care, to have detected that Stone was subject to a continuing scheme of fraud in circumstances in which Stone was insolvent and being made increasingly so. Lord Scott of Foscote was in general agreement with Lord Mance.

23 I will return to the decision in the *Stone & Rolls* case in the light of the submissions of counsel for the parties in this case. At this stage I would make the following observations: (1) The turpis causa relied on by Stone was the fraud practised on the Czech bank by Stojevic. (2) The duty of the auditors did not, in the view of the majority, extend to the protection of creditors where the company was or was becoming insolvent. (3) Stone was a one man company within Lord Walker's formulation.

The claim of Bilta

24 I turn now to the first point underlying the application of Jetivia and Mr Brunschweiler. Is the claim against them made by Bilta barred by the principle of ex turpi causa? Their counsel submits, in summary, that it is. He contends that I am bound by the decision of the House of Lords in the *Stone & Rolls* case and that the ratio decidendi of that decision is applicable to the facts of this case. He relies on the facts that Bilta was under the control of Mr Nazir and Mr Chopra and that Mr Chopra was beneficially entitled to all the shares in Bilta. It follows, he submits, that Bilta was a "one man company" in the sense explained by Lord Walker to which the frauds of Mr Nazir and Mr Chopra are to be attributed. Further he relies on paragraphs 14, 15, 22 and 23 of the amended particulars of claim (quoted or referred to above) as demonstrating that Bilta is relying on those frauds in its claim against them.

25 Counsel for Bilta does not dispute that if the ratio decidendi in the *Stone & Rolls* case is applicable to the facts of this case then the result for which counsel for Jetivia and Mr Brunschweiler contends would follow. He submits that that condition is not satisfied for two reasons. First, Bilta was the victim of the fraud not the villain. In that connection he relies on the decision of Warren J in *Greener Solutions Ltd v Revenue and Customs Comrs* [2012] STC 1056. Second, the relevant duty owed to Bilta was that of the directors, Mr Nazir and Mr Chopra, not of auditors and extended to

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the interests of creditors. He relies on the provisions of sections 172 and 180 of the Companies Act 2006.

26 *Greener Solutions Ltd v Inland Revenue Comrs* [2012] STC 1056 also concerned a "missing trader" fraud. In that case Greener Solutions ("GSL") sought repayment of the input tax incurred in respect of mobile telephones it had bought and then exported. The individual who had effected all the relevant transactions on behalf of GSL was Oliver Murray. Murray knew of the fraud committed by Jag-Tec, the missing trader. The question was whether his knowledge should be imputed to GSL. Warren J concluded at para 43 that it should be because Murray had effectively implemented the fraud on behalf of GSL but the fraud was not aimed at GSL. Counsel for Bilta submits that this decision exemplifies the limitation on the ratio decidendi of the *Stone & Rolls* case for which he contends.

27 Section 172 of the Companies Act 2006 provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> "(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> "(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

28 It is not disputed that in circumstances where the company is or is likely to become insolvent the requirement to consider and act in the interests of creditors is imposed on the directors of the company. As Bilta never had any assets of its own of any substance but entered into commitments of considerable value this duty was operative on Mr Nazir and Mr Chopra at all material times.

29 Section 180 of the Companies Act 2006 provides:

> "(1) In a case where— (a) section 175 (duty to avoid conflicts of interest) is complied with by authorisation by the directors, or (b) section 177 (duty to declare interest in proposed transaction or arrangement) is complied with, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company. This is without prejudice to any enactment, or provision of the company's constitution, requiring such consent or approval.
>
> "(2) The application of the general duties is not affected by the fact that the case also falls within Chapter 4 (transactions requiring approval of members), except that where that Chapter applies and— (a) approval

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is given under that Chapter, or (b) the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with section 175 (duty to avoid conflicts of interest) or section 176 (duty not to accept benefits from third parties).

"(3) Compliance with the general duties does not remove the need for approval under any applicable provision of Chapter 4 (transactions requiring approval of members).

"(4) The general duties— (a) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty, and (b) where the company's articles contain provisions for dealing with conflicts of interest, are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions.

"(5) Otherwise, the general duties have effect (except as otherwise provided or the context otherwise requires) notwithstanding any enactment or rule of law."

Counsel for Bilta relies on section 180(5) as demonstrating that there is no limitation on the duty imposed by section 172(3) in cases of "one man" companies.

30 The riposte of counsel for Jetivia and Mr Brunschweiler involved a detailed examination of the amended statement of claim in order to establish that Bilta was relying on its own wrong. He contended that the allegations made in paragraphs 43 and 45, quoted in para 10 above, were, inevitably, attributable to Bilta and one consequence of such attribution is that Bilta must have been the villain and not the victim. He accepted the further consequence of his submission, namely, that the defence of ex turpi causa would be available to Mr Nazir and Mr Chopra too.

31 In relation to section 180 of the Companies Act 2006 counsel for Jetivia and Mr Brunschweiler pointed out that subsection 4(a) preserved the efficacy of general rules of law to qualify the general duties of a director of a company. He contended that the defence of ex turpi causa was available to any claim based on any breach of any duty. Accordingly, so he submitted, the defence must be available to a claim based on a breach of the duty imposed or recognised by section 172(3).

32 I accept the submission of counsel for Bilta to the effect that the facts of this case distinguish it from those of *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 in both the respects on which counsel relies. It is clear from the paragraphs in the amended particulars of claim I have set out above that the conspiracy alleged in paragraph 14 was aimed at Bilta; that is what paragraph 14(a) and (c) assert. The conspiracy involved denuding Bilta of its assets so that it would be unable to satisfy its liability to HMRC for VAT at the standard rate on its sales of EUAs to Pan and others, as alleged in paragraph 15(7). This was achieved by ensuring that the moneys due to Bilta in respect of those sales were paid directly or indirectly to Jetivia or the other overseas entities from which Bilta bought the EUAs, as alleged in paragraph 15(4). It is not alleged that Bilta was a party to or beneficiary of the conspiracy.

33 The conspiracy so alleged subjected Mr Nazir and Mr Chopra to the duty imposed by section 172(3) of the Companies Act and its infringement

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A by them with, as alleged, the active, knowing and fraudulent participation of Jetivia and Mr Brunschweiler, amongst others. Thus the present and future creditors of Bilta were within the scope of the directors' duty. It is true that, as their counsel submitted, Jetivia and Mr Brunschweiler are one step removed from Mr Nazir and Mr Chopra. But if the defence of ex turpi causa is not available to them I do not understand how it can be available to those
B who fraudulently conspired with them to breach their duties as directors of Bilta.

34 Accordingly, I would start by testing the propositions for which counsel for Jetivia and Mr Brunschweiler contends by considering their application to the case against Mr Nazir and Mr Chopra. It was not disputed that if an individual agent defrauds his individual principal the defence of ex turpi causa would not be available as a defence to a claim
C against the agent by the principal. It would be the same in the case of a company principal and individual agent except where, as in the *Stone & Rolls* case, the company can be identified as the agent in corporate form. That, as I understand it, is the basis for the "one man" company exception applied by Lords Walker and Brown.

35 But the conclusion of the majority in the *Stone & Rolls* case also
D depended on the fact that the scope of the auditors' duty was restricted to the company and those interested in it as members. As Lord Walker pointed out in para 168 "If the only human embodiment of the company already knew all about its fraudulent activities, there was realistically no protection that its auditors could give it." Lord Brown, at para 205, agreed with Lord Walker. The fifth proposition enunciated by Lord Phillips at para 18, and the further
E statements made by him in paras 67, 68 and 86, which I have quoted in paras 19–21 above, emphasise the need to consider the scope of the duty alleged to have been infringed. None of them referred to section 172 of the Companies Act 2006.

36 In my judgment, the ratio decidendi of the *Stone & Rolls* case is not applicable to cases in which the claim is based on a breach of duty the scope of which encompasses persons or interests other than the fraudsters in
F corporate form. None of the majority so held. Whether the true view is that in such a case the company is not a "one man" company for the purposes of that claim or that the scope of the duty extends to persons or interests not implicated in the fraud may be a moot point. In either case my conclusion is consistent with the views of Lord Mance at para 265, which I have quoted in para 22 above.

G 37 I do not suggest that creditors of a company not in liquidation have any proprietary interest in the assets of the company, but their interests as creditors are within the scope of the duties of directors at least where the company is or may become insolvent. Section 172 of the Companies Act 2006 is statutory recognition of the principle to that effect recognised by Dillon LJ in *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. In my
H view, therefore, the defence of ex turpi causa would not be available to Mr Nazir and Mr Chopra as a defence to any of the claims made against them in paragraphs 42–45 of the amended particulars of claim quoted in para 10 above.

38 In my judgment Jetivia and Mr Brunschweiler can be in no better position. Paragraphs 61–64 of the amended Particulars of Claim, quoted in

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para 11 above, assert, in addition to participation in the conspiracy, their dishonest assistance in the breaches of the duties of Mr Nazir and Mr Chopra. If the defence of ex turpi causa is not available to Mr Nazir and Mr Chopra I am unable to detect any basis on which it could be available to those who dishonestly conspired with them to break it. In my view the defence of ex turpi causa is not available to Jetivia and Mr Brunschweiler as a defence to the claim brought against them by Bilta. Accordingly, I shall not dismiss that claim.

Section 213 of the Insolvency Act 1986

39 That section is in the following terms:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> "(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

40 The claim was amended in October 2011 so as to join the Liquidators as the second and third claimants. The particulars of claim were amended so as to include a claim against all the defendants under that section. Jetivia and Mr Brunschweiler do not allege that such claim is not properly pleaded against them. Nor do they assert that they are not amenable to service of the amended claim. They contend that the section does not have extra territorial application so as to cover their activities outside the United Kingdom constituted by the sale of EUAs on the Danish Emissions Trading Agency. They rely on the well established principle of statutory construction that statutes are presumed not to have such an effect unless the express words of the statute or a clear implication indicate otherwise, see *Ex p Blain; In re Sawers* (1879) 12 Ch D 522; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130. Counsel for Jetivia and Mr Brunschweiler submits that there is no authority to the effect that section 213 can have extraterritorial effect and there are no clear words or necessary implication to justify me in concluding that it does. By analogy they rely on the decision of the House of Lords setting aside an order under CPR Pt 71 requiring the director of a company resident in Greece to attend for cross-examination as to the company's assets, see *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90.

41 The general principle is not in doubt. Counsel for the Liquidators contends that the context of insolvency and the unqualified references to "any business" and "any person" do entitle and require the court to conclude that section 213 does have extra territorial effect. He relies on a number of decided cases as examples. Thus:

(1) Section 133 of the Insolvency Act 1986 (orders for the public examination of officers of a company in liquidation) was held to have extraterritorial effect in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345.

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A (2) Section 238 of the Insolvency Act 1986 (orders setting aside transactions at an undervalue) was held to have extraterritorial effect in *In re Paramount Airways Ltd* [1993] Ch 223.

(3) Section 423 of the Insolvency Act 1986 (transactions defrauding creditors) was held to have extraterritorial effect in *Inland Revenue Comrs v Begum* [2011] BPIR 59.

B (4) Section 214 Insolvency Act 1986 (wrongful trading) was assumed to have extraterritorial effect in *In re Howard Holdings Inc* [1998] BCC 549.

(5) Section 213 was assumed to have extraterritorial effect in *Carman v Cronos Group SA* [2006] BCC 451; *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.

42 The starting point must be the nature of corporate insolvency. This was described by Millett J in *In re International Tin Council* [1987] Ch 419,
C 446–447:

> "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation. In the case of a foreign company, therefore, the fact that other countries, in accordance with their own rules of private international law, may not recognise our winding up order or the title of a liquidator
D appointed by our courts, necessarily imposes practical limitations on the consequences of the order. But in theory the effect of the order is world-wide. The statutory trusts which it brings into operation are imposed on all the company's assets wherever situate, within and beyond the jurisdiction. Where the company is simultaneously being wound up in the country of its incorporation, the English court will naturally seek to
E avoid unnecessary conflict, and so far as possible to ensure that the English winding up is conducted as ancillary to the principal liquidation. In a proper case, it may authorise the liquidator to refrain from seeking to recover assets situate beyond the jurisdiction, thereby protecting him from any complaint that he has been derelict in his duty. But the statutory trusts extend to such assets, and so does the statutory obligation to collect and realise them and to deal with their proceeds in accordance with the
F statutory scheme."

43 Although that passage must now be read in the light of the provisions, where they apply, of the UNCITRAL Model Law on Cross Border Insolvency and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1), the underlying theory of corporate liquidation remains as Millett J described it. Its international
G effect was recognised and given further effect by Sir Donald Nicholls V-C in *In re Paramount Airways Ltd* [1993] Ch 223. That case concerned a transaction at an undervalue within section 238 of the Insolvency 1986 effected by a transfer to a bank in Jersey. Proceedings were taken under that section against the bank. The bank claimed that the section did not have extra territorial effect. The Vice-Chancellor disagreed. He noted that
H the section did not purport to have any territorial limitation: p 235G–H. At p 239 he added:

> "In my view the solution to the question of statutory interpretation raised by this appeal does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does

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fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression 'any person' in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of *Ex p Blain* (1879) 12 Ch D 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."

44 Though stated in relation to section 238 the principles expressed by Sir Donald Nicholls V-C then are equally, if not more, applicable to this case some twenty years later. If a company is involved in trade across state boundaries and that trade is designed to defraud its creditors there is no more reason to confine the operation of the section to those within the jurisdiction than in cases where the transaction in question is at an undervalue. In the case of both sections 213 and 238 the object of the section is "any person". Both sections confer on the court a discretion as to what order to make. Both sections, and many others, are directed to recovering assets, wherever they may be, or compensation for the benefit of all the creditors of the company in liquidation whether resident in the United Kingdom or elsewhere. I would hold that section 213 is of extraterritorial effect and reject the second ground advanced in support of this application by counsel for Jetivia and Mr Brunschweiler.

Revenue debt

45 It is a well-known principle of private international law that the courts in England have no jurisdiction, directly or indirectly, to enforce a revenue law of a foreign state, see *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), vol 1, rule 3. There is no evidence as to the laws of Switzerland. I assume it to be to the same effect.

46 It was submitted by counsel on behalf of Jetivia and Mr Brunschweiler that the claim made in this action by both Bilta and the Liquidators seeks to enforce the claim of HMRC for VAT under the VAT Act duly assessed on Bilta. He contended that this was a ground for distinguishing *In re Paramount Airways Ltd* [1993] Ch 223 and, in addition, a reason summarily to dismiss this claim "by way of comity".

47 I reject this submission. First, the claim is not the enforcement directly or indirectly of a revenue claim. The claimants seek to recover compensation for a conspiracy to defraud it wherewith to provide a fund from which HMRC and any other creditor may be paid a dividend in respect of their debts. Second, even if it is a revenue claim, it is the claim of HMRC not of the revenue authorities of some foreign state. There is no basis for refusing to enforce the proper claims of HMRC in the courts of England and Wales whether based on comity or otherwise. Third, even if the claimants do seek to enforce the claim of HMRC, no question of comity arises. The claimants are not seeking to enforce the revenue laws of Switzerland and this is a court of England and Wales not of Switzerland!

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For all these reasons I see no reason to distinguish the *Paramount Airways* case either.

Summary of conclusions

48 Having rejected each of the arguments summarised in para 5 above I will dismiss this application. I would make two further observations. First, the fact that there is, in accordance with my conclusions, a claim against these defendants both at common law and under section 213 of the Insolvency Act 1986 is no reason for extending the defence of ex turpi causa so as to provide a defence to the claim by Bilta. There will be cases in which a company is defrauded to the detriment of creditors but is not being wound up. Second, there is no risk of any of the malefactors, such as Mr Chopra, benefiting from any judgment Bilta or the Liquidators may obtain. The claim under section 213 necessarily gives rise to the discretion of the court under section 213(2). Any damages or specific relief granted in respect of Bilta's claim can be limited and directed to the creditors (and innocent shareholders if any) by the operation of the principle of *In re VGM Holdings Ltd* [1942] Ch 235 as applied in *Selangor United Rubber Estates Ltd v Cradock (No 4)* [1969] 1 WLR 1773 and the orders made in *Kota Tinggi (Johore) Rubber Co Ltd v Burden (Note)* [1970] 1 WLR 388 and *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602.

Application dismissed.

Celia Fox, Barrister

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Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
AWB Geneva SA v. North America Steamships Limited [2007] 2 Lloyd's Rep 31	Canada	8
Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825	United Kingdom	11
Bilta (UK) Ltd v. Nazir [2014] Ch 52 (CA)	United Kingdom	12
Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
In re C (A Bankrupt) BVIHC 0080/2013	British Virgin Islands	15
Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852	United Kingdom	18
Jyske Bank (Gibraltar) Ltd v. Spjeldnaes [2000] BCC 16	United Kingdom	19
Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

Exhibit List

	Jurisdiction	Exhibit Number
Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
Picard v. Bernard L Madoff Investment Securities LLC BVIHCV140/2010	British Virgin Islands	22
Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
Stichting Shell Pensioenfonds v. Krys [2015] AC 616; [2014] UKPC 41	United Kingdom	25
Other Authorities		
McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
Cases Cited by *Amici Curiae*		
A, B, C & D v. E , HCVAP 2011/001	Anguilla	28
Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 12

(Part 1of 2)

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Court of Appeal

Bilta (UK) Ltd (in liquidation) and others *v* Nazir and others (No 2)

[2012] EWHC 2163 (Ch)

[2013] EWCA Civ 968

2012 July 17, 18; 30
2013 May 22, 23; July 31

Sir Andrew Morritt C
Lord Dyson MR, Rimer, Patten LJJ

Company — Fraud — Knowledge of company — Company's claim for conspiracy to defraud — Whether defence of ex turpi causa non oritur actio available to company's directors or those alleged to have conspired with them — Companies Act 2006 (c 46), ss 172, 239

Insolvency — Winding up — Fraudulent trading — Statutory provision making persons party to fraudulent trading liable to contribute to company's assets — Whether having extraterritorial effect — Insolvency Act 1986 (c 45), s 213

The first and second defendants were the sole directors of the first claimant, a company incorporated in England and registered for the purposes of VAT. The company purchased carbon credits on the Danish Emissions Trading Agency from traders carrying on business outside the United Kingdom, including the sixth defendant, a company incorporated in Switzerland whose sole director was the seventh defendant. Accordingly the purchases were zero-rated for VAT. The first and second defendants as directors owed fiduciary duties to the company under sections 172 and 239 of the Companies Act 2006[1]. The second and third claimants, the company's liquidators, claimed that a conspiracy existed to injure and defraud the company by trading in carbon credits and dealing with the resulting proceeds in such a way as to deprive the company of its ability to meet its VAT obligations on such trades. It was claimed that the defendants were knowingly parties to the business of the company with intent to defraud creditors and for other fraudulent purposes, and should therefore be ordered under section 213 of the Insolvency Act 1986[2] to contribute to the company's assets. The sixth and seventh defendants, who were claimed to have dishonestly assisted the conspiracy, applied for orders that the claim be summarily dismissed against each of them on the grounds, among others, that (1) the claim by the company was precluded by an application of the maxim ex turpi causa non oritur actio on the basis that the pleaded conspiracy disclosed the use of the company by its directors and their associates to carry out a carousel fraud, the only victim of which was the Revenue and Customs Commissioners, and since the company was a party to the fraud it could not claim against the other conspirators for losses which it had suffered as a result of the fraud it had carried out, and (2) the liquidators' claim for fraudulent trading under section 213 of the 1986 Act was bound to fail because the section had no

[1] Companies Act 2006, s 172: see post, Court of Appeal judgments, para 21.
S 239: "(1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company. (2) The decision of the company to ratify such conduct must be made by resolution of the members of the company. (3) Where the resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member . . . (5) For the purposes of this section— (a) 'conduct' includes acts and omissions; . . . (7) This section does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company."

[2] Insolvency Act 1986, s 213: see post, Court of Appeal judgments, para 84.

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A extraterritorial effect. The application was refused on the grounds, among others, that the defence of ex turpi causa non oritur actio was not available to the defendants, and section 213 of the Insolvency Act 1986 was of extraterritorial effect.

On appeal by the sixth and seventh defendants—

Held, dismissing the appeal, (1) that whether the conduct of an agent, including a director, created a personal liability on the part of a company depended on the context in which the issue arose; that, as between the company and a defrauded third party, the B company was not to be treated as the victim of the wrongdoing on which the third party sued but one of the perpetrators, the interests of the third party who was the intended victim of the unlawful conduct taking priority over the loss which the company would suffer through the actions of its own directors; but that, where the company itself sought compensation for a breach of fiduciary duty owed to it by its director or agent, as between it and the director the company was the victim of a legal wrong; that the director could not defeat that claim by seeking to attribute to the company the unlawful C conduct for which he was responsible so as to make it the company's own conduct, because the defaulting director could not rely on his own breach of duty to defeat the operation of sections 172 and 239 of the Companies Act 2006, the very purpose of which was to protect the company against such unlawful breaches; that there was no rule that a director of a one-man company could not be held liable for his breaches of fiduciary duty against the company, and so, where the fraud or dishonesty was committed against the company even by a sole director or shareholder, no defence by way of attribution was available, and therefore the director could be held liable to D account for his breaches of fiduciary duty against the company; that the company was to be treated as the victim whether the loss which the company sought to recover arose out of the fraudulent conduct of its directors towards a third party for which it had to pay compensation or out of the fraudulent conduct of its directors directed at the company itself; that, since on a strikeout application the conspiracy was to stand as pleaded, in the circumstances the intended and only victim was the company; that, in the context of a claim against the directors and their associates for breach of fiduciary E duty, the company was the victim regardless of whether its loss was direct or consequential on that of a third party; and that, accordingly, the judge had rightly refused to dismiss the claim on the basis of the maxim ex turpi causa non oritur actio (post, Court of Appeal judgments, paras 34–35, 38, 41–42, 45, 75–83, 92, 93).

In re Hampshire Land Co [1896] 2 Ch 743, *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL(E), *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, CA, *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, CA and F *Prest v Prest* [2013] 2 AC 415, SC(E) applied.

Stone & Rolls Ltd v Moore Stephens [2009] AC 1391, HL(E) distinguished.

(2) That section 213 of the Insolvency Act 1986, which allowed the court to order "any persons" knowingly parties to the fraudulent carrying on of the business of a company to "make such contributions (if any) to the company's assets as the court thinks proper", had extraterritorial effect; and that, accordingly, although the sixth and seventh defendants were domiciled and the sixth defendant carried on business G out of the jurisdiction and neither defendant had any assets in England or had been present in this country at any material time, the court could, if appropriate, make an order under section 213 against them (post, Court of Appeal judgments, paras 85, 90–91, 92, 93).

In re Paramount Airways Ltd [1993] Ch 223, CA applied.

Decision of Sir Andrew Morritt C, post, p 58; [2012] EWHC 2163 (Ch); [2013] 2 WLR 825; [2013] 1 All ER 375 affirmed.

H The following cases are referred to in the judgment of Patten LJ in the Court of Appeal:

Abrath v North Eastern Railway Co (1886) 11 App Cas 247, HL(E)
Attorney General's Reference (No 2 of 1982) [1984] QB 624; [1984] 2 WLR 447; [1984] 2 All ER 216, CA

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Bank of Credit and Commerce International SA, In re (No 15); Morris v Bank of India [2005] EWCA Civ 693; [2005] 2 BCLC 328, CA
Belmont Finance Corpn Ltd v Williams Furniture Ltd [1979] Ch 250; [1978] 3 WLR 712; [1979] 1 All ER 118, CA
Blain, Ex p; In re Sawers (1879) 12 Ch D 522, CA
Citizens' Life Assurance Co Ltd v Brown [1904] AC 423, PC
Clark v Oceanic Contractors Inc [1983] 2 AC 130; [1983] 2 WLR 94; [1983] 1 All ER 133, HL(E)
Cross v Kirkby The Times, 5 April 2000; [2000] CA Transcript No 321, CA
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685, CA
Franbar Holdings Ltd v Patel [2008] EWHC 1534 (Ch); [2009] Bus LR D14; [2009] 1 BCLC 1
Hampshire Land Co, In re [1896] 2 Ch 743
Holman v Johnson (1775) 1 Cowp 341
McNicholas Construction Co Ltd v Customs and Excise Comrs [2000] STC 553
Mediators (The) Inc, In re; The Mediators Inc v Manney (1997) 105 F 3d 822
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; [1995] 3 WLR 413; [1995] 3 All ER 918, PC
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
Prest v Prest [2011] EWHC 2956 (Fam); [2012] EWCA Civ 1395; [2013] 2 AC 415; [2013] 2 WLR 557; [2013] 1 All ER 795, CA [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1; [2013] 4 All ER 673, SC(E)
Revenue and Customs Comrs v Begum [2010] EWHC 1799 (Ch); [2011] BPIR 59
Royal British Bank v Turquand (1856) 6 E & B 327
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; [1995] 3 WLR 64; [1995] 3 All ER 97, PC
Salomon v A Salomon & Co Ltd [1897] AC 22, HL(E)
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980, CA
Stone & Rolls Ltd v Moore Stephens [2008] EWCA Civ 644; [2009] AC 1391; [2008] 3 WLR 1146; [2008] Bus LR 1579; [2008] 2 Lloyd's Rep 319, CA; [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125; [2009] 2 Lloyd's Rep 537, HL(E)
Tesco Supermarkets Ltd v Nattrass [1972] AC 153; [1971] 2 WLR 1166; [1971] 2 All ER 127, HL(E)
Tinsley v Milligan [1992] Ch 310; [1992] 2 WLR 508; [1992] 2 All ER 391, CA; [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E)
Ultraframe UK Ltd v Fielding [2003] EWCA Civ 1805; [2004] RPC 479, CA
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250, CA

The following additional cases were cited in argument before the Court of Appeal:

Downs v Chappell [1997] 1 WLR 426; [1996] 3 All ER 344, CA
Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 AC 366; [2002] 3 WLR 1913; [2003] 1 All ER 97; [2003] 2 All ER (Comm) 451; [2003] 1 Lloyd's Rep 65, HL(E)
Dulles Settlement, In re; Dulles v Vidler [1951] Ch 265; [1950] 2 All ER 1013, CA
Greener Solutions Ltd v Revenue and Customs Comrs [2012] UKUT 18 (TCC); [2012] STC 1056, UT
Hewison v Meridian Shipping Services PTE Ltd [2002] EWCA Civ 1821; [2003] ICR 766, CA
Howard Holdings Inc, In re [1998] BCC 549
Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E)
Jyske Bank (Gibraltar) Ltd v Spjeldnaes [1999] 2 BCLC 101
Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271, CA

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Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43; [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2010] 1 All ER (Comm) 220; [2009] 2 Lloyd's Rep 473, HL(E)
R v McDonnell [1966] 1 QB 233; [1965] 3 WLR 1138; [1966] 1 All ER 193
Revenue and Customs Comrs v Total Network SL [2008] UKHL 19; [2008] AC 1174; [2008] 2 WLR 711; [2008] 2 All ER 413; [2008] STC 644, HL(E)
Tucker (RC) (A Bankrupt), In re; Ex p Tucker (KR) [1990] Ch 148; [1988] 2 WLR 748; [1988] 1 All ER 603, CA
Webb v Chief Constable of Merseyside Police [2000] QB 427; [2000] 2 WLR 546; [2000] 1 All ER 209, CA

The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

Apollo Communications Centre Ltd v Rahmann [2008] EWHC 3467 (Ch); [2008] BTC 5716
Berg Sons & Co Ltd v Mervyn Hampton Adams [1993] BCLC 1045
Carman v The Cronos Group SA [2005] EWHC 2403 (Ch); [2006] BCC 451
Cook v Deeks [1916] 1 AC 554, PC
Everet v Williams (1725) (1893) 9 LQR 197
Fortress Vale Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP [2012] EWHC 1486 (Comm)
Hall v Hebert (1993) 101 DLR (4th) 129
Hopkins v TL Dallas Group Ltd [2004] EWHC 1379 (Ch); [2005] 1 BCLC 543
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
K v P (J, Third Party) [1993] Ch 140; [1992] 3 WLR 1015; [1993] 1 All ER 521
Les Laboratoires Servier v Apotex Inc [2012] EWCA Civ 593; [2013] Bus LR 80, CA
Manta Line Inc v Sofianites [1984] 1 Lloyd's Rep 14, CA
Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm); [2009] 2 All ER (Comm) 287; [2009] 1 Lloyd's Rep 475
North-West Transportation Co Ltd v Beatty (1887) 12 App Cas 589, PC
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204; [1982] 2 WLR 31; [1982] 1 All ER 354, CA
QRS 1 ApS v Frandsen [1999] 1 WLR 2169; [1999] 3 All ER 289, CA
Stocznia Gdanska SA v Latreefers Inc (No 2) [2001] 2 BCLC 116, Lloyd J and CA
Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2) [1998] 1 WLR 294; [1998] 4 All ER 82; [1998] 1 Lloyd's Rep 322

The following cases are referred to in the judgment of Sir Andrew Morritt C:

Blain, Ex p; In re Sawers (1879) 12 Ch D 522, CA
Carman v The Cronos Group SA [2005] EWHC 2403 (Ch); [2006] BCC 451
Clark v Oceanic Contractors Inc [1983] 2 AC 130; [1983] 2 WLR 94; [1983] 1 All ER 133, HL(E)
Greener Solutions Ltd v Revenue and Customs Comrs [2012] UKUT 18 (TCC); [2012] STC 1056, UT
Hampshire Land Co, In re [1896] 2 Ch 743
Howard Holdings Inc, In re [1998] BCC 549
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602; [1972] 1 All ER 1210; [1972] 1 Lloyd's Rep 73
Kota Tinggi (Johore) Rubber Co Ltd v Burden (Note) [1970] 1 WLR 388; [1970] 1 All ER 388
Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43; [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2010] 1 All ER (Comm) 220; [2009] 2 Lloyd's Rep 473, HL(E)

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Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
Revenue and Customs Comrs v Begum [2010] EWHC 1799 (Ch); [2011] BPIR 59
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980, CA
Selangor United Rubber Estates Ltd v Cradock (No 4) [1969] 1 WLR 1773; [1969] 3 All ER 965
Stocznia Gdanska SA v Latreefers Inc (No 2) [2001] 2 BCLC 116, Lloyd J and CA
Stone & Rolls Ltd v Moore Stephens [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125; [2009] 2 Lloyd's Rep 537, HL(E)
VGM Holdings Ltd, In re [1942] Ch 235; [1942] 1 All ER 224, CA
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250, CA

The following additional cases were cited in argument before Sir Andrew Morritt C:

Bank of Credit and Commerce International SA, In re (No 15); Morris v Bank of India [2005] EWCA Civ 693; [2005] 2 BCLC 328, CA
Belmont Finance Corpn Ltd v Williams Furniture Ltd [1979] Ch 250; [1978] 3 WLR 712; [1979] 1 All ER 118, CA
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; [1995] 3 WLR 413; [1995] 3 All ER 918, PC
Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E)
Tucker (RC) (A Bankrupt), In re, Ex p Tucker (KR) [1990] Ch 148; [1988] 2 WLR 748; [1988] 1 All ER 603, CA

APPLICATION

In September 2009 the second and third claimants, Kevin John Hellard and David Anthony Ingram, as the provisional liquidators of the first claimant, Bilta (UK) Ltd ("Bilta"), commenced proceedings in Bilta's name against the defendants, Muhammad Nazir, Chetan Copra, Pan I Ltd, Aman Ullah Khan, Sheikh Zulfiqar Mahmood, Jetivia SA, Urs Brunschweiler, Trading House Group Ltd (a company incorporated in the British Virgin Islands) and Muhammad Fayyaz Shafiq (also known as Fayyaz Shafiq Rana), alleging conspiracy to injure and defraud Bilta. On 25 November 2009 Bilta was compulsorily would up and the second and third claimants were appointed liquidators. The proceedings were amended on 13 October 2011 to include claims under section 213 of the Insolvency Act 1986 for fraudulent trading. The first and second defendants were the sole directors of Bilta, the fourth and fifth defendants were the directors of the third defendant, and the seventh defendant was the sole director of the sixth defendant.

By an application notice issued on 22 December 2011 the sixth and seventh defendants sought orders that the claim be summarily dismissed against each of them on the grounds that (1) the claim made by Bilta was precluded by an application of the maxim ex turpi causa non oritur actio, (2) the claim under section 213 of the 1986 Act had to fail because that section had no extraterritorial effect, and (3) both claims were outside the jurisdiction of the court because they constituted the enforcement of a revenue debt of a foreign state. By the time of the hearing of the application none of the defendants save the sixth, seventh and ninth was participating in the proceedings.

The facts are stated in the judgment.

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Alan Maclean QC and *Colin West* (instructed by *Macfarlanes LLP*) for the sixth and seventh defendants.

The company's claim for conspiracy to defraud is barred by the maxim ex turpi causa non oritur actio. In order for the maxim to apply the claimant must rely on its own wrong: see *Tinsley v Milligan* [1994] 1 AC 340. The company does rely on its own wrong. The fraud alleged was carried out through the company. There is no scope for the operation of the exception whereby the knowledge of directors of a company is not to be imputed to the company: see *In re Hampshire Land Co* [1896] 2 Ch 743. That exception is inapplicable to "one man" companies: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391.

The liquidators' claim for fraudulent trading must fail because section 213 of the Insolvency Act 1986 has no extraterritorial effect. It is a fundamental principle of English statutory construction that statutes are presumed not to have extraterritorial effect, unless the express word of the statute or its clear implication points to a different construction: see *Ex p Blain; In re Sawers* (1879) 12 Ch D 522; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130; *In re Tucker (RC) (A Bankrupt), Ex p Tucker (KR)* [1990] Ch 148 and *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90. The phrase "any person" in section 213 contains no words of limitation, but to say that the absence of words of limitation indicates an intention that the provision should apply extraterritorially is to turn the presumption on its head.

The Court of Appeal's decision in *In re Paramount Airways Ltd* [1993] Ch 345 is distinguishable. [Reference was made to *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] 2 BCLC 328.]

It is a fundamental principle of the conflict of laws that one country will not enforce the revenue laws of another country: see *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), vol 1, rule 3. By taking jurisdiction over the section 213 claim, this court would in effect be applying English revenue laws in Switzerland.

Christopher Parker QC and *Rebecca Page* (instructed by *Gateley LLP*) for the claimants.

The maxim ex turpi causa non oritur actio is not available to the sixth and seventh defendants as a defence to the claim brought by the company. The first and second defendants, as directors of the company, owed the company fiduciary duties under sections 172 and 180 of the Companies Act 2006 which extended to the protection of creditors' interests where the company was or was becoming insolvent. There is no basis on which the defence could be available to those who had fraudulently conspired and dishonestly assisted in the breaches of the first and second defendant's duties as directors. For the rules of attribution generally, see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *In re Hampshire Land Co* [1896] 2 Ch 743 and *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250. The company was the victim of the fraud, not the villain: see *Greener Solutions Ltd v Revenue and Customs Comrs* [2012] STC 1056.

The present case is distinguishable from *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391. It is not part of the ratio in the *Stone & Rolls* case

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that an insolvent "one man" company is barred from bringing a claim against its own director for breach of duty by reason that the knowledge of that director is attributed to the company.

There is nothing in the wording of section 213 of the Insolvency Act 1986 which indicates that Parliament intended to limit its territorial scope. Nor can any limitation on the territorial scope be read as being implied in the legislation: see *In re Paramount Airways Ltd* [1993] Ch 223. [Reference was also made to *In re Howard Holdings Inc* [1998] BCC 549; *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116; *Carman v The Cronos Group SA* [2006] BCC 451; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130; *Ex p Blain; In re Sawers* (1879) 12 Ch D 522 and *In re International Tin Council* [1987] Ch 419.]

The claims by the company for dishonest assistance and conspiracy and by its liquidators for fraudulent trading are not proceedings by HMRC for unpaid tax

Maclean QC replied.

The other defendants did not appear and were not represented.

The court took time for consideration.

30 July 2012. **SIR ANDREW MORRITT C** handed down the following judgment.

Introduction

1 A European Emissions Trading Scheme Allowance ("EUA"), commonly known as a "carbon credit", authorises the holder to emit one tonne of carbon dioxide. Carbon credits are of value to those whose industrial activities give rise to such emissions. They are traded on recognised exchanges and elsewhere. Until 31 July 2009 the supply of such credits was standard-rated for the purposes of VAT, since then they have been zero-rated.

2 Between 22 April and 21 July 2009 Bilta (UK) Ltd ("Bilta"), a company incorporated in England and registered for the purposes of VAT, traded in the purchase and sale of EUAs on the Danish Emissions Trading Agency. In that period it bought and sold in excess of 5·7m EUAs for some €294m. The following were the relevant features of those trades:

(a) The purchases were from traders carrying on business outside the UK, including Jetivia SA ("Jetivia") a company incorporated in Switzerland, and were therefore zero-rated for purposes of VAT.

(b) The sales were to persons in the UK registered for the purposes of VAT, including Pan 1 Ltd ("Pan"), none of whom had any use for an EUA in the conduct of its business, such supplies being subject to VAT at the standard rate.

(c) The price payable by Pan and the other purchasers net of VAT was less than that paid by Bilta to Jetivia and the other suppliers and was paid to them in full directly or through Bilta.

(d) Consequently Bilta was unable to pay the VAT due on its supplies because it had made no profit and the proceeds of its sales had been paid away to the overseas traders.

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A 3 Between 8 September 2009 and 20 January 2011 HMRC raised eight assessments on Bilta for VAT in the aggregate amount of £38m none of which were paid. On 29 September 2009 Messrs Hellard and Ingram ("the Liquidators") were appointed provisional liquidators of Bilta and commenced the proceedings now before me in the name of Bilta. On 25 November 2009 Bilta was compulsorily wound up and the Liquidators were so appointed. The proceedings were amended on 13 October 2011 to include claims by the liquidators under section 213 of the Insolvency Act 1986.

4 Thus the claimants in this action are Bilta and the Liquidators. The first and second defendants are the sole directors of Bilta, Mr Nazir and Mr Chopra. Mr Chopra owned all the issued shares in Bilta. The third to fifth defendants are Pan and its two directors Mr Khan and Mr Mahmood. The sixth and seventh defendants are Jetivia and its sole director Urs Brunschweiler ("Mr Brunschweiler"). The eighth defendant Trading House Group Ltd ("THG"), a company incorporated in the British Virgin Islands, was, like Jetivia, a seller of EUAs to Bilta. The amended particulars of claim, to which I shall refer in greater detail later, allege that the defendants (1) conspired to injure and defraud Bilta, and (2) were knowingly parties to the carrying on of the business of Bilta with intent to defraud the creditors of Bilta and other fraudulent purposes. The claimants seek to recover £38,733,444 with compound interest and costs.

5 Save for the ninth defendant, Mr Shafiq only Jetivia and Mr Brunschweiler are now participating in the proceedings. By an application notice issued on 22 December 2011 they sought orders that the claim be summarily dismissed against each of them on the grounds that (1) the claim made by Bilta is precluded by an application of the maxim ex turpi causa non oritur actio, (2) the claim of the Liquidators under section 213 of the Insolvency Act 1986 must fail because that section has no extraterritorial effect and (3) both claims are outside the jurisdiction of this court because, vis-à-vis Jetivia and Mr Brunschweiler, they constitute the enforcement of a revenue debt of a foreign state. I will consider those three points in due course. First it is necessary to consider the amended particulars of claim in greater detail and the recent decision of the House of Lords in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 on which counsel for Jetivia and Mr Brunschweiler placed much reliance in relation to the first point.

The amended particulars of claim

6 Paragraphs 1–13 set out the facts, substantially as I have already summarised them. The conspiracy is alleged in paragraph 14 in the following terms:

> "(a) During at least the period 22 April 2009 to 21 July 2009 a conspiracy existed to defraud and injure a company (and thereby to engage in fraudulent trading with an intention to defraud and injure that company) by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive that company of its ability to meet its VAT obligations on such trades namely to pass the money (which would otherwise have been available to that company to meet such

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liability) to accounts off-shore, including accounts of Jetivia and THG ('the Conspiracy').

"(b) As the conspirators knew, the fraudulent scheme involved breaches of fiduciary duty by a director or directors of such company.

"(c) Bilta was the defrauded company. This claim concerns Bilta's purchase and sale of EUAs between 22 April 2009 and 21 July 2009.

"(d) The parties to the conspiracy included Mr Brunschweiler and Jetivia . . .

"(e) It is not known on what date or dates the conspiracy was formed."

7 The fraudulent scheme referred to in paragraph 14(b) is described in detail in paragraph 15. So far as concerns Jetivia and Mr Brunschweiler it is alleged that:

"(1)(a) Mr Brunschweiler and Jetivia agreed to supply Bilta with EUAs, and to enter into documentation which showed Jetivia as having supplied Bilta even though in a number of cases the EUAs had been transferred direct to a First Line Buffer (see paragraph 22(8) below), for onward sale, knowing that Bilta would not be paying the VAT due on its onward sales.

"[(b)–(e)]

"(2) Bilta would then sell the EUAs on (or, where Bilta had not itself received the EUAs, produce paperwork showing the EUAs to have been sold on) at a price inclusive of VAT. In at least 46 cases Bilta sold the EUAs at a price which was less (net of VAT) than it had paid. Bilta sold to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the First Line Buffers'), which they were only able to do because Bilta had sold for a price net of VAT less than it had paid, (save that on at least 25 occasions Pan 1 immediately sold on at a loss—see Schedule 1). The First Line Buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.

"(3) The First Line Buffers would themselves often sell on to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the Second Line Buffers') (which they were only able to do because Bilta had sold for a price net of VAT less than it had paid). (Sometimes the First Line Buffers would sell onto the Second Line Buffers at a loss.) The Second Line Buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.

"(4) The money payable to Bilta by its purchasers (inclusive of the VAT element) would almost all be paid by the purchasers either (a) to Bilta and then paid by Bilta to Jetivia or (b) directly to Jetivia or to THG, or (c) to offshore accounts the account-holders of which have yet to be identified.

"(5) Jetivia's participation in the fraudulent scheme was not limited to transactions in which Bilta actually acquired EUAs from Jetivia . . . (a) In a good number of transactions Jetivia . . . entered into paperwork with Bilta which showed that Bilta had acquired and sold on EUAs from Jetivia . . . which EUAs the Registry showed as being transferred from . . . Jetivia directly to Bilta's purchaser or through a different intermediary company before transfer to Bilta's purchaser or through a different intermediary company before transfer to Bilta's purchaser (see paragraph 22(8) below). (b) Jetivia . . . would receive payments directly

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from the First Line Buffers depriving Bilta of the means of meeting its VAT liabilities.

"(6) The First Line Buffers included Pan 1 . . . The aforementioned First Line Buffers' participation in the fraudulent scheme was not limited to transactions in which EUAs were actually transferred at the Registry. In a good number of transactions the aforementioned First Line Buffers produced paperwork for the sale or purchase of EUAs when no transfer of EUAs was made at the Registry.

"(7) The design and effect of the fraudulent scheme was to render Bilta insolvent and unable to discharge its VAT liability.

"(8) The First Line Buffers and the Second Line Buffers (and the directors of each) knowingly participated in the fraudulent scheme and were parties to the Conspiracy."

8 Paragraphs 16–21 relate, respectively, to Bilta's lack of credit, the Danish Emissions Trading Agency registry, the amounts involved and the unpaid assessments to VAT made on Bilta. Paragraph 22 alleges that the trading by Bilta was neither bona fide nor consistent with legitimate commercial trading. Substantial particulars of that allegation are set out in sub-paragraphs (1)–(15).

9 Paragraphs 23–25B make specific allegations against Jetivia. Paragraph 23 alleges, with substantial particulars contained in sub-paragraphs (1)–(14), that the pattern of trading by Jetivia with or involving Bilta was not bona fide or consistent with legitimate commercial trading and, it should be inferred, was undertaken in furtherance of the conspiracy. The extent of that trading, as alleged in sub-paragraph (4), was €60m all of which was received by Jetivia from Bilta or from the purchasers from Bilta. Paragraph 24 asserts facts from which it is alleged that the court should infer that Jetivia knew that its dealings with Bilta were dishonest and part of a "missing trader" fraud. Paragraphs 25–25B assert facts in support of the allegations previously made.

10 Paragraphs 26–41 contain comparable allegations against THG, Pan and other buyers of EUAs from Bilta and the connections between all participants in the alleged conspiracy. Paragraphs 42–50 summarise the claims against Mr Nazir and Mr Chopra. So far as relevant they assert:

"42. At all material times Mr Nazir and Mr Chopra as the directing will and mind of Bilta failed to file any VAT return in respect of the period 1 April to 31 July 2009 on behalf of Bilta nor have they caused Bilta to account to HMRC for any sum in respect of the VAT charged on the Sales.

"43. In directing Pan 1 to pay the entirety or substantial part of the purchase price (including that element attributable to VAT) to parties other than Bilta, and in paying over its receipts to third parties without retaining the VAT element for payment to HMRC Mr Nazir and Mr Chopra as the directing will and mind of Bilta were depriving it of funds with which to discharge its liabilities, including its VAT liability in relation to the Sales.

"44. At all material times Mr Nazir and Mr Chopra owed fiduciary duties to act in the way they considered in good faith, would be most likely to promote the success of Bilta for the benefit of its members as a whole.

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"45. Pursuant to and in furtherance of the Conspiracy Mr Nazir and Mr Chopra, in breach of the aforesaid duties, conducted the Company's affairs as set out in paragraphs 11 to 43 above. The dishonest breaches of fiduciary duty were the deliberate arranging of the Company's affairs such that no part of its VAT liabilities would be discharged. The effect of the said trading arrangements as set out was that Bilta incurred VAT liabilities in respect of the Sales in the sum of not less than £38,733,444·04 none of which has been paid to HMRC. Mr Nazir and Mr Chopra failed to apply Bilta's funds for the purpose of discharging its lawful liabilities."

11 Paragraphs 57–64 contain the claims against Jetivia and Mr Brunschweiler. The latter is alleged to be the directing mind and will of Jetivia in paragraph 57. Paragraphs 58–60 assert liability as parties to the conspiracy and under section 213 of the Insolvency Act 1986. Paragraphs 61–64 allege:

"61. Further or in the alternative, Jetivia is liable to Bilta in equity for knowing receipt in the amount of the sums it received from Pan 1.

"62. Further or in the alternative, Jetivia and/or Mr Brunschweiler are liable to account to Bilta in equity for dishonestly assisting breaches of fiduciary duty by Mr Nazir and/or Mr Chopra. They knowingly and dishonestly assisted in the diversion of book debts due to Bilta or, alternatively, the VAT element thereof away from it.

"63. Jetivia and Mr Brunschweiler knew or were reckless as to the fact that the receiving of payments by Jetivia from Pan 1 would lead to Bilta being unable to discharge its VAT liability . . .

"64. Jetivia and/or Mr Brunschweiler are liable to account for the sum of £38,733,444·04 for dishonestly assisting each of Mr Nazir and/or Mr Chopra's breaches of fiduciary duty."

Stone & Rolls Ltd v Moore Stephens

12 In this case Moore Stephens, a firm of chartered accountants, was the auditor of Stone & Rolls Ltd ("Stone"). Ostensibly the director of Stone was a resident in Sark and its entire share capital was vested in a company registered in the Isle of Man. In fact it was under the sole control of Mr Stojevik as the beneficial owner of the shares and an attorney of the sole director. Under such control Stone fraudulently extracted money from a Czech bank. Details of the fraud are sufficiently summarised in the judgment of Langley J quoted by Rimer LJ [2009] AC 1391, para 6. The money thereby obtained was applied for the purposes of Mr Stojevik, not those of Stone. Judgment for damages for deceit was obtained by the bank against Stone which it could not meet. Stone was wound up and proceedings against the auditors were commenced by the liquidator. In those proceedings Stone alleged that in breach of its duties in both contract and in tort the auditors had negligently failed to detect various aspects of the fraudulent scheme with the result that the activities of Mr Stojevik continued, Stone fraudulently extracted further money from the Czech bank and thereby incurred further liability which it could not satisfy. The loss claimed was, in substance, the additional liability incurred after the end of each audit period in which it was alleged that the frauds should have been discovered. Moore Stephens applied to the court to have the claim

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A struck out or summarily dismissed on the basis that it was barred by the maxim ex turpi causa non oritur actio. The turpis causa relied on was the fraud practised on the Czech Bank, see the argument of counsel for Moore Stephens [2009] AC 1391, 1444C–D. Langley J refused to do so and dismissed the application. Moore Stephens successfully appealed to the Court of Appeal. Stone then appealed to the House of Lords. That appeal
B was, by a majority (Lord Phillips of Worth Matravers, Lord Brown of Eaton-under-Heywood and Lord Walker of Gestingthorpe) dismissed. The minority (Lord Scott of Foscote and Lord Mance) considered that the appeal should be allowed. It is necessary to refer to all five speeches in some detail.

13 It is convenient to start with that of Lord Walker. After setting out the facts and describing the issue he noted at para 131 that the main area of
C dispute was whether the criminal acts and intentions of Mr Stojevik should be attributed to Stone. He concluded at para 136 that Stone was primarily, not merely vicariously, liable to the Czech bank for the frauds of Mr Stojevik. In a long section (paras 137–168) under headings of "The *Hampshire Land* principle" (see *In re Hampshire Land Co* [1869] 2 Ch 743), "Sole actors and secondary victims" and "The modern cases", Lord Walker
D pointed out at para 161 that:

> "In this appeal, by contrast, the issue is the attribution to S & R of a dishonest state of mind. Where that is the issue the notion of a one-man company does become meaningful, as *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 demonstrates. In this context I would treat the expression as covering cases where there is one single dominant
> E director and shareholder (such as Mr Tan in *Royal Brunei*, Mr Golechha in *Berg Sons & Co Ltd v Mervyn Hampton Adams* [2002] Lloyd's Rep PN 41, or Mr Stojevic in the present case) even if there are other directors or shareholders who are subservient to the dominant personality (such as Mr Tan's wife in *Royal Brunei*, the inactive solicitor-director in *Berg*, or S & R's nominee directors). I would also treat it as covering cases where there are two or more
> F individual directors and shareholders acting closely in concert, such as the anonymised directors in *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 or Mr Chappell and Mr Palmer in *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68. It may be simplest to propose a test in negative terms, on the lines of what Hobhouse J said in *Berg*, that is a company which has no individual concerned in its management and
> G ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned."

14 After considering various US cases Lord Walker concluded in para 167:

> "In the case of a one-man company (in the sense indicated above)
> H which has deliberately engaged in serious fraud, I would follow *Royal Brunei* (and the strong line of United States and Canadian authority) in imputing awareness of the fraud to the company, applying what is referred to in the United States as the 'sole actor' exception to the 'adverse interest' principle."

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15 In para 168 Lord Walker added:

"In particular I would apply the 'sole actor' principle to a claim made against its former auditors by a company in liquidation, where the company was a one-man company engaged in fraud, and the auditors are accused of negligence in failing to call a halt to that fraud . . . On the assumption that the auditors did owe a duty of care to S & R, it was a duty owed to that company as a whole, not to individual shareholders, or potential shareholders, or current or prospective creditors, as this House decided in *Caparo Industries plc v Dickman* [1990] 2 AC 605. If the only human embodiment of the company already knew all about its fraudulent activities, there was realistically no protection that its auditors could give it."

16 Lord Walker then considered the position of "secondary victims". He concluded in paras 173–174:

"173. . . . There is in my opinion a clearer and firmer basis on which to determine what (if any) significance to give to the notion of a company being the secondary victim of the fraud (aimed at a third party) of one or more of its directors. It is necessary to keep well in mind why the law makes an exception (the adverse interest rule) for a company which is a primary victim (like the Belmont company, which was manipulated into buying Maximum at a gross overvaluation). The company is not fixed with its directors' fraudulent intentions because that would be unjust to its innocent participators (honest directors who were deceived, and shareholders who were cheated); the guilty are presumed not to pass on their guilty knowledge to the innocent. But if the company is itself primarily (or directly) liable because of the 'sole actor' rule, there is ex hypothesi no innocent participator, and no one who does not already share (or must by his reckless indifference be taken as sharing) the guilty knowledge. That is consistent with the analysis by Rix J in *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262. In that case Mr Browne was not the directing mind of JDW, which was not a one-man company; Rix J accepted that the position might have been different if it had been.

"174. I would therefore limit my ground of decision in this appeal to the proposition that one or more individuals who for fraudulent purposes run a one-man company (in the sense described above) cannot obtain an advantage by claiming that the company is not a fraudster, but a secondary victim."

17 Finally, on this aspect of the appeal Lord Walker considered whether the liquidation of the "one man company" made any difference. He concluded, at para 184:

"It was argued for the appellants that the public policy defence should not bar claims brought by a company in insolvent liquidation, where the creditors were innocent parties who had been defrauded by Mr Stojevic. If that were right, it would create a very large gap in the public policy defence, since most fraudsters (individual and corporate) become insolvent sooner or later and have liabilities to those whom they have defrauded. Mr Brindle conceded that if Mr Stojevic had carried out his frauds directly (and not through a one-man company) neither he nor his

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A trustee in bankruptcy could have resisted the public policy defence. That conclusion was reached by Langley J [2008] Bus LR 304, para 65(2) and is clearly correct (see Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156). There is no good reason to apply a different rule to a company in liquidation. Apart from special statutory claims in respect of misfeasance, wrong trading and so on, it cannot assert B any cause of action which it could not have asserted before the commencement of its liquidation, as Mr Brindle concedes. That is especially true in the context of the duties of an auditor, which are not owed to a company's creditors."

18 Lord Brown of Eaton-under-Heywood was of the same opinion. He concluded at para 201 that in the case of a one man company the company C can be in no better position than the one man, and the liquidator in no better position than either of them, to resist the ex turpi causa defence.

19 Lord Phillips of Worth Matravers described at para 14 the fallback submission of counsel for Moore Stephens to be that where there is no human embodiment of the company other than the fraudster attribution of his fraud to the company is inevitable. In para 18 he summarised his conclusions in the following six propositions:

D

"(1) Under the principle of ex turpi causa the court will not assist a claimant to recover compensation for the consequences of his own illegal conduct.

"(2) This appeal raises the question of whether, and if so how, that principle applies to a claim by a company against those whose breach of E duty has caused or permitted the company to commit fraud that has resulted in detriment to the company.

"(3) The answer to this question is not to be found by the application of *Hampshire Land* or any similar principle of attribution. The essential issue is whether, in applying ex turpi causa in such circumstances, one should look behind the company at those whose interests the relevant duty is intended to protect.

F "(4) While in principle it would be attractive to adopt such a course, there are difficulties in the way of doing so to which no clear resolution has been demonstrated.

"(5) On the extreme facts of this case it is not necessary to attempt to resolve those difficulties. Those for whose benefit the claim is brought fall outside the scope of any duty owed by Moore Stephens. The sole person G for whose benefit such duty was owed, being Mr Stojevic who owned and ran the company, was responsible for the fraud.

"(6) In these circumstances ex turpi causa provides a defence to the claim."

20 Thus, in his fifth proposition Lord Phillips agreed with Lords Walker and Brown. He returned to this aspect of the appeal in paras 67 and 68 H where he said:

"67. For the reasons that I have already given, I consider that the real issue is not whether the fraud should be attributed to the company but whether ex turpi causa should defeat the company's claim for breach of the auditor's duty. That in turn depends, or may depend, critically on

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whether the scope of the auditor's duty extends to protecting those for whose benefit the claim is brought.

"68. One fundamental proposition appears to me to underlie the reasoning of Lord Walker and Lord Brown. It is that the duty owed by an auditor to a company is owed for the benefit of the interests of the shareholders of the company but not of the interests of its creditors. It seems to me that here lies the critical difference of opinion between Lord Walker and Lord Brown on the one hand and Lord Mance on the other. Lord Mance considers that the interests that the auditors of a company undertake to protect include the interests of the creditors."

21 Lord Phillips returned to this aspect of the case in para 86 where he said:

"The scope of Moore Stephens' duty is not directly in issue on this appeal. What is in issue is whether ex turpi causa provides a defence to S & R's claim that Moore Stephens was in breach of duty. That is not, however, a question that I have been able to consider in isolation from the question of the scope of Moore Stephens's duty. I have reached the conclusion that all whose interests formed the subject of any duty of care owed by Moore Stephens to S & R, namely the company's sole will and mind and beneficial owner Mr Stojevic, were party to the illegal conduct that forms the basis of the company's claim. In these circumstances I join with Lord Walker and Lord Brown in concluding that ex turpi causa provides a defence."

22 In order to appreciate the full import of the speeches of those in the majority, in particular Lord Phillips, it is helpful to refer briefly to the speech of Lord Mance. Lord Mance considered at para 263 that Moore Stephens's argument and the majority conclusion overlooked a critical distinction between a company which is solvent and a company which is insolvent at the audit date. After dealing with two other submissions he returned to this point at para 265 where he said:

"The fact that S & R was insolvent at each audit date is, in contrast, in my opinion critical. The powers of directors and shareholders in circumstances of insolvency or potential insolvency are qualified (as described in paras 235–240 above). The issue as between the company and its auditors is whether the auditors' duty to the company extends, like the directors', beyond the protection of the interests of shareholders in a situation where the auditors ought to have detected that the company was (in fact, as a result of the fraud which the auditors ought to have discovered) insolvent. Despite the immense and highly skilled attention that the appeal has had generally, both prior to and during its presentation before the House, I fear that the centrality of this point may have been a little obscured by the spread of argument over other issues . . ."

He concluded at para 271 that Moore Stephens could not invoke the maxim ex turpi causa or deny causation by reference to the knowledge of and involvement in the fraud of Mr Stojevic if Moore Stephens ought, with proper skill and care, to have detected that Stone was subject to a continuing scheme of fraud in circumstances in which Stone was insolvent and being made increasingly so. Lord Scott of Foscote was in general agreement with Lord Mance.

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A 23 I will return to the decision in the *Stone & Rolls* case in the light of the submissions of counsel for the parties in this case. At this stage I would make the following observations. (1) The turpis causa relied on by Stone was the fraud practised on the Czech bank by Stojevic. (2) The duty of the auditors did not, in the view of the majority, extend to the protection of creditors where the company was or was becoming insolvent. (3) Stone was a one man company within Lord Walker's formulation.

B

The claim of Bilta

24 I turn now to the first point underlying the application of Jetivia and Mr Brunschweiler. Is the claim against them made by Bilta barred by the principle of ex turpi causa? Their counsel submits, in summary, that it is. He contends that I am bound by the decision of the House of Lords in the C *Stone & Rolls* case and that the ratio decidendi of that decision is applicable to the facts of this case. He relies on the facts that Bilta was under the control of Mr Nazir and Mr Chopra and that Mr Chopra was beneficially entitled to all the shares in Bilta. It follows, he submits, that Bilta was a "one man company" in the sense explained by Lord Walker to which the frauds of Mr Nazir and Mr Chopra are to be attributed. Further he relies on D paragraphs 14, 15, 22 and 23 of the amended particulars of claim (quoted or referred to above) as demonstrating that Bilta is relying on those frauds in its claim against them.

25 Counsel for Bilta does not dispute that if the ratio decidendi in the *Stone & Rolls* case is applicable to the facts of this case then the result for which counsel for Jetivia and Mr Brunschweiler contends would follow. He submits that that condition is not satisfied for two reasons. First, Bilta was E the victim of the fraud not the villain. In that connection he relies on the decision of Warren J in *Greener Solutions Ltd v Revenue and Customs Comrs* [2012] STC 1056. Second, the relevant duty owed to Bilta was that of the directors, Mr Nazir and Mr Chopra, not of auditors and extended to the interests of creditors. He relies on the provisions of sections 172 and 180 of the Companies Act 2006.

F 26 *Greener Solutions Ltd v Inland Revenue Comrs* [2012] STC 1056 also concerned a "missing trader" fraud. In that case Greener Solutions ("GSL") sought repayment of the input tax incurred in respect of mobile telephones it had bought and then exported. The individual who had effected all the relevant transactions on behalf of GSL was Oliver Murray. Murray knew of the fraud committed by Jag-Tec, the missing trader. The question was whether his knowledge should be imputed to GSL. Warren J G concluded at para 43 that it should be because Murray had effectively implemented the fraud on behalf of GSL but the fraud was not aimed at GSL. Counsel for Bilta submits that this decision exemplifies the limitation on the ratio decidendi of the *Stone & Rolls* case for which he contends.

27 Section 172 of the Companies Act 2006 provides:

H "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and

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others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

"(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

"(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

28 It is not disputed that in circumstances where the company is or is likely to become insolvent the requirement to consider and act in the interests of creditors is imposed on the directors of the company. As Bilta never had any assets of its own of any substance but entered into commitments of considerable value this duty was operative on Mr Nazir and Mr Chopra at all material times.

29 Section 180 of the Companies Act 2006 provides:

"(1) In a case where— (a) section 175 (duty to avoid conflicts of interest) is complied with by authorisation by the directors, or (b) section 177 (duty to declare interest in proposed transaction or arrangement) is complied with, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company. This is without prejudice to any enactment, or provision of the company's constitution, requiring such consent or approval.

"(2) The application of the general duties is not affected by the fact that the case also falls within Chapter 4 (transactions requiring approval of members), except that where that Chapter applies and— (a) approval is given under that Chapter, or (b) the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with section 175 (duty to avoid conflicts of interest) or section 176 (duty not to accept benefits from third parties).

"(3) Compliance with the general duties does not remove the need for approval under any applicable provision of Chapter 4 (transactions requiring approval of members).

"(4) The general duties— (a) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty, and (b) where the company's articles contain provisions for dealing with conflicts of interest, are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions.

"(5) Otherwise, the general duties have effect (except as otherwise provided or the context otherwise requires) notwithstanding any enactment or rule of law."

Counsel for Bilta relies on section 180(5) as demonstrating that there is no limitation on the duty imposed by section 172(3) in cases of "one man" companies.

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30 The riposte of counsel for Jetivia and Mr Brunschweiler involved a detailed examination of the amended statement of claim in order to establish that Bilta was relying on its own wrong. He contended that the allegations made in paragraphs 43 and 45, quoted in para 10 above, were, inevitably, attributable to Bilta and one consequence of such attribution is that Bilta must have been the villain and not the victim. He accepted the further consequence of his submission, namely, that the defence of ex turpi causa would be available to Mr Nazir and Mr Chopra too.

31 In relation to section 180 of the Companies Act 2006 counsel for Jetivia and Mr Brunschweiler pointed out that subsection 4(a) preserved the efficacy of general rules of law to qualify the general duties of a director of a company. He contended that the defence of ex turpi causa was available to any claim based on any breach of any duty. Accordingly, so he submitted, the defence must be available to a claim based on a breach of the duty imposed or recognised by section 172(3).

32 I accept the submission of counsel for Bilta to the effect that the facts of this case distinguish it from those of *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 in both the respects on which counsel relies. It is clear from the paragraphs in the amended particulars of claim I have set out above that the conspiracy alleged in paragraph 14 was aimed at Bilta; that is what paragraph 14(a) and (c) assert. The conspiracy involved denuding Bilta of its assets so that it would be unable to satisfy its liability to HMRC for VAT at the standard rate on its sales of EUAs to Pan and others, as alleged in paragraph 15(7). This was achieved by ensuring that the moneys due to Bilta in respect of those sales were paid directly or indirectly to Jetivia or the other overseas entities from which Bilta bought the EUAs, as alleged in paragraph 15(4). It is not alleged that Bilta was a party to or beneficiary of the conspiracy.

33 The conspiracy so alleged subjected Mr Nazir and Mr Chopra to the duty imposed by section 172(3) of the Companies Act and its infringement by them with, as alleged, the active, knowing and fraudulent participation of Jetivia and Mr Brunschweiler, amongst others. Thus the present and future creditors of Bilta were within the scope of the directors' duty. It is true that, as their counsel submitted, Jetivia and Mr Brunschweiler are one step removed from Mr Nazir and Mr Chopra. But if the defence of ex turpi causa is not available to them I do not understand how it can be available to those who fraudulently conspired with them to breach their duties as directors of Bilta.

34 Accordingly, I would start by testing the propositions for which counsel for Jetivia and Mr Brunschweiler contends by considering their application to the case against Mr Nazir and Mr Chopra. It was not disputed that if an individual agent defrauds his individual principal the defence of ex turpi causa would not be available as a defence to a claim against the agent by the principal. It would be the same in the case of a company principal. and individual agent except where, as in the *Stone & Rolls* case, the company can be identified as the agent in corporate form. That, as I understand it, is the basis for the "one man" company exception applied by Lords Walker and Brown.

35 But the conclusion of the majority in the *Stone & Rolls* case also depended on the fact that the scope of the auditors' duty was restricted to the company and those interested in it as members. As Lord Walker pointed out

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in para 168: "If the only human embodiment of the company already knew all about its fraudulent activities, there was realistically no protection that its auditors could give it." Lord Brown, at para 205, agreed with Lord Walker. The fifth proposition enunciated by Lord Phillips at para 18, and the further statements made by him in paras 67, 68 and 86, which I have quoted in paras 19–21 above, emphasise the need to consider the scope of the duty alleged to have been infringed. None of them referred to section 172 of the Companies Act 2006.

36 In my judgment, the ratio decidendi of the *Stone & Rolls* case is not applicable to cases in which the claim is based on a breach of duty the scope of which encompasses persons or interests other than the fraudsters in corporate form. None of the majority so held. Whether the true view is that in such a case the company is not a "one man" company for the purposes of that claim or that the scope of the duty extends to persons or interests not implicated in the fraud may be a moot point. In either case my conclusion is consistent with the views of Lord Mance at para 265, which I have quoted in para 22 above.

37 I do not suggest that creditors of a company not in liquidation have any proprietary interest in the assets of the company, but their interests as creditors are within the scope of the duties of directors at least where the company is or may become insolvent. Section 172 of the Companies Act 2006 is statutory recognition of the principle to that effect recognised by Dillon LJ in *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. In my view, therefore, the defence of ex turpi causa would not be available to Mr Nazir and Mr Chopra as a defence to any of the claims made against them in paragraphs 42–45 of the amended particulars of claim quoted in para 10 above.

38 In my judgment Jetivia and Mr Brunschweiler can be in no better position. Paragraphs 61–64 of the amended particulars of claim, quoted in para 11 above, assert, in addition to participation in the conspiracy, their dishonest assistance in the breaches of the duties of Mr Nazir and Mr Chopra. If the defence of ex turpi causa is not available to Mr Nazir and Mr Chopra I am unable to detect any basis on which it could be available to those who dishonestly conspired with them to break it. In my view the defence of ex turpi causa is not available to Jetivia and Mr Brunschweiler as a defence to the claim brought against them by Bilta. Accordingly, I shall not dismiss that claim.

Section 213 of the Insolvency Act 1986

39 That section is in the following terms:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> "(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

40 The claim was amended in October 2011 so as to join the Liquidators as the second and third claimants. The particulars of claim were

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A amended so as to include a claim against all the defendants under that section. Jetivia and Mr Brunschweiler do not allege that such claim is not properly pleaded against them. Nor do they assert that they are not amenable to service of the amended claim. They contend that the section does not have extra territorial application so as to cover their activities outside the United Kingdom constituted by the sale of EUAs on the Danish
B Emissions Trading Agency. They rely on the well established principle of statutory construction that statutes are presumed not to have such an effect unless the express words of the statute or a clear implication indicate otherwise, see *Ex p Blain; In re Sawers* (1879) 12 Ch D 522; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130. Counsel for Jetivia and Mr Brunschweiler submits that there is no authority to the effect that section 213 can have extraterritorial effect and there are no clear words or necessary implication
C to justify me in concluding that it does. By analogy they rely on the decision of the House of Lords setting aside an order under CPR Pt 71 requiring the director of a company resident in Greece to attend for cross-examination as to the company's assets, see *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90.

41 The general principle is not in doubt. Counsel for the Liquidators
D contends that the context of insolvency and the unqualified references to "any business" and "any person" do entitle and require the court to conclude that section 213 does have extraterritorial effect. He relies on a number of decided cases as examples. Thus:

(1) Section 133 of the Insolvency Act 1986 (orders for the public examination of officers of a company in liquidation) was held to have extraterritorial effect in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345.

E (2) Section 238 of the Insolvency Act 1986 (orders setting aside transactions at an undervalue) was held to have extraterritorial effect in *In re Paramount Airways Ltd* [1993] Ch 223.

(3) Section 423 of the Insolvency Act 1986 (transactions defrauding creditors) was held to have extraterritorial effect in *Revenue and Customs Comrs v Begum* [2011] BPIR 59.

F (4) Section 214 Insolvency Act 1986 (wrongful trading) was assumed to have extraterritorial effect in *In re Howard Holdings Inc* [1998] BCC 549.

(5) Section 213 was assumed to have extraterritorial effect in *Carman v The Cronos Group SA* [2006] BCC 451; *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.

42 The starting point must be the nature of corporate insolvency. This
G was described by Millett J in *In re International Tin Council* [1987] Ch 419, 446–447:

> "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation. In the case of a foreign company, therefore, the fact that other countries, in accordance with their own rules of private international law,
H may not recognise our winding up order or the title of a liquidator appointed by our courts, necessarily imposes practical limitations on the consequences of the order. But in theory the effect of the order is world-wide. The statutory trusts which it brings into operation are imposed on all the company's assets wherever situate, within and beyond the jurisdiction. Where the company is simultaneously being wound up in

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the country of its incorporation, the English court will naturally seek to avoid unnecessary conflict, and so far as possible to ensure that the English winding up is conducted as ancillary to the principal liquidation. In a proper case, it may authorise the liquidator to refrain from seeking to recover assets situate beyond the jurisdiction, thereby protecting him from any complaint that he has been derelict in his duty. But the statutory trusts extend to such assets, and so does the statutory obligation to collect and realise them and to deal with their proceeds in accordance with the statutory scheme."

43 Although that passage must now be read in the light of the provisions, where they apply, of the UNCITRAL Model Law on Cross Border Insolvency and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1), the underlying theory of corporate liquidation remains as Millett J described it. Its international effect was recognised and given further effect by Sir Donald Nicholls V-C in *In re Paramount Airways Ltd* [1993] Ch 223. That case concerned a transaction at an undervalue within section 238 of the Insolvency 1986 effected by a transfer to a bank in Jersey. Proceedings were taken under that section against the bank. The bank claimed that the section did not have extra territorial effect. The Vice-Chancellor disagreed. He noted that the section did not purport to have any territorial limitation: p 235G–H. At p 239 he added:

"In my view the solution to the question of statutory interpretation raised by this appeal does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression 'any person' in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of *Ex p Blain* (1879) 12 Ch D 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."

44 Though stated in relation to section 238 the principles expressed by Sir Donald Nicholls V-C then are equally, if not more, applicable to this case some twenty years later. If a company is involved in trade across state boundaries and that trade is designed to defraud its creditors there is no more reason to confine the operation of the section to those within the jurisdiction than in cases where the transaction in question is at an undervalue. In the case of both sections 213 and 238 the object of the section is "any person". Both sections confer on the court a discretion as to what order to make. Both sections, and many others, are directed to recovering assets, wherever they may be, or compensation for the benefit of all the creditors of the company in liquidation whether resident in the United Kingdom or elsewhere. I would hold that section 213 is of extraterritorial

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effect and reject the second ground advanced in support of this application by counsel for Jetivia and Mr Brunschweiler.

Revenue debt

45 It is a well-known principle of private international law that the courts in England have no jurisdiction, directly or indirectly, to enforce a revenue law of a foreign state, see *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), vol 1, rule 3. There is no evidence as to the laws of Switzerland. I assume it to be to the same effect.

46 It was submitted by counsel on behalf of Jetivia and Mr Brunschweiler that the claim made in this action by both Bilta and the Liquidators seeks to enforce the claim of HMRC for VAT under the VAT Act duly assessed on Bilta. He contended that this was a ground for distinguishing *In re Paramount Airways Ltd* [1993] Ch 223 and, in addition, a reason summarily to dismiss this claim "by way of comity".

47 I reject this submission. First, the claim is not the enforcement directly or indirectly of a revenue claim. The claimants seek to recover compensation for a conspiracy to defraud it wherewith to provide a fund from which HMRC and any other creditor may be paid a dividend in respect of their debts. Second, even if it is a revenue claim, it is the claim of HMRC not of the revenue authorities of some foreign state. There is no basis for refusing to enforce the proper claims of HMRC in the courts of England and Wales whether based on comity or otherwise. Third, even if the claimants do seek to enforce the claim of HMRC, no question of comity arises. The claimants are not seeking to enforce the revenue laws of Switzerland and this is a court of England and Wales not of Switzerland! For all these reasons I see no reason to distinguish the *Paramount Airways* case either.

Summary of conclusions

48 Having rejected each of the arguments summarised in para 5 above I will dismiss this application. I would make two further observations. First, the fact that there is, in accordance with my conclusions, a claim against these defendants both at common law and under section 213 of the Insolvency Act 1986 is no reason for extending the defence of ex turpi causa so as to provide a defence to the claim by Bilta. There will be cases in which a company is defrauded to the detriment of creditors but is not being wound up. Second, there is no risk of any of the malefactors, such as Mr Chopra, benefiting from any judgment Bilta or the Liquidators may obtain. The claim under section 213 necessarily gives rise to the discretion of the court under section 213(2). Any damages or specific relief granted in respect of Bilta's claim can be limited and directed to the creditors (and innocent shareholders if any) by the operation of the principle of *In re VGM Holdings Ltd* [1942] Ch 235 as applied in *Selangor United Rubber Estates Ltd v Cradock (No 4)* [1969] 1 WLR 1773 and the orders made in *Kota Tinggi (Johore) Rubber Co Ltd v Burden (Note)* [1970] 1 WLR 388 and *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602.

Application refused.

CELIA FOX, Barrister

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APPEAL

By an appellant's notice filed on 7 September 2012 the sixth and seventh defendants appealed, pursuant to permission granted by the judge, on the following grounds, inter alia. (1) The judge had erred in holding, applying *In re Hampshire Land Co* [1896] 2 Ch 743, that the knowledge of the first and second defendants did not fall to be imputed to Bilta and thus that Bilta's claim was not barred on the ground of ex turpi causa non oritur actio, since the *Hampshire Land* case only applied where the company was the victim of the fraud and had no application to one-man companies, which Bilta was. (2) The judge ought to have held that Bilta's claim fell foul of the ex turpi causa rule on the binding authority of *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391. (3) The judge had erred in holding that the defendants' application for summary dismissal of the claim involved an extension of the defence of ex turpi causa. (4) The judge had erred in distinguishing the position of Bilta from that of the other conspirators when Bilta was in fact one of the villains of the fraud rather than a victim. (5) The judge had wrongly approached the ambit of the directors' duties, when the duties which Bilta's directors had owed under section 172(3) of the Insolvency Act 1986, in a situation of impending insolvency, had been to the company's creditors, the true victim being the company's only creditor, the Revenue and Customs Commissioners, not Bilta itself. The primary issue which arose was not whether any duty had been owed to the creditors but whether the *company* could sue in respect of conduct to which, by application of the ordinary rules of attribution, it was knowingly a party. (6) The judge had erred in applying the *Hampshire Land* exception to a one-man company, which was to treat the company as having no mind of its own and as being incapable of wrongdoing, which was contrary to principle: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, para 189. (7) The judge had erred in holding that the present case was analogous to the case of principal and agent, when the knowledge of an agent who was defrauding his principal was not attributed to the principal so as to bar an action by the principal against the agent. However, in such a case the principal had his own innocent state of mind whereas a one-man company had no state of mind separate from that of its fraudulent alter ego. (8) In relation to the interpretation of section 213 of the Insolvency Act 1986, the judge had erred in failing to give sufficient weight to the fundamental principle of statutory construction that an Act of Parliament was presumed not to apply outside the English territorial jurisdiction unless it appeared from express words or necessary implication that Parliament intended the statute to apply extraterritorially. Section 213 contained no express provision concerning its territorial extent. (9) The judge had erred in holding that the conclusion that section 213 applied extraterritorially was supported by the use of the words "any person" in that section, and in relying on the fact that other provisions of the insolvency legislation had been held to have extraterritorial effect when each provision had to be considered individually. (10) The judge ought to have held that section 213 had no application to the sixth and seventh defendants who were neither English nor resident nor present in England, and who did not do business or own property in this country.

By a respondent's notice filed on 21 September 2012 the claimants asked the court to uphold the judge's decision on the additional grounds, among others, that (1) section 180(5) of the Companies Act 2006 prevented the

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application to the facts of the pleaded defence of ex turpi causa non oritur actio; (2) the sole director did not have the authority to take or pay away the company's assets so his acts were not acts of the company, his fraud could not be said to be the fraud of the company and therefore he could not plead ex turpi causa against the company; (3) the court had jurisdiction to apply section 213 of the Insolvency Act 1986 to the sixth and seventh defendants as they had voluntarily conferred jurisdiction on the court to do so, and section 213 did not clearly limit the court's jurisdiction so as to prevent it from exercising jurisdiction over foreigners abroad; and (4) any presumption against extraterritoriality did not apply in a statute imposing a world-wide statutory regime on the insolvent company operating on all assets anywhere and all creditors everywhere.

The facts are stated in the judgment of Patten LJ.

Alan Maclean QC and *Colin West* (instructed by *Macfarlanes LLP*) for the sixth and seventh defendants.

The maxim, ex turpi causa non oritur actio, precludes a company making claim for losses allegedly suffered by reason of a fraud which the company itself carried out. Sincethe first and second defendants had complete control over the company and used it to perpetrate the fraud, the company was guilty of participating in a conspiracy to cause loss to the revenue, the victim of the fraud. As its sole directors and controllers the knowledge of the first and second defendants is imputed to the company: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The exception to that rule of attribution applies where the company's directors are committing a fraud or other wrong against the company: see *In re Hampshire Land Co Ltd* [1896] 2 Ch 743. That exception only applies where the company is the victim of the wrongdoing of its fraudulent director, so that guilty knowledge is not attributed to the innocent directors: see *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250. Where the company is one of the wrongdoers with an essential part in the fraudulent scheme, or where there are no innocent directors or shareholders in the company who are harmed by the wrongdoing of the fraudulent director, the *Hampshire Land* exception has no application. A company cannot bring itself within the *Hampshire Land* exception by an assertion in the pleadings that it was a victim when in truth it was a villain: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, 1448, para 5. The victim of a carousel VAT fraud, for the purposes of the application of the *Hampshire Land* exception, is the revenue, not any of the companies participating in the carousel who are all parties to the same fraudulent conspiracy: see *Greener Solutions Ltd v Revenue and Customs Comrs* [2012] STC 1056. The losses suffered by the company are irrecoverable since they were entirely dependent on its own criminality, which involved the common law offence of cheating the revenue: see *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174. The claimant company is an instrument of the fraud, the target being the revenue, and cannot be described as a secondary victim: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391; *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 and *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] 2 BCLC 328. Although persons guilty of criminal activity are not permitted to sue each other, liability may be apportioned in contribution

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proceedings to ensure that ill-gotten gains are disgorged and fairness is achieved: see *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 and *Downs v Chappell* [1997] 1 WLR 426. A

The *Hampshire Land* exception to the attribution rule does not apply to one man companies because there are no innocent directors or shareholders to whom it would be unfair to attribute the guilty knowledge of the fraudulent director: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, paras 173–174. A "one man company" as described in the *Stone & Rolls* case is one all the directors and shareholders of which are knowing participants in the fraud or other wrongdoing. The claimant company was a one man company in that sense and therefore does not fall within the *Hampshire Land* exception. The state of mind of the fraudster is the state of mind of the company in a one man company: see *R v McDonnell* [1966] 1 QB 233; *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 and *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. Once the knowledge of the controlling mind has been attributed to the company, the company cannot claim for alleged losses caused by its own wrong because of the maxim ex turpi causa non oritur actio. That is a principle of public policy which protects the coherence and integrity of the law where a cause of action is founded on an immoral or illegal act: see *Holman v Johnson* (1775) 1 Cowp 341, 343; *Tinsley v Milligan* [1992] Ch 310; *Cross v Kirkby* The Times, 5 April 2000; *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766 and *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391. B C D

A claim by a company in liquidation is still brought by the company, not its creditors, and a company in liquidation has only those causes of action it had before it entered liquidation. The nature of the particular fraud perpetrated required the companies involved in it to become insolvent and unable to meet their VAT liabilities in order for the fraudsters to retain the fruits of their wrongdoing. To exclude attribution of knowledge in the case of impending insolvency would allow a company to be treated as having no knowledge of the fraud and thus as innocent of it even when it has no innocent directors or shareholders untainted by the fraud. The issues of insolvency and the attribution of knowledge are quite separate: see *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391. E F

Where an insolvent company is defrauded to the detriment of its creditors, section 213 of the Insolvency Act 1986 provides the liquidators with a statutory cause of action enabling them to pursue both the former directors of the company and third parties who were party to the company's fraudulent trading. Section 213 applies to the directors or former directors of the company in question, wherever they are: see *In re Howard Holdings Inc* [1998] BCC 549. It also applies to third parties who are in the jurisdiction or have a sufficient connection with it. To that extent it is extraterritorial. It does not, however, apply to third parties out of the jurisdiction who have no connection with the jurisdiction. G

A statute is presumed to apply only within the territorial jurisdiction unless express words or necessary implication dictate otherwise: see *Ex p Blain; In re Sawers* (1879) 12 Ch D 522, 526; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145 and *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90. The sixth and seventh defendants are not subject to section 213 of the 1986 Act unless it has extraterritorial effect. Section 213 contains no express words to indicate H

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A that it is intended to have extraterritorial effect and no such intention is to be implied. *In re Paramount Airways Ltd* [1993] Ch 223 is not a binding authority on the interpretation of section 213 because it concerned section 238 of the 1986 Act, which involves different considerations: see *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [1999] 2 BCLC 101. The reference to "any persons" in both sections does not imply extraterritorial effect: those
B are general words which are to be taken to apply only within the territory unless a contrary intention is irresistibly implied: see *In re Tucker (RC) (A Bankrupt), Ex p Tucker (KR)* [1990] Ch 148. Section 213 does not apply to persons out of the jurisdiction who were not present within the jurisdiction at the material time, do not and did not trade within the jurisdiction and own no property there. Since the English court would not enforce foreign revenue laws in England, as a matter of comity it should not
C entertain a claim sanctioning the enforcement of English revenue laws in a foreign jurisdiction.

The in personam jurisdiction of the court is separate from the subject matter jurisdiction. Whether a defendant submits to the subject matter jurisdiction in relation to the claim under section 213 is a question of fact and ought therefore to be raised before the first instance judge: see *In re*
D *Dulles Settlement; Dulles v Vidler* [1951] Ch 265. An argument that the defendant has submitted to the jurisdiction under section 213 and cannot be heard to challenge that requires evidence, and as such cannot be raised for the first time in a respondent's notice to the Court of Appeal.

Christopher Parker QC and *Rebecca Page* (instructed by *Gateley LLP*) for the claimants.

E Where a fraud is perpetrated against a company by its directors, not against a third party, so that the company has a claim as between principal and agent, *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 has no application. The claimant company incurred liabilities for VAT but as part of the defendants' conspiracy did not receive from its customers the purchase payments which would have enabled it to pay the VAT. The fraudulent scheme defrauded the company by allowing it to incur substantial liabilities
F and direct its assets to be paid offshore. The fraud did not depend on whether there was any attempt to reclaim input tax at the end of the chain of transactions. The claim is based on breach of duty by the directors as agents of the company. The company was the victim, not the villain. The knowledge of the directors could not be attributed to the company in those circumstances so that the ex turpi causa defence is not available to the
G defendants. Since the company is insolvent the directors are subject to the duties under section 172(3) of the Companies Act 2006 to the company's present and future creditors so that the scope of the breach of duty goes beyond that perpetrated by the company directors, encompassing other persons, and for that reason also the *Stone & Rolls* case is not applicable.

The claim pleaded is a classic fraud on a company by which the directors extract the assets leaving the creditors with a loss which mirrors the
H company's loss. The revenue suffered a loss because the company's directors extracted the company's assets, in consequence of which the company is the sole victim. This is distinguishable from the critical factors in the *Stone & Rolls* case, in which the sole director caused the company to defraud a third party bank. Further, it is no part of the ratio of the *Stone & Rolls* case that a

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director who has misapplied the assets of a company can rely on the ex turpi causa defence to bar a claim by the company against him. The company cannot be said to be a party to breaches of fiduciary duty which the directors owed to the company; nor can such breaches of duty be attributed to the company to which the duty was owed. There is always a difference between the company and its directors, even when it is solvent, because of the separate legal personality of the company: see *Webb v Chief Constable of Merseyside Police* [2000] QB 427. The sole actor principle in the *Stone & Rolls* case does not apply where a director of a one man company is sued by the company for extracting its assets: see the *Stone & Rolls* case [2009] AC 1391, 1444B–D. The only debt owed to the company is owed by the sole actors, the first and second defendant directors of the company. The knowledge of a principal that it is being defrauded by its agent is irrelevant if it can do nothing about it. What is required is consent. No effective consent can be given to the extraction of the company's assets otherwise than by lawful distribution of capital under section 830 of the Companies Act 2006, because of the restrictions placed on companies by the 2006 Act to protect the interests of creditors. The dishonest act alleged against the directors is the breach of fiduciary duty under section 172 of the 2006 Act to act so as deliberately to render the company unable to pay its debts when the company is or will become insolvent. Those dishonest acts as between a claimant company and a dishonest director cannot legally be attributed to the company. A director does not have authority to take the company's assets so his acts cannot be said to be the acts of the company, his fraud cannot be said to be the fraud of the company and therefore he cannot plead the ex turpi causa defence against the company. The position is no different in a one man company. The company having pleaded its case without relying on its own illegality, the ex turpi causa defence is not available to the defendants: see *Tinsley v Milligan* [1994] 1 AC 340, 376–377 and *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, 1472, 1481, 1506. To the extent that it is permissible to look beyond the four corners of the pleadings and the claimant's reliance on its own illegality, the company is able to sue its own directors without condoning the failure to pay VAT.

To establish a conspiracy by the defendants to defraud, an intention to injure must be shown: see *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271. The pattern of trading shows that money which the company should have received was paid away from the company to third parties offshore, thereby indicating that the business was defrauding creditors and establishing an intention to injure the company. In those circumstances the revenue as creditor cannot sue the company for defrauding the revenue (see *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174) because, whereas in the *Total Network* case the revenue relied on the refunding of input tax, in the present case no payment of refunds has been pleaded. In those circumstances the court will not permit the revenue to bring a claim based on its loss as a creditor of the company because of the reflective loss principle: see *Johnson v Gore Wood & Co* [2002] 2 AC 1.

Where a defendant has submitted to the court's in personam jurisdiction by voluntarily accepting service within the jurisdiction, he may still run a jurisdiction argument based on territoriality. The applicable test is, however, not a presumption that a statute does not apply extraterritorially

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A unless there are express words or necessary implication to dictate otherwise, but whether the statute has by its character and terms made plain that it is intended to confer only a limited jurisdiction: see *In re Dulles Settlement; Dulles v Vidler* [1951] Ch 265. Since there is no clear limitation to the jurisdiction in section 213 of the 1986 Act, the court has jurisdiction to apply section 213 to the sixth and seventh defendants because they have voluntarily conferred jurisdiction on the court to do so. There can be no B presumption against extraterritoriality in a statute imposing a worldwide statutory regime on an insolvent company operating on all assets anywhere and creditors everywhere: see *In re Paramount Airways Ltd* [1993] Ch 223. The words "any persons" in section 213 are clear and should be interpreted as meaning precisely that. On its face section 213 has unlimited territorial scope. It is indistinguishable from other sections of the 1986 Act which have C been held to have extraterritorial effect, including sections 133, 238, 214 and 423: see *In re Seagull Manufacturing Co Ltd* [1993] Ch 345; *In re Paramount Airways Ltd* [1993] Ch 223 and *In re Howard Holdings Inc* [1998] BCC 549. Where a company trades across borders with the intention of defrauding creditors, section 213 is aimed at recovering assets wherever they may be or providing compensation for creditors of the company in liquidation wherever they may be. It is of extraterritorial effect. D

Maclean QC replied.

The court took time for consideration.

31 July 2013. The following judgments were handed down.

E **PATTEN LJ**

Introduction

1 This is an appeal by the sixth and seventh defendants, Jetivia SA ("Jetivia") and Mr Urs Brunschweiler ("Mr Brunschweiler"), against an order of Sir Andrew Morritt C dismissing their applications for the summary F dismissal or striking out of the claims against them in this action. The appeal is brought with the leave of Sir Andrew Morritt C.

2 The claimants are Bilta (UK) Ltd ("Bilta") which is now in liquidation together with Mr Hellard and Mr Ingram who are the joint liquidators of the company. Bilta seeks damages and equitable compensation from the sixth and seventh defendants and the other defendants for conspiracy and dishonest assistance. The liquidators have separate claims for fraudulent G trading under section 213 of the Insolvency Act 1986. The defendants' applications relate to both types of claim but are based on different grounds. The defendants contend that Bilta's own claim should be dismissed or struck out on the grounds of public policy based on the ex turpi causa non oritur actio principle. The section 213 claim is challenged on the basis that the court has no jurisdiction over the defendants in respect of the claim. Jetivia is a Swiss company and Mr Brunschweiler, who is resident in France, is its H sole director. This is ultimately a question of statutory construction in relation to section 213.

3 Much of the factual background is not in dispute but, in relation to the conspiracy and dishonest assistance claims, there is an issue between the parties as to whether the pleaded conspiracy represents an accurate

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statement of what the various defendants were engaged upon. Bilta's pleaded case is that the object of the alleged conspiracy was to defraud and injure the company by depriving it of the money necessary to meet its VAT liabilities incurred from its trading in carbon credits. The defendants contend that this is only a partial account of the allegedly fraudulent scheme and that, looked at overall, it is obvious that the intended victim of the fraud which the defendants are said to have participated in must have been HM Revenue and Customs ("HMRC") who were deprived of the VAT which was due to them.

4 The difference between these two versions of the conspiracy is relevant on one view to the application of the ex turpi causa principle. Sir Andrew Morritt C decided the case on the basis of the fraudulent scheme as set out in the amended particulars of claim which he accepted went no further than the position contended for by the claimants. But, for reasons which I will come to later in this judgment, I am not convinced that the difference in the identity of the alleged victim of the conspiracy (Bilta or HMRC) can or should materially affect the outcome of the defendants' applications.

The facts

5 I can start with what is common ground. Bilta is a company incorporated in England which is registered for the purposes of VAT. The first and second defendants, Mr Nazir and Mr Chopra, were its only directors and Mr Chopra owned all the issued shares. Between 22 April and 21 July 2009 Bilta traded in European Emissions Trading Scheme Allowances ("EUAs") which are more commonly known as carbon credits. Until 31 July 2009 EUAs were treated as taxable supplies under the Value Added Tax Act 1994 and were standard-rated. Since that date they have been zero rated.

6 EUAs are traded on the Danish Emissions Trading Registry. According to its own records, Bilta bought and sold more than 5·7m EUAs in the three month period between April and July for some €294m. Because the sales to Bilta were from traders like Jetivia carrying on business outside the UK, these supplies were zero rated. The EUAs were then sold on back-to-back to UK-based traders such as the third defendant, Pan 1 Ltd, who were registered for VAT. These were taxable supplies at the standard rate and Bilta thereby incurred liabilities to VAT in excess of €44m.

7 The price payable to Bilta by Pan 1 Ltd and the other purchasers was in each case less before VAT than the amount paid by Bilta to Jetivia and the other non-UK suppliers and, on the instructions of Bilta's directors, was paid to Jetivia or some other third party located outside the UK. In some cases there were further sales on of the EUAs to other UK traders with, again, similar instructions for the price to be paid to an external third party. As a consequence, Bilta made no profit on the transactions and was unable to pay the VAT which it owed because it never received or retained the proceeds of sale. Its liability for VAT on the transactions amounts to £38,733,444.

8 On 29 September 2009 Mr Hellard and Mr Ingram were appointed provisional liquidators of Bilta and commenced the company's claim against the sixth and seventh defendants and the other defendants. Bilta was wound up compulsorily on 25 November 2009 and on 13 October 2011 the

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A proceedings were amended to include the claims by the liquidators under section 213.

The pleaded claim

9 The allegation of conspiracy is pleaded in para 14 of the amended particulars of claim as follows:

B "(a) During at least the period 22 April 2009 to 21 July 2009 a conspiracy existed to defraud and injure a company (and thereby to engage in fraudulent trading with an intention to defraud and injure that company) by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive that company of its ability to meet its VAT obligations on such trades namely to pass the money (which C would otherwise have been available to that company to meet such liability) to accounts off-shore, including accounts of Jetivia and [Trading House Group Ltd ('THG')] ('the conspiracy'). (b) As the conspirators knew, the fraudulent scheme involved breaches of fiduciary duty by a director or directors of such company. (c) Bilta was the defrauded company. This claim concerns Bilta's purchase and sale of EUAs between D 22 April 2009 and 21 July 2009. (d) The parties to the conspiracy included Mr Brunschweiler and Jetivia, and Mr Shafiq and THG. (e) It is not known on what date or dates the conspiracy was formed."

10 Particulars of the fraudulent scheme are then set out in paras 15–19:

"15(1)(a) Mr Brunschweiler and Jetivia agreed to supply Bilta with EUAs, and to enter into documentation which showed Jetivia as having E supplied Bilta even though in a number of cases the EUAs had been transferred direct to a first line buffer (see para 22(8) below), for onward sale, knowing that Bilta would not be paying the VAT due on its onward sales. [(b)–(e)]

"(2) Bilta would then sell the EUAs on (or, where Bilta had not itself received the EUAs, produce paperwork showing the EUAs to have been F sold on) at a price inclusive of VAT. In at least 46 cases Bilta sold the EUAs at a price which was less (net of VAT) than it had paid. Bilta sold to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the first line buffers'), which they were only able to do because Bilta had sold for a price net of VAT less than it had paid, (save that on at least 25 occasions Pan 1 immediately sold on at G a loss—see schedule 1). The first line buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.

"(3) The first line buffers would themselves often sell on to companies that had no legitimate use for the EUAs and whose role was to sell on the EUAs for a small profit ('the second line buffers') (which they were only able to do because Bilta had sold for a price net of VAT less than it had H paid). (Sometimes the first line buffers would sell onto the second line buffers at a loss). The second line buffers were not engaged in legitimate trading but were dishonestly participating in the fraudulent scheme.

"(4) The money payable to Bilta by its purchasers (inclusive of the VAT element) would almost all be paid by the purchasers either (a) to Bilta and

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then paid by Bilta to Jetivia or (b) directly to Jetivia or to THG, or (c) to offshore accounts the account-holders of which have yet to be identified.

"(5) Jetivia and THG's participation in the fraudulent scheme was not limited to transactions in which Bilta actually acquired EUAs from Jetivia and THG: (a) In a good number of transactions Jetivia and THG entered into paperwork with Bilta which showed that Bilta had acquired and sold on EUAs from Jetivia and THG which EUAs the Registry showed as being transferred from THG and Jetivia directly to Bilta's purchaser or through a different intermediary company before transfer to Bilta's purchaser (see para 22(8) below). (b) Jetivia and THG would receive payments directly from the first line buffers depriving Bilta of the means of meeting its VAT liabilities.

"(6) The first line buffers included Pan 1 . . . The aforementioned first line buffers' participation in the fraudulent scheme was not limited to transactions in which EUAs were actually transferred at the Registry. In a good number of transactions the aforementioned first line buffers produced paperwork for the sale or purchase of EUAs when no transfer of EUAs was made at the Registry.

"(7) The design and effect of the fraudulent scheme was to render Bilta insolvent and unable to discharge its VAT liability.

"(8) The first line buffers and the second line buffers (and the directors of each) knowingly participated in the fraudulent scheme and were parties to the conspiracy.

"16(1) Bilta and the first and second line buffers were able to fund a significant number of deals worth many millions of euros despite having very poor credit rating and asset bases.

"(2) The parties were able to carry out multiple deals on one day, with all parties being able to immediately source a supplier and customer despite their limited, and even nonexistent experience in this particular sector.

"(3) The pricing of the deals did not accord with legitimate trading.

"17. According to the Registry:

"(1) In May 2009 Bilta was supplied 624,000 EUAs by Jetivia and 334,000 EUAs by THG (using the account of Mr Shafiq) in 22 transactions.

"(2) In June 2009 Bilta was supplied with 5,139,569 EUAs by Jetivia, THG (using the account of Mr Shafiq), Pan 1, GW Deals and IEG in 100 transactions.

"18. Between 22 April and 21 July 2009, in 259 transactions Bilta's paperwork showed it as having sold EUAs back-to-back ('the sales') to four first line buffers being (i) Pan 1; (ii) GW Deals; (iii) AHM; and (iv) Ambron. The first line buffers were registered under the Value Added Tax Act 1994. 113 of the sales by Bilta were recorded at the Registry as having transferred the EUAs to the respective transferee. Each of the sales, being a supply or invoice issued in respect of a supply by Bilta (as a trader registered for VAT in the United Kingdom) to a purchaser, also registered for VAT in the United Kingdom, was subject to VAT at 15%.

"19. The total invoice value of the sales as per the invoices issued to the first line buffers was in excess of €294,089,290·71 plus VAT in excess of €44,113,993·61. The first line buffers immediately sold on the EUAs acquired from Bilta to other purchasers."

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A 11 The amended particulars of claim (in paras 20–21) give details of the assessments on Bilta to VAT and the tax due. In para 22 it alleges that the trading in EUAs by Bilta was not bona fide or legitimate and was undertaken in furtherance of the conspiracy alleged in para 14. Particulars are given of this allegation by reference to the instructions from Bilta to its purchasers to pay the gross purchase price (including VAT) to third parties outside the UK.
B In paras 22(9)–(11) it is pleaded:

"(9) Bilta would often form part of a carousel in which the EUAs would end where they started with everyone profiting from the transactions, save Bilta, and profiting by reason of Bilta's selling on at a loss: see Schedule 7. These transactions were within the second HMRC assessment.

C "(10) Despite being based in and trading from England, Bilta used a HSBC Hong Kong bank account for these transactions.

"(11) Mr Nazir and Mr Chopra failed to file any VAT return in respect of the period 1 April to 31 July 2009 on behalf of Bilta nor have they caused Bilta to account to HMRC for any sum in respect of the VAT charged on the sales."

D 12 In para 23 it is alleged that the pattern of trading by Jetivia with or involving Bilta was not bona fide and was, it should be inferred, undertaken in furtherance of the pleaded conspiracy. Para 24 pleads (and particularises) facts which are relied on as showing that Jetivia's dealings with Bilta were dishonest and part of a missing trader fraud. Similar allegations are made in paras 26–41 against the other corporate defendants.

E 13 The case against Mr Nazir and Mr Chopra is contained in paras 42–50 of the amended particulars of claim:

"42. At all material times Mr Nazir and Mr Chopra as the directing will and mind of Bilta failed to file any VAT return in respect of the period 1 April to 31 July 2009 on behalf of Bilta nor have they caused Bilta to account to HMRC for any sum in respect of the VAT charged on the sales.

F "43. In directing Pan 1 to pay the entirety or substantial part of the purchase price (including that element attributable to VAT) to parties other than Bilta, and in paying over its receipts to third parties without retaining the VAT element for payment to HMRC Mr Nazir and Mr Chopra as the directing will and mind of Bilta were depriving it of funds with which to discharge its liabilities, including its VAT liability in relation to the sales.

G "44. At all material times Mr Nazir and Mr Chopra owed fiduciary duties to act in the way they considered in good faith, would be most likely to promote the success of Bilta for the benefit of its members as a whole.

"45. Pursuant to and in furtherance of the conspiracy Mr Nazir and Mr Chopra, in breach of the aforesaid duties, conducted the company's
H affairs as set out in paras 11–43 above. The dishonest breaches of fiduciary duty were the deliberate arranging of the company's affairs such that no part of its VAT liabilities would be discharged. The effect of the said trading arrangements as set out was that Bilta incurred VAT liabilities in respect of the sales in the sum of not less than £38,733,444·04 none of

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which has been paid to HMRC. Mr Nazir and Mr Chopra failed to apply Bilta's funds for the purpose of discharging its lawful liabilities.

"46. Mr Nazir was registered as a director of Bilta from 10 May 2009. Mr Chopra was a registered director of Bilta from 17 April 2008 until 3 July 2009 (he was previously a registered director between 15 February 2006 and 1 July 2007). Mr Chopra continued to act as a director of Bilta after 3 July 2009.

"47. Further, Mr Chopra and Mr Nazir conducted the company's affairs knowing and intending that it would be rendered insolvent and would be unable to meet, or had no reasonable prospect of paying, its liabilities (including its VAT liabilities) and was (alternatively, would become, as a consequence of the above transactions) insolvent.

"48. Mr Chopra and Mr Nazir are liable for damages for unlawful means conspiracy and/or to pay compensation pursuant to section 213 of the Insolvency Act 1986 . . . for carrying on Bilta's business with intent to defraud creditors or alternatively for a fraudulent purpose (namely the non-payment of its liability to HMRC for VAT).

"49. In particular the claimants rely on the facts and circumstances pleaded in paras 11–41 above.

"50. Mr Nazir and/or Mr Chopra are liable to compensate Bilta for breach of fiduciary duty. Further or alternatively by reason of the conspiracy to defraud and injure Bilta and/or as a result of the fraudulent trading Bilta has suffered loss and damage.

"PARTICULARS OF LOSS

"An amount equal to Bilta's liability for VAT arising from the company's invoices on the sales in the sum of £38,733,444·04."

14 Finally, in paras 57–64 it is alleged that Jetivia and Mr Brunschweiler were parties to the conspiracy to defraud Bilta and are liable for dishonestly assisting Mr Nazir and Mr Chopra in their breaches of fiduciary duties owed to the company; and for carrying on Bilta's business with intent to defraud creditors. It is not suggested that these claims are capable of being determined on a summary basis if the arguments based on the ex turpi causa rule and the scope of section 213 do not succeed.

Ex turpi causa

15 The first issue therefore to consider is whether Sir Andrew Morritt C was wrong to refuse to dismiss or strike out Bilta's claims against the defendants on the ground that they were precluded by the application of the ex turpi causa principle. This is a rule of public policy which was explained by Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341, 343 in the following terms:

"No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, . . . there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

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A 16 An issue arises in this case (as in many others where the rule is invoked) as to whether the causes of action relied on by Bilta are founded on an immoral or illegal act. But what is not in dispute is the test which the court must apply in order to answer that question. In *Tinsley v Milligan* [1992] Ch 310, the Court of Appeal, by a majority, adopted a flexible approach to the operation of the ex turpi causa rule which required it to conduct a balancing exercise between the consequences of granting or B refusing relief in the particular case. This so-called public conscience test was rejected on appeal by the House of Lords. Lord Goff of Chieveley said [1994] 1 AC 340, 355:

> "It is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as C between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other."

17 There was not unanimity as to the correct test to be applied but the view of the majority was expressed by Lord Browne-Wilkinson, at p 376, in these terms: D

> "In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction."

E 18 It is clear from this passage that a distinction is being made between reliance on the illegal act as the basis of the cause of action and (as in *Tinsley v Milligan* [1994] 1 AC 340) the enforcement of a property or other legal right which although historically the product of an illegal act or transaction, has an independent existence from it. Although there have been subsequent dicta in this court suggesting that some causal connection less than the reliance test is sufficient to engage the ex turpi causa rule (see e g *Cross v* F *Kirkby* [2000] CA Transcript No 321, per Beldam LJ), the House of Lords has re-affirmed reliance as the correct test in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 (see Lord Walker of Gestingthorpe, at para 131, Lord Scott of Foscote, at para 96 and Lord Mance, at para 208) and neither party to this appeal has suggested that it does not represent a correct statement of the law.

G 19 In what sense then is it contended that Bilta relies on its own illegal act to found its claim against its directors and their co-conspirators? The conspiracy pleaded in para 14 of the amended particulars of claim was one to defraud and injure Bilta itself by depriving it of moneys to which it was contractually entitled from the sale on of the EUAs. Such a conspiracy would necessarily involve a breach of fiduciary duty on the part of the directors as well as exposing them and their co-conspirators to a liability in H tort. By dishonestly assisting the directors in their breach of fiduciary duty the defendants are also arguably liable to account in equity for the losses which Bilta has suffered.

20 This conventional analysis of the claims available to Bilta against its directors and the defendants is unaffected as a matter of company law by the

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fact that both its directors were involved in the fraud and that Mr Chopra is the sole shareholder. In *Salomon v A Salomon & Co Ltd* [1897] AC 22 the House of Lords affirmed that the property of even a so-called one-man company belongs to the company and not to its director or shareholder and that the only means for a sole shareholder lawfully to extract assets from the company is by a distribution of capital carried out in accordance with what is now section 830 of the Companies Act 2006. By the same token, the sole director/shareholder owes to the company the fiduciary duties spelt out in section 172 of the Companies Act and cannot use his control of the company to ratify his fraudulent acts against the company particularly where the interests of creditors would be prejudiced: see the Companies Act 2006, section 239(3)(7); *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1; *Ultraframe UK Ltd v Fielding* [2004] RPC 479, para 40.

21 The importance of protecting the separate rights of even a one-man company to its own property is critical to the interests of its creditors. Section 172 of the Companies Act 2006 provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> "(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> "(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

22 The obligation to act in the interests of creditors arises in circumstances where the company is or is likely to become insolvent and is no more than a statutory recognition of the decision of this court in *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. In this case, as Sir Andrew Morritt C observed, Bilta never had any substantial assets of its own and depended on receiving the proceeds of sale from the EUAs in order to meet its VAT liabilities. The purpose and effect of the conspiracy was to deprive Bilta of those moneys so that it was insolvent from the moment it entered into the back-to-back transactions. It follows that the duty of the directors to consider the interests of creditors was engaged from the very start.

23 These principles are all well established but were recently re-stated with approval by the Supreme Court in *Prest v Prest* [2013] 2 AC 415. The case concerned an application by Mrs Prest for ancillary relief on her divorce. Moylan J ordered her husband to transfer to her the matrimonial home, free of encumbrances, and to make a lump sum payment to her of £17·5m. In part satisfaction of this liability, he directed that seven UK

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properties legally owned by Petrodel Resources Ltd and an associated company, Vermont Petroleum Ltd, should also be transferred to Mrs Prest. He made this order not on the basis that there were grounds for piercing the corporate veil (which he rejected) but because, in his view, there existed under section 24 of the Matrimonial Causes Act 1973 a wider jurisdiction to treat the seven properties as property to which the husband was "entitled, either in possession or reversion" even if the property in question was not held by the company on an express or resulting trust in favour of the husband. In the judge's view the properties fell within the ambit of section 24 because the Petrodel companies were owned and controlled by Mr Prest and their assets were, in the judge's words, "effectively the husband's property". He therefore ordered the companies to transfer the seven properties to the wife in exercise of the court's powers under section 24 and made no findings that any of them (except for the matrimonial home itself) were held by one or other company on trust for Mr Prest so as to give him a beneficial interest in the property.

24 That order was set aside by this court [2013] 2 AC 415 as being made without jurisdiction because its effect was to equate control of a company with the beneficial ownership of its assets. Rimer LJ said, at p 446, paras 105–106, that:

> "105. The flaw in the 'power equals property' approach is that it ignores the fundamental principle that the only entity with the power to deal with assets held by it is the *company*. Those who control its affairs—even if the control is in a single individual—act merely as the company's agents. Their agency will include the authority to procure an exercise by the company of its dispositive powers in respect of its property, but those powers are still exclusively the company's own: they are not the agents' powers. When and if the agents act as such, and procure a corporate disposition, the property which immediately before the disposition belonged to the company will become the property of the disponee. Until then, it remains the property of the company and belongs beneficially to no-one else. The judge's point that the agent is automatically the owner of all the company's assets by the mere fact of his authority to procure the company to dispose of them to himself is astonishing and does not begin to pass muster. And why should it? The proposition was simply the fruit of a judicial attempt to shoehorn into section 24(1)(a) assets which manifestly do not fit there. The judge's finding that the husband's mastery of the companies meant that they and their assets were his, and that they were the equivalent of mere nominees or agents for him (see, for example, his para 225), could have been lifted directly from the argument of counsel for the respondents that was rejected in *Salomon v A Salomon & Co Ltd* [1897] AC 22, 28, 29.
>
> "106. That is probably all that needs to be said about the judge's 'power equals property' theory. I shall, however, add a little more. A further reason why the theory does not work is that the judge overlooked that even the one-man in such a company does not have unlimited power to procure the company to deal as he would wish with the company's assets. He may in practice be able to do so, by procuring the payment of its money and the execution of corporate dispositions right, left and centre, all perhaps for nothing in return. But he will not be

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able to do so lawfully. Even he will be constrained by the capital maintenance provisions which limit such wholesale disposals. He cannot, for example, lawfully procure the making of distributions by the company save out of its distributable profits and, if he does, the distribution will be unlawful and void. I discussed such problems in *Inn Spirit Ltd v Burns* [2002] 2 BCLC 780, which concerned a one-man corporate group, in which the one-man purported to pay himself a dividend. The one-man is not in a position lawfully to distribute to himself the entirety of his company's assets at any time. To revert to the judge's para 225, there is a 'legal impediment' to wholesale transfers by a company in favour of its one-man controller. Only when the one-man lawfully procures the exercise of the corporate power of disposition in his own favour is it possible to identify which property has ceased to belong to the company and has become his."

25 This entirely orthodox statement of the law was criticised by a number of commentators in terms verging on the hysterical ("a cheat's charter") but was approved unanimously by the Supreme Court. Mrs Prest succeeded in her appeal only by persuading the Supreme Court to re-consider the evidence as to whether the seven properties were in fact held by the companies for her husband on a resulting trust; an exercise which the judge did not carry out and which she did not ask the Court of Appeal to perform. On the point of principle, Lord Sumption JSC, giving the leading judgment, said, at pp 490–491, paras 41–42:

"41. The recognition of a jurisdiction such as the judge sought to exercise in this case would cut across the statutory schemes of company and insolvency law. These include elaborate provisions regulating the repayment of capital to shareholders and other forms of reduction of capital, and for the recovery in an insolvency of improper dispositions of the company's assets. These schemes are essential for the protection of those dealing with a company, particularly where it is a trading company like PRL and Vermont. The effect of the judge's order in this case was to make the wife a secured creditor. It is no answer to say, as occasionally has been said in cases about ancillary financial relief, that the court will allow for known creditors. The truth is that in the case of a trading company incurring and discharging large liabilities in the ordinary course of business, a court of family jurisdiction is not in a position to conduct the kind of notional liquidation attended by detailed internal investigation and wide publicity which would be necessary to establish what its liabilities are. In the present case, the difficulty is aggravated by the fact that the last financial statements, which are not obviously unreliable, are more than five years old. To some extent that is the fault of the husband and his companies, but that is unlikely to be much comfort to unsatisfied creditors with no knowledge of the state of the shareholder's marriage or the proceedings in the Family Division. It is clear from the judge's findings of fact that this particular husband made free with the company's assets as if they were his own. That was within his power, in the sense that there was no one to stop him. But, as the judge observed, he never stopped to think whether he had any right to act in this way, and in law, he had none. The sole shareholder or the whole body of shareholders may approve a foolish or negligent decision in the ordinary course of

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Exhibit List

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Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
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Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
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Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
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Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
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Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

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Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
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Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
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Exhibit 12

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A business, at least where the company is solvent: *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258. But not even they can validly consent to their own appropriation of the company's assets for purposes which are not the company's: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 261 (Buckley LJ), *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, *R v Gomez* [1993] AC 442, 496–497 (Lord Browne-
B Wilkinson). Mr Prest is of course not the first person to ignore the separate personality of his company and pillage its assets, and he will certainly not be the last. But for the court to deploy its authority to authorise the appropriation of the company's assets to satisfy a personal liability of its shareholder to his wife, in circumstances where the company has not only not consented to that course but vigorously
C opposed it, would, as it seems to me, be an even more remarkable break with principle.

"42. It may be said, as the judge in effect did say, that the way in which the affairs of this company were conducted meant that the corporate veil had no reality. The problem about this is that if, as the judge thought, the property of a company is property to which its sole shareholder is 'entitled, either in possession or reversion', then that will be so even in a
D case where the sole shareholder scrupulously respects the separate personality of the company and the requirements of the Companies Acts, and even in a case where none of the exceptional circumstances that may justify piercing the corporate veil applies. This is a proposition which can be justified only by asserting that the corporate veil does not matter where the husband is in sole control of the company. But that is plainly not the
E law."

Attribution

26 In order to engage the ex turpi causa rule in this case the defendants must establish that the law attributes to Bilta the unlawful conduct of its directors and sole shareholder so that its actions against them and the
F defendants falls to be treated as an action between co-conspirators. Although the applications we are concerned with were not brought on behalf of the directors, Mr Maclean QC accepts that his argument would, if successful, apply to them as well. Put very simply, his case is that Bilta's claim, although pleaded in para 14 of the amended particulars of claim as a conspiracy to defraud the company by unlawful means, in fact discloses that Bilta was used by its directors and their associates to carry out a carousel
G fraud, the only victim of which was HMRC. Since Bilta was a party to the fraud, it cannot claim against the other conspirators for losses which it suffered as a result of the fraud it carried out.

27 At the heart of this argument is the question of attribution. Mr Maclean relies on the fact that the fraud was orchestrated by Mr Nazir and Mr Chopra who were the only directors of the company and must therefore be treated as its directing mind and will. This process of
H attribution, he submits, fixes the company with the knowledge and criminal intent of its directors so that its admitted use as part of the fraudulent transactions becomes a conscious act of wrongdoing for which the company is personally responsible. Although Lord Bramwell expressed the view in *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247, 251 that it was

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impossible for a corporation to have either malice or motive, that view was rapidly discarded (see *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423) and it is common ground on this appeal (as accepted by the House of Lords in the *Stone & Rolls* case [2009] AC 1391) that the process of attribution operates to make the company personally and not merely vicariously liable for the actions of its directors. In short, their dishonesty becomes that of the company itself.

28 Mr Maclean relies on the principles set out by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507:

> "There is in fact no such thing as the company as such, no 'ding an sich', only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company. The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company? One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i e if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

29 In the context of civil or criminal proceedings brought against a company the acts and intentions of its directors will usually be attributed to it so as to found corporate liability for the actions complained of unless (as explained in the *Meridian* case) the statute or legal principle imposing the relevant liability is one not intended to apply to a company except in a

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A vicarious capacity. In *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 a company was fixed with liability as a constructive trustee on the basis of knowing receipt through the knowledge of one of its directors. Nourse LJ said, at p 695:

> "This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil
B jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane LC in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC
C 705, 713: 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.' The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At
D that point, in the words of Millett J [1993] 3 All ER 717, 740: 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point. This was well put by Eveleigh J
E in delivering the judgment of the Criminal Division of this court in *R v Andrews Weatherfoil Ltd* [1972] 1 WLR 118, 124: 'It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself.' "

F 30 The same principles were applied by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 to a claim for dishonest assistance.

31 Other examples of civil liability being imposed on a company based on the acts of its employees or agents are *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 where the company, through its
G site managers, fraudulently claimed to recover the VAT on purported payments to bogus sub-contractors and *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] 2 BCLC 328 where the bank was required to pay compensation under section 213 of the Insolvency Act 1986 as a result of the actions of its senior manager in London who caused it to enter into a scheme to assist BCCI in perpetrating a fraud on its creditors.

H 32 The same principles can be seen in operation in a criminal context in the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170–171, per Lord Reid:

> "I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind

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which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability . . . Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 was one of them."

33 It is, however, clear from the decisions I have just referred to that whilst the acts and intentions of the directors or other senior representative will usually be attributed to the company for the purpose of establishing personal liability for the conduct complained of, the process of attribution is not an automatic one dependent only on the individual responsible for the unlawful conduct occupying a sufficiently senior position in the management of the company. In both the *McNicholas* case [2000] STC 553 and *Morris v Bank of India* [2005] 2 BCLC 328 the defendant company deployed an argument that it should not be made personally liable for the consequences of its employees' actions because it was also at least a secondary victim of those actions. In the *McNicholas* case the employee's fraudulent conduct had caused direct loss to the Customs and Excise Commissioners and in *Morris v Bank of India* to the creditors of BCCI. But it had also exposed the company in both cases to a secondary liability to pay compensation for the loss which it had caused. The argument was rejected. As Mummery LJ said in *Morris v Bank of India* [2005] 2 BCLC 328, para 114:

"Clearly there are some circumstances in which an individual's knowledge of fraud cannot and should not be attributed to a company. The classic case is where the company is itself the target of an agent's or employee's dishonesty. In general, it would not be sensible or realistic to attribute knowledge to the company concerned, if attribution had the effect of defeating the right of the company to recover from a dishonest agent or employee or from a third party. Mr Moss argued that there

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A should be no attribution of knowledge as this was a case in which [the bank] was the 'secondary victim' of Mr Samant. His actions were harmful to the interests of [the bank], as he had exposed it to the risk of potential liability for fraudulent trading. We have no hesitation in rejecting that submission. If it were correct, it would never be possible to attribute the knowledge of the individual to a company under B section 213. That is contrary to the agreed position that a company is capable of being made liable under section 213. Knowledge of fraud may be attributed to a company even though such attribution may expose it to the risk of liability under section 213."

34 The point being made in this passage is that attribution of the conduct of an agent so as to create a personal liability on the part of the C company depends very much on the context in which the issue arises. In what I propose to refer to as the liability cases like *El Ajou* [1994] 2 All ER 685, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, *McNicholas* [2000] STC 553 and *Morris v Bank of India* [2005] 2 BCLC 328, reliance on the consequences to the company of attributing to it the conduct of its managers or directors is not enough to prevent attribution because, as Mummery LJ pointed out, it would prevent liability ever being imposed. As D between the company and the defrauded third party, the former is not to be treated as a victim of the wrongdoing on which the third party sues but one of the perpetrators. The consequences of liability are therefore insufficient to prevent the actions of the agent being treated as those of the company. The interests of the third party who is the intended victim of the unlawful conduct take priority over the loss which the company will suffer through E the actions of its own directors.

35 But, in a different context, the position of the company as victim ought to be paramount. Although the loss caused to the company by its director's conduct will be no answer to the claim against the company by the injured third party, it will and ought to have very different consequences when the company seeks to recover from the director the loss which it has suffered through his actions. In such cases the company will itself be seeking F compensation by an award of damages or equitable compensation for a breach of the fiduciary duty which the director or agent owes to the company. As between it and the director, it is the victim of a legal wrong. To allow the defendant to defeat that claim by seeking to attribute to the company the unlawful conduct for which he is responsible so as to make it the company's own conduct as well would be to allow the defaulting G director to rely on his own breach of duty to defeat the operation of the provisions of sections 172 and 239 of the Companies Act whose very purpose is to protect the company against unlawful breaches of duty of this kind. For this purpose and (it should be stressed) in this context, it ought therefore not to matter whether the loss which the company seeks to recover arises out of the fraudulent conduct of its directors towards a third party (as in the *McNicholas* case [2000] STC 553 and *Morris v Bank of India* [2005] H 2 BCLC 328) or out of fraudulent conduct directed at the company itself which Sir Andrew Morritt C accepted was what is alleged in the present case. There is a breach of fiduciary duty towards the company in both case. But Mr Maclean submits that this conclusion was not open to the court in the present case as a result of the decision of the House of Lords in the *Stone*

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& Rolls case [2009] AC 1391 and that if one accepts the reasoning of two members of the House (Lord Walker and Lord Brown of Eaton-under-Heywood) that applies regardless of whether Bilta is a primary or a secondary victim of the alleged conspiracy.

36 Before coming to what was decided in that case I need to say a little more about the operation of the principles of attribution in the context of a claim by the company to recover for losses caused to it by breaches of duty by its directors and those associated with them. In the passage quoted above from the judgment of Mummery LJ in *Morris v Bank of India* [2005] 2 BCLC 328 the reference to the company being treated as the target or victim of the director's breach of duty can be traced back to the judgment of Buckley LJ in *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250 referred to by Lord Sumption JSC in *Prest v Prest* [2013] 2 AC 415. In that case the company sued two of its three directors for loss caused by a dishonest conspiracy as a result of which it acquired the shares in another company (Maximum) for an artificially inflated price of £500,000 and was then sold to one of the defendants for £489,000. The transaction involved some £0·4m of Belmont's assets being used to acquire the shares in Maximum (which was itself a breach of fiduciary duty) and was facilitated by the same moneys being then used by the fraudster to purchase the shares in Belmont so that the company provided financial assistance for the purchase of its own shares contrary to what was then section 54 of the Companies Act 1948.

37 The trial judge dismissed the action on the ground that Belmont was itself a party to the conspiracy on which its action was based because the conduct and knowledge of the guilty directors fell to be attributed to it. His decision was reversed on appeal. Buckley LJ said [1979] Ch 250, 261–262:

> "On the footing that the directors of the plaintiff company who were present at the board meeting on 11 October 1963, knew that the sale of the Maximum shares was at an inflated value, and that such value was inflated for the purpose of enabling the third, fourth, fifth and sixth defendants to buy the share capital of the plaintiff company, those directors must be taken to have known that the transaction was illegal under section 54.
>
> "It may emerge at a trial that the facts are not as alleged in the statement of claim, but if the allegations in the statement of claim are made good, the directors of the plaintiff company must then have known that the transaction was an illegal transaction.
>
> "But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.

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A "So in my opinion the plaintiff company should not be regarded as a party to the conspiracy, on the ground of lack of the necessary guilty knowledge."

38 The decision in the *Belmont* case was followed by the Court of Appeal in *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 in relation to whether the directors and sole shareholders of a company could B be convicted of stealing its property. The issue was one of consent and dishonesty. It was argued that because the directors were the sole will and directing mind of the company, it was to be treated as having consented to the appropriations. This was rejected on *Belmont* principles but the issue of dishonesty ultimately turned on the construction of section 2(1)(b) of the Theft Act 1968 and so is of limited assistance on that point. It does, C however, provide further authority for the proposition that where the fraud or dishonesty even of a sole director or shareholder is committed against the company no defence by way of attribution will be available.

39 Although not referred to or cited to the Court of Appeal in the *Belmont* case [1979] Ch 250, the non-attribution to the company of its directors' fraudulent conduct is said to rest on what I shall refer to for D convenience as the *Hampshire Land* principle. This is a reference to the decision of Vaughan Williams J in *In re Hampshire Land Co* [1896] 2 Ch 743 in which the judge had to decide whether the Portsea Island Building Society was entitled to prove in the liquidation of Hampshire Land for a debt of £30,000. Hampshire Land was closely connected with Portsea in that they had their offices in the same building and had some common directors. A Mr Wills was also the secretary of both. Hampshire Land resolved at a F general meeting to borrow the money from Portsea even though no proper notice of the meeting had been given and the amount of the borrowing exceeded what was permitted by the company's articles of association without a valid resolution of the company in general meeting. Although there was no authority to borrow, Portsea was protected by the rule in *Royal British Bank v Turquand* (1836) 6 E & B 327 which entitled it to assume F that the procedure required under Hampshire Land's articles had been complied with unless it had knowledge to the contrary. The issue therefore for the judge was whether the knowledge of Mr Wills (who was taken to be aware of the irregularities in the resolution that was passed) should also be attributed to Portsea by virtue of his being an officer of the building society.

40 The judge held that the knowledge of the secretary could not G be imputed to Portsea. He gave two reasons for his decision. The first was that the knowledge of a common officer was not to be imputed to both companies unless the officer had some duty to communicate that knowledge to the company in question. The second was that even if communication of the information was within the scope of the officer's duty, it was subject to the exception that, where the officer was guilty of fraud, his knowledge of his H own fraud could not be attributed to the company [1896] 2 Ch 743, 749:

"because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud."

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41 The essentially factual assumption which Vaughan Williams J relied on as creating an exception to the presumption of knowledge based on the performance of a duty to disclose cannot in my view be treated as an exhaustive statement of the reasons why the law will not attribute to a company the acts or knowledge of one of its officers. *Hampshire Land* was concerned only with the imputation of knowledge which was relevant to Portsea's ability to enforce a contract that was unauthorised by Hampshire Land. The judge treated it as a question of whether the knowledge of an agent should be imputed to his principal and it was not therefore necessary for him to consider any wider issues of attribution relevant to unlawful conduct. In particular, the rationale based on the inherent unlikelihood of the director disclosing his own fraud to the object of his deceit might be thought to apply even where the intended victim was not the company, of which he was a director or officer but was a third party. Yet this was not sufficient to prevent attribution in *El Ajou* [1994] 2 All ER 685 and the other liability cases I mentioned earlier.

42 Therefore, although the *Hampshire Land* principle is often referred to in cases dealing with the attribution to a company of the acts of its directors and others, the principles applied to determine liability for unlawful conduct more generally are not limited to asking whether the director is likely to have wished to keep knowledge of his fraud secret. They involve the application of a more fundamental rule accepted by this court in the *Belmont* [1979] Ch 250 and also in *Stone & Rolls* [2009] AC 1391 cases that the law will not attribute the fraud or other unlawful conduct of the director to the company when it is itself the intended victim of that conduct. This, as I explained earlier, is a question to be determined in the context of the proceedings in which attribution is relied on. In a liability case the company will not be the victim for purposes of the attribution rule. But where the company makes the claim based on the director's breach of duty it is the victim and the *Belmont* case confirms that the law will not allow the enforcement of that duty to be compromised by the director's reliance on his own wrong.

43 One can illustrate the operation of these principles by looking at the decision of Dyson J in the *McNicholas* case [2000] STC 553. In considering whether the company should be made liable for the fraud on HMRC carried out by its site managers, the judge said, at paras 55–56:

> "55. In my judgment, the tribunal correctly concluded that there should be attribution in the present case, since the company could not sensibly be regarded as a victim of the fraud. They were right to hold that the fraud was 'neutral' from the company's point of view. The circumstances in which the exception to the general rule of attribution will apply are where the person whose acts it is sought to impute to the company knows or believes that his acts are detrimental to the interests of the company in a material respect. This explains, for example, the reference by Viscount Sumner in *JC Houghton & Co v Nothard Lowe & Wills Ltd* [1928] AC 1, 19 to making 'a clean breast of their delinquency'. It follows that, in judging whether a company is to be regarded as the victim of the acts of a person, one should consider the effect of the acts themselves, and not what the position would be if those acts eventually prove to be ineffective. As the tribunal pointed out, in *In re Supply of*

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Ready Mixed Concrete (No 2) [1995] 1 AC 456 the company suffered a large fine for contempt of court on account of the wrongful acts of its managers. The fact that their wrongful acts caused the company to suffer a financial penalty in this way did not prevent the acts and knowledge of the managers from being attributed to it.

"56. The *Hampshire Land* principle or exception is founded in common sense and justice. It is obvious good sense and justice that the act of an employee should not be attributed to the employer company if, in truth, the act is directed at, and harmful to, the interests of the company. In the present case, the fraud was not aimed at the company. It was not intended by the participants in the fraud that the interests of the company should be harmed by their conduct. In judging whether the fraud was in fact harmful to the interests of the company, one should not be too ready to find such harm. In my view, the cash flow point made by Mr Purle [leading counsel for the company] comes nowhere near being serious enough to trigger the principle. Looking at the facts of this case from a common sense point of view, there was no VAT fraud or harm to the interests of the company. The tribunal were entitled to reach this conclusion. It was the correct conclusion to reach."

44 As mentioned earlier, the argument for the company had been that the loss which it would suffer by being made to compensate the Commissioners for their loss of VAT was sufficient to prevent the dishonesty of the employees being attributed to the company. In the passage quoted, Dyson J rejects the argument just as this court did in *Morris v Bank of India* [2005] 2 BCLC 328: see para 33 above. In the *Stone & Rolls* case [2009] AC 1391, para 55 Rimer LJ said:

"The *McNicholas* case [2000] STC 553 shows that, in assessing whether the *Hampshire Land* principle applies, it is not appropriate to factor into the consideration the adverse consequences to the company when and if the fraud is found out."

45 But it does not follow from this that secondary damage of the kind relied on unsuccessfully in the liability cases will not be sufficient to prevent attribution when it forms the subject matter of the action by the company against those whose breach of duty has caused it. In that context the damage is not secondary but primary and the company is the direct victim of the breach of duty relied on. It ought therefore not to matter whether the conspiracy alleged in these proceedings had as its object a VAT fraud on HMRC or is limited to depriving Bilta of the proceeds of sale from the EUAs. In both cases the directors and the other defendants will have committed or aided a breach of fiduciary duty and other wrongs against the company for which Bilta can sue. In neither case should it be open to the directors and their accessories such as the defendants to rely on a process of attribution to defeat the claim. What remains to be considered is whether there is anything in the *Stone & Rolls* case which requires us to reach a different conclusion.

Stone & Rolls

46 The *Stone & Rolls* case [2009] AC 1391 involved a claim by a company against its former auditors for damages for negligence. The company ("S & R") was owned and controlled by a Mr Stojevic who was its

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only director. He carried out a fraud on a Czech bank which involved S & R presenting false documents to the bank which purported to relate to share transactions that had never taken place. As a result of this, the bank paid moneys to S & R which were then channelled to the other parties to the fraud.

47 The bank obtained judgment for deceit against S & R and Mr Stojevic and was awarded substantial damages. S & R, then in liquidation, began proceedings against Moore Stephens, who had been its auditors in the years in which the frauds against the bank had been committed, seeking damages for negligence of some US$174m which represented the losses it had suffered as a result of the auditors' failure to detect the dishonest behaviour of Mr Stojevic.

48 The auditors applied to strike out the claim on the ground that it was barred by the ex turpi causa principle. Their case (as here) was that, as the directing mind and will of the company, Mr Stojevic's fraudulent conduct fell to be attributed to S & R so that its reliance on the fraud to found a cause of action in negligence against the auditors amounted to it relying on its own wrong. The company could not, it was said, rely on being the victim of the fraud to avoid attribution because the only victim of the fraud was the bank. In the alternative, it was submitted that where the company was under the sole control of the fraudster (i e it had no directors or shareholders who were not participants in the fraud) then there was no room for the operation of the *Hampshire Land* principle because there was no-one at the company from whom the fraudulent director would wish to or could conceal his fraud. The company was therefore fixed with personal liability for the fraud and could not base a cause of action on it against the auditors.

49 In the Court of Appeal the second of these two arguments was rejected by Rimer LJ as being inconsistent with the decisions of this court in the *Belmont* [1979] Ch 250 and *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 cases. But he accepted the submission for the auditors that S & R was only a victim of Mr Stojevic's fraud in the sense that it was thereby exposed to a secondary liability to the bank. In the context of a claim by S & R against its auditors, this was, he held, insufficient to allow it to take advantage of the *Hampshire Land* or *Belmont* principle.

50 Much of the argument which Mr Sumption QC directed to this point was based on the passages in the *McNicholas* case [2000] STC 553 and *Morris v Bank of India* [2005] 2 BCLC 328 which I quoted earlier at paras 33, 43. But those, as I have said, were both cases in which the claim in issue was one made against the company based on the fraud of its directors or employees. The court was not concerned with what the position would be if the claim was being made against the directors or their accomplices for fraud or breach of fiduciary duty against the company and Rimer LJ, I think, accepted this at least implicitly by his rejection of Mr Sumption's second line of argument and by what he said [2009] AC 1391, paras 71–72 about the auditors' reliance on the decisions in the *McNicholas* case and *Morris v Bank of India*:

> "71. I find it a little surprising that the *McNicholas* and *Bank of India* cases emerge as authorities contributing to the jurisprudence on the application of the *Hampshire Land* principle. They were both concerned with fixing *liability* on a company at the suit of a third party and a central

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question in each was whether the relevant statutory policy (respectively the VAT legislation and the insolvency legislation) required the attribution to the company of the acts of its agents, being agents who were not its directing mind and will. Once, as in each case it did, the court held that the applicable policy did require such attribution, I find it difficult to see on what basis it was considered that such attribution could or might be trumped by the *Hampshire Land* principle, which is primarily concerned not with a company's *liabilities* to others but rather with its *claims* against others.

"72. But, surprising or not, there is no escaping that both in the *McNicholas* case and in the *Bank of India* case the court discussed the scope of the *Hampshire Land* principle. In my judgment both cases support Mr Sumption's submission that the principle will ordinarily only apply in circumstances in which the agents intend to harm the company (the *McNicholas* case [2000] STC 553, para 56), or it is the target of their acts (the *Bank of India* case [2005] 2 BCLC 328, para 118), and that it is not enough to engage the principle that an agent's acts may result in harm to the company. In the former case it made no difference that the agents' frauds were found out and resulted in material harm to McNicholas in the shape of assessments to tax of more than £1m: see [2000] STC 553, para 1; and in the latter case it made no difference that Mr Samant's actions resulted in [the bank] being made liable under section 213 to a judgment of over US$80m: see [2005] 2 BCLC 328, para 1. In both cases the companies were, in the phrase used in argument, left 'holding the baby', just as the company is said to have been here. Both authorities support the view that being a 'secondary' victim of this nature is not enough to engage the principle; what counts is the identification of the victim against whom the fraudulent acts are directed. The logic underlying this approach is that it is irrelevant in the present context to take account of the adverse consequences to the fraudster of being a fraudster: those are simply the consequences that the law visits on fraudsters, but they do not, in the present context, make the fraudster a victim. Whilst I recognise *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 as pointing in a different direction, I take the view that this court in the *Bank of India* case preferred and approved the reasoning in the *McNicholas* case, and in my judgment we should take our lead from the *Bank of India* case."

51 In agreeing with him, Mummery LJ said, at para 118:

"What about the primary and secondary rules on attribution to the company of knowledge and of a guilty mind? They are relevant to whose acts count as acts of the company for the purposes of the substantive rule in question and to fixing it with responsibility for/liability for the fraud of its director or vicarious liability. In my judgment, in this case the knowledge of the fraudulent mastermind and the knowledge of his creature company are identical in targeting the victim bank. It is not a case of a company itself being an innocent victim of deception by one of its officers. This company was party to the fraud, not an innocent victim of it."

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52 Rimer LJ accepted in para 72 that, for the purposes of S & R's claim against the auditors, it could not rely on the loss it suffered by being involved in the fraud on the bank so as to prevent it being treated as a fraudster along with Mr Stojevic and so falling foul of the ex turpi causa principle. Moore Stephens had been arguably negligent in their conduct of the audit but they were not party to a fraud on the company and owed no duty to its creditors. Mr Stojevic who had undoubtedly committed a breach of fiduciary duty against the company was not a defendant and his actions against S & R were not the subject matter of the claim. In these circumstances, I do not read Rimer LJ's judgment as going any further than to hold that in the proceedings against the auditors the fact that S & R did suffer loss as a result of the actions of Mr Stojevic against the bank was not sufficient to engage the *Hampshire Land* principle so as to prevent the auditors from relying on the ex turpi causa rule. The case is not authority for any wider proposition.

53 The decision of the Court of Appeal was upheld by a majority in the House of Lords but the speeches disclose a variety of different approaches to the principles to be applied.

54 Lord Phillips of Worth Matravers considered that the answer to the question whether the ex turpi causa rule applied to the claim was not to be found in the application of the *Hampshire Land* principle but by looking behind the company at the persons whose interests the duty of the auditors was intended to protect. Since this was owed to the shareholders of the company and not to its creditors, there was no justification for disapplying the ex turpi causa rule [2009] AC 1391, para 86:

> "The scope of Moore Stephens's duty is not directly in issue on this appeal. What is in issue is whether ex turpi causa provides a defence to S & R's claim that Moore Stephens was in breach of duty. That is not, however, a question that I have been able to consider in isolation from the question of the scope of Moore Stephens's duty. I have reached the conclusion that all whose interests formed the subject of any duty of care owed by Moore Stephens to S & R, namely the company's sole will and mind and beneficial owner Mr Stojevic, were party to the illegal conduct that forms the basis of the company's claim. In these circumstances I join with Lord Walker and Lord Brown in concluding that ex turpi causa provides a defence."

55 If S & R had not been under the sole control of Mr Stojevic but had also had independent shareholders then he would have concluded that the claim was not barred by the ex turpi causa rule: see para 63:

> "My Lords, I would not think it right to hold as a matter of general principle that ex turpi causa does not apply to a claim by a company against its auditors for failing to detect that the company has been operating fraudulently unless it were demonstrated how the difficulties to which I have referred could be resolved. There has been no such demonstration in this case. Thus I am not able to join Lord Scott and Lord Mance in concluding, for the reasons that they have given, that ex turpi causa does not apply to S & R's claim. At the same time, I have not been persuaded by Mr Sumption's primary case that the reliance test, or the principle of public policy that underlies it, would necessarily defeat S & R's claim if S & R were a company with independent shareholders

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A that had been 'high-jacked' by Mr Stojevic. In that, at least, I believe that I share common ground with all your Lordships."

56 Lord Walker and Lord Brown (also in the majority) dismissed the appeal for different reasons from those of Rimer LJ in the Court of Appeal. They adopted the auditors' second line of argument that the *Hampshire Land* principle can have no application to what Lord Walker described as a B one-man company where both ownership and control was vested in the fraudster or fraudsters.

57 In his speech Lord Walker emphasised, at para 139, that the *Belmont* case [1979] Ch 250 did not concern a one-man company and was obviously itself the victim of a conspiracy: see para 144:

"In all these cases there was a company which was the victim of a fraud C or serious breach of duty, and the court held that it was not to be prejudiced by the guilty knowledge of an individual officer who could not be expected to disclose his own fault. (The fact that duties were owed to two different companies in the *Hampshire Land* and *Houghton* cases is, I think, an irrelevant coincidence). This principle is sometimes referred to in the United States of America as the 'adverse interest' exception to the usual rule of imputation (see for instance Rudolph and Tanis, 'Invoking D In Pari Delicto to Bar Accountant Liability Actions Brought by Trustees and Receivers' (2008) ALI-ABA Study Materials). It is applied, typically, in cases in which the corporate victim is the claimant and the defence seeks to rely on the corporate victim's notice, knowledge or complicity. It will be necessary to consider some recent English cases which do not fit so neatly into the same mould."

E 58 He refers at para 145 to what Rimer LJ said at para 71 about the *McNicholas* [2000] STC 553 and *Morris v Bank of India* [2005] 2 BCLC 328 cases but then goes on:

"But I can see no reason why the principle should be limited to claims. It is, as I have said, a general principle of agency which can apply to any issue as to a company's notice, knowledge or complicity, whether that F issue arises as a matter of claim or defence."

59 That is, of course, true but the contexts in which the point arises are very different.

60 At para 157 Lord Walker begins his analysis of the sole actor exception to the adverse interest principle, the essence of which is summarised in the extract from the decision of the Second Circuit of the G United States Court of Appeals in *In re The Mediators Inc; The Mediators Inc v Manney* (1997) 105 F 3d 822 which he quotes, at para 163:

"Second, the adverse interest exception does not apply to cases in which the principal is a corporation and the agent is its sole shareholder. As noted, the adverse interest exception is to a presumption that an agent has discharged the duty of disclosing material facts to the principal. H Under New York law, where the agent is defrauding the principal, such disclosure cannot be presumed because it would defeat—or have defeated—the fraud. However, where the principal and agent are one and the same, the adverse interest exception is itself subject to an exception styled the 'sole actor' rule. This rule imputes the agent's

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knowledge to the principal notwithstanding the agent's self-dealing because the party that should have been informed was the agent itself albeit in its capacity as principal. Where, as here, a sole shareholder is alleged to have stripped the corporation of assets, the adverse interest exception to the presumption of knowledge cannot apply."

61 His conclusions on this point follow [2009] AC 1391, para 168:

"In particular I would apply the 'sole actor' principle to a claim made against its former auditors by a company in liquidation, where the company was a one-man company engaged in fraud, and the auditors are accused of negligence in failing to call a halt to that fraud. Here I return to Mr Brindle's point (para 132 above) about the need to decide any question of attribution by reference to its context. Looking at the context, I cannot accept his submission that a claim against auditors is a context in which S & R should not be treated as primarily (or directly) liable for its fraud against [Komercni Banka SA], and so disabled by the ex turpi causa principle. Mr Sumption conceded, in line with the pleadings, that the auditors did owe a duty of care to S & R, although Mummery LJ (with whom, as with Rimer LJ, Keene LJ agreed) considered, ante, p 1435, para 115, that 'the firm did not owe a duty of care to the company, which was a fraudster in the total grip of another fraudster'. On the assumption that the auditors did owe a duty of care to S & R, it was a duty owed to that company as a whole, not to individual shareholders, or potential shareholders, or current or prospective creditors, as this House decided in *Caparo Industries plc v Dickman* [1990] 2 AC 605. If the only human embodiment of the company already knew all about its fraudulent activities, there was realistically no protection that its auditors could give it. In *Caparo* this House approved the decision of Millett J in *Al Saudi Banque v Clarke Pixley* [1990] Ch 313, the facts of which were comparable to those of the present case."

62 Finally, in relation to the issue of S & R being a secondary victim, Lord Walker said, at paras 173–174:

"173. However it is unnecessary to speculate further about the commercial terms on which gangs of robbers or fraudsters might be expected to organise their criminal activities. There is in my opinion a clearer and firmer basis on which to determine what (if any) significance to give to the notion of a company being the secondary victim of the fraud (aimed at a third party) of one or more of its directors. It is necessary to keep well in mind why the law makes an exception (the adverse interest rule) for a company which is a primary victim (like the Belmont company, which was manipulated into buying Maximum at a gross overvaluation). The company is not fixed with its directors' fraudulent intentions because that would be unjust to its innocent participators (honest directors who were deceived, and shareholders who were cheated); the guilty are presumed not to pass on their guilty knowledge to the innocent. But if the company is itself primarily (or directly) liable because of the 'sole actor' rule, there is ex hypothesi no innocent participator, and no one who does not already share (or must by his reckless indifference be taken as sharing) the guilty knowledge. That is consistent with the analysis by Rix J in *Arab Bank* [1999] 1 Lloyd's Rep 262. In that case Mr Browne was not

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A the directing mind of JDW, which was not a one-man company; Rix J accepted that the position might have been different if it had been.

"174. I would therefore limit my ground of decision in this appeal to the proposition that one or more individuals who for fraudulent purposes run a one-man company (in the sense described above) cannot obtain an advantage by claiming that the company is not a fraudster, but a B secondary victim. *McNicholas* [2000] STC 553 and *Bank of India* [2005] 2 BCLC 328 may be best analysed as depending on a special rule of attribution required by the scheme of the legislation relating to VAT or fraudulent trading (as the case may be). It is not necessary to the disposal of this appeal, or prudent, to address every situation that may be described as involving a secondary victim."

C 63 Lord Brown set out his conclusions at paras 200–201:

"200. For this reason I find the concept of the 'sole actor' exception to the adverse interest exception (the *Hampshire Land* principle) a somewhat puzzling one. Why is it necessary to except from an exception a category of case which cannot logically fall into the exception in the first place? Assuming, however, that there is scope for such an exception to D the *Hampshire Land* principle, then the need for it seems to me compelling and as good a statement of it as any is to be found in *In re The Mediators Inc; The Mediators Inc v Manney* (1997) 105 F 3d 822 already fully set out at para 163 of Lord Walker's opinion.

"201. It is on this basis and this basis alone—the one-man company or sole actor basis—that I would uphold the Court of Appeal's judgment that S & R is in no different or better position than Mr Stojevic himself to F resist the ex turpi causa defence (and the liquidator of S & R in no better position than either of them)."

64 The reasoning of the minority is contained in the speeches of Lord Scott and Lord Mance. Lord Scott considered that recovery by S & R against the auditors would not breach the policy of the ex turpi causa rule, at paras 120–121:

F "120. The ex turpi causa rule is a procedural rule based on public policy. The perpetrators of illegality, a fortiori of dishonest illegality, ought not to be allowed to benefit from their reprehensible conduct. If S & R had remained a solvent company, an action against Moore Stephens that would have enabled Mr Stojevic to benefit from any damages that were recovered would have offended the ex turpi causa rule. G Take the case of a solvent company that under the direction of its managing director engages in an unlawful and, in the event, loss making activity that could and should have been prevented by a timely report made by its auditors. Let it be supposed the managing director is also a shareholder and that he and the auditors are together sued for negligent breach of duty. I know of no authority that would bar such an action on ex turpi causa grounds. The action, assuming it succeeded against both H defendants, could be expected, via contribution proceedings, to leave the delinquent managing director with no benefit from any damages recovered from the auditors. And why, if that were so, should public policy require the auditors to be relieved of liability for their breach of duty?

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"121. In a case, such as the present, where the company is insolvent and will stay so whatever damages are recoverable from the auditors, the need to ensure that the delinquent director does not benefit from the damages does not present a problem. There is no possibility of Mr Stojevic benefiting from any damages recoverable from Moore Stephens. So, I repeat, why should the ex turpi causa rule, a rule based on public policy, bar an action against the auditors based on their breach of duty?"

65 But more important for present purposes is what he said about the sole actor exception [2009] AC 1391, paras 107–110:

"107. There are, however, cases, sometimes referred to as 'sole actor' cases, where the company has no human embodiment other than the fraudster and where, therefore, there is no one in the company for the fraudster to deceive, no one in the company to whom 'a clean breast of . . . delinquency' could be made. In these 'one actor' cases, it is said, the *Hampshire Land Co* rule can have no sensible application. The knowledge of the fraudster simply *is* the knowledge of the company. An example of this proposition in action is *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. This was a case in which the issue was whether the company, BLT, had been guilty of fraud or dishonesty in relation to money it held in trust for the plaintiff airline. The company had become insolvent and the airline sued its controlling director, Mr Tan, on the ground that he had knowingly assisted in the dissipation by BLT of the money. Lord Nicholls of Birkenhead said, at p 393: 'The defendant accepted that he knowingly assisted in that breach of trust. In other words, he caused or permitted his company to apply the money in a way he knew was not authorised by the trust of which the company was trustee. Set out in these bald terms, the defendant's conduct was dishonest. By the same token, and for good measure, BLT also acted dishonestly. The defendant was the company, and his state of mind is to be imputed to the company.'

"108. But the attribution to BLT of Mr Tan's dishonesty for the purposes of the airline's claim against, in effect, BLT and Mr Tan, could not be taken to bar misfeasance proceedings by the liquidator of BLT against Mr Tan or against any other officer of BLT who, in relation to the trust money, 'has . . . been guilty of any misfeasance or breach of any . . . other duty in relation to' BLT—section 212(1) of the Insolvency Act 1986—assuming, of course, that section 212 or some similar statutory provision were applicable to BLT's insolvent liquidation.

"109. It is noteworthy that there appears to be no case in which the 'sole actor' exception to the *Hampshire Land Co* rule has been applied so as to bar an action brought by a company against an officer for breaches of duty that have caused, or contributed to, loss to the company as a result of the company engaging in illegal activities. I can easily accept that, for the purposes of an action against the company by an innocent third party, with no notice of any illegality or impropriety by the company in the conduct of its affairs, the state of mind of a 'sole actor' could and should be attributed to the company if it were relevant to the cause of action asserted against the company to do so. But it does not follow that that attribution should take place where the action is being brought by the

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company against an officer or manager who has been in breach of duty to the company.

"110. It appears that the liquidators of S & R know of no assets of Mr Stojevic that could become the fruits of successful proceedings against him for breach of duty. But suppose that were not so. There can surely be no doubt that the liquidators could issue a misfeasance summons against him under section 212(1)(c) of the Insolvency Act 1986. Could Mr Stojevic, on such a summons, contend that his dishonesty should be attributed to the company that, in breach of his fiduciary duties under the power of attorney, he had turned into his vehicle for fraud? It is long established that section 212, like its statutory predecessors, is procedural and does not create a cause of action where none previously existed—although it is to be noted that section 212(3)(b) confers on the court a judgmental discretion as to the quantum of compensation that would not in an ordinary damages action be applicable. But Mr Stojevic could not, in my opinion, reduce his liability for breach of duty to S & R by attributing to S & R his own dishonesty, praying in aid the 'sole actor' exception and the application of the ex turpi causa rule.

66 In relation to the position as between the company and its directors, Lord Mance adopted a similar line of reasoning [2009] AC 1391, paras 227–230:

"227. Though not essential to my reasoning, I also consider that the principle established in *In re Hampshire Land Co* [1896] 2 Ch 743, *Belmont Finance* [1979] Ch 250 and *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 points towards the same result. It prevents a company being treated as party to a fraud committed by its officers 'on' or 'against' the company, at least in the context of claims by the company for redress for offences committed *against* the company: *Belmont Finance* [1979] Ch 250, 261D–H, per Buckley LJ, and p 271F–G, per Goff LJ, and *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, 640A–B, per Kerr LJ; and see *Edwards Karwacki Smith & Co Pty Ltd v Jacka Nominees Pty Ltd* (1994) 15 ACSR 502, 515–517. Thus, in *Belmont Finance* the company's directors were party to an illegal conspiracy, 'part and parcel' of which was that the company bought shares at an inflated price (p 264A), but their knowledge of this illegality was not imputed to the company and did not bar the company suing them for the conspiracy. The principle has also been applied in the context of a claim or allegation of estoppel against a company, seeking to hold the company responsible for a transaction in fraud of the company, by attributing to it knowledge of the fraud possessed by directors or agents who did not represent or act for the company in the transaction but had knowledge of it which they withheld from the company: *JC Houghton & Co v Nothard Lowe & Wills Ltd* [1928] AC 1 and *Kwei Tek Chao v British Traders and Shippers, etc, Ltd* [1954] 2 QB 459, 471–472.

"228. Mr Sumption submits that the principle has no present relevance for two reasons. The first is based on its original rationale: that, since an agent deceiving a company will not disclose his own fraud to the company, the company cannot be imputed with knowledge of or treated as party to the fraud. This rationale, Mr Sumption submits, postulates a company with an 'innocent constituency' (other officers and/or

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shareholders) to whom Mr Stojevic could have disclosed, but from whom he would and did actually conceal, his misdeeds. If the suggestion is that the *Hampshire Land* principle or the thinking behind it can only apply where a company alleges loss through being deceived, I see no reason why it should be so confined. Whether knowledge should be attributed to a company is irrelevant in contexts like the present, where S & R's claim is not that there were others within the company who relied on misleading statements by Mr Stojevic, but rather that Mr Stojevic's actions were in breach of his duties to S & R and that, had Moore Stephens detected them, no further breaches of duty would have been possible.

"229. Neither in *Belmont Finance* nor in *Attorney General's Reference (No 2 of 1982)* is there any suggestion that the application of the principle in *Hampshire Land* depends on there being some innocent constituency within the company to whom knowledge could have been communicated. Moreover, *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 is direct authority to the contrary. The two defendants were charged with theft, consisting of the abstraction of the assets of companies, of which they were 'the sole shareholders and directors' and 'the sole will and directing mind'": pp 635D–F, 638F–G. They contended that the companies were bound by and had consented to the abstractions precisely because they were its sole shareholders, directors and directing mind and will: pp 634E–F, 638F–H. The Court of Appeal acknowledged the rule of attribution attributing to a solvent company the unanimous decision of all its shareholders (p 640A–D), but roundly rejected its application to circumstances where the sole shareholders, directors and directing minds were acting illegally or dishonestly in relation to the company. The court cited *Belmont Finance* as 'directly contradict[ing] the basis of the defendants' argument': p 641B–C. The defendants' acts and knowledge were thus not to be attributed to the companies—although there was no other innocent constituency within the companies. Another justification for this conclusion may be that the effect of the limitations recognised by Lord Hoffmann in *Meridian Global Funds Managment Asia Ltd v Securities Commission* [1995] 2 AC 500 (para 221 above) is that in such situations there *is* another innocent constituency with interests in S & R, since it is not open even to a directing mind owning all a company's shares to run riot with the company's assets and affairs in a way which renders or would render a company insolvent to the detriment of its creditors.

"230. The second reason advanced by Mr Sumption is that, if the *Hampshire Land* principle could otherwise apply, the fraud here was committed on the banks, not on S & R. The Court of Appeal agreed with this submission. The company's exposure when it was left 'holding the baby' was merely a 'secondary exposure' which was not enough to engage the principle: see paras 72–73. In so reasoning, Rimer LJ was influenced by the fact that Mr Stojevic's fraud would be (and was by Toulson J) attributed to S & R itself in the context of any claims by the banks against S & R. This distinction between personal and vicarious liability towards third parties could have been relevant if, for example, S & R had been prosecuted for fraud (see e g *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, 640A–B) or if (more fancifully) there had been a general banking facility between Komercni Banka and S & R under which the latter's liability depended on whether it was personally as opposed to

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A vicariously liable for the deception of Komercni Banka. But it is irrelevant in the present context where S & R is seeking recourse from persons who, whatever their status vis-à-vis the company in the eyes of the outside world, owe duties and have committed wrongs towards S & R. The truth behind the *Hampshire Land* principle as explained in *Belmont Finance* and *Attorney General's Reference (No 2 of 1982)* is that B such situations are different. They compel by their nature a separation of the interests and states of mind of the company and those owing it duties."

67 In relation to Rimer LJ's view that the secondary liability of the company was not enough to enable it to rely on the *Hampshire Land* principle in relation to claims against the auditors, he said [2009] AC 1391, C para 234:

"In *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262, 282–283 Rix J, and in *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 (a case involving a scheme of fraud with analogies to the present) the Court of Appeal considered that a company exposed to third party liability by fraud could be regarded as a victim of the fraud for the purposes of a claim against other persons allegedly in breach of duty to it. In D distinguishing between primary and secondary victims, the Court of Appeal in the present case was, however, influenced by reasoning in *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 (Dyson J) and in *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] 2 BCLC 328 (Court of Appeal). Both those cases were (as Rimer LJ noted) concerned E with claims *against* the company by injured third parties, rather than claims by the company against others in breach of duty to it. So it is not clear why the *Hampshire Land* issue arose at all, and in my view the statements in them are of no assistance in resolving any issue of attribution in the present context."

68 In particular, he expressly rejected the submission that the sole actor F exception should be imported so as to bar a claim by a company against its sole director and shareholder. To do so would be to undermine the protection given to creditors both at common law and under the Companies Act, at paras 237–240:

"237. The current edition (2007) of *Palmer's Company Law Annotated Guide to the Companies Act 2006* states the position, at p 169: G 'The scope of the common law duty requiring directors to consider the interests of creditors is more controversial. Cases support a variety of propositions, but the better accepted view is that a duty is owed by directors to the company (and not to the creditors themselves: *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, 217, PC; *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294 [Toulson J]), and this duty requires H directors of insolvent or borderline insolvent companies to have regard to the interests of the company's creditors: *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250, CA.'

"238. I agree with this analysis. The Court of Appeal was therefore also correct in *West Mercia* to hold that directors who know the company

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to be insolvent owe to the company an enforceable duty to have regard to the interests of the company's creditors. In *Yukong Line* [1998] 1 WLR 294 Toulson J was likewise right to consider that that would be so: p 314F–G. There, as in *West Mercia*, the directing mind and owner of a company which had incurred a large liability sought to put the company's assets out of the reach of its creditor by transferring them to another of his companies. A claim by the creditor against the director failed on the basis that the director owed no direct fiduciary or other duty towards creditors. His liability was, as in *West Mercia*, to the company for disregard of the interests of its creditors. Far from undermining the integrity of the common law if such a liability were recognised and enforced, it would undermine the concept of separate corporate identity and the protection for creditors in insolvent situations at which company law aims, if a company were not entitled to claim against its directing mind and sole controlling shareholder in such a situation. The English cases *RBG Resources plc v Rastogi* [2002] EWHC 2782 (Ch); [2004] EWHC 1089 (Ch) and *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 and the Canadian case *Oger v Chiefscope Inc* (1996) 29 OR 3d 215; upheld (1998) 113 OAC 373, in all of which the directing minds of the relevant companies were the only shareholders, reach the same conclusion.

"239. In *In re The Mediators Inc; The Mediators Inc v Manney* (1997) 105 F 3d 822 (USAC, 2nd Cir), the court held inadmissible a claim by a creditors' committee standing in the company's shoes brought against the company's sole shareholder, chief executive officer and chairman together with its bankers, lawyers and accountants for deliberately devising a scheme, which stripped the company of its assets in order to shield them from liquidation and from the company's creditors, while rendering the company liable for the cost of so doing. The reasoning was that, in a case of a sole shareholder and decision-maker, 'whatever decisions he made were, by definition, authorised by, and made on behalf of, the corporation' (p 827) and that the company had 'no standing to assert aiding-and-abetting claims against third parties for co-operating in the very misconduct that it had initiated': p 826. This is not English law. But an important element to understanding this rule is that in American law 'Where third parties aid and abet a fiduciary's breach of duty to creditors—as is claimed here—the creditors may bring an action in their own right against such parties': p 825.

"240. In summary, it is no answer in English law to a claim by S & R against Mr Stojevic that Mr Stojevic had, as S & R's sole directing mind and sole shareholder, authorised the scheme of fraud which to his knowledge made the company increasingly insolvent to the detriment of its existing and future creditors. For present purposes it is to be assumed (and in fact it seems clear) that Mr Stojevic must have known that, as a result of his scheme of fraud, S & R was (increasingly) insolvent at each audit date."

69 Lord Mance went on to consider the position of the auditors and concluded that they could not rely on the ex turpi causa principle even in relation to a claim by a one-man company where the company was insolvent at the date of the audit due to the fraudulent activities of its owners and directors. In such circumstances they had a reporting duty which went

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beyond the shareholders to consider the interests of creditors and it was no answer therefore to say that Mr Stojevic did not need their advice that he was acting fraudulently and was not prejudiced by not receiving it. His fraudulent conduct should not therefore be attributed to the company so as to lead to the operation of the ex turpi causa rule.

The present appeal

70 Mr Maclean relies on both limbs of the auditors' argument in the *Stone & Rolls* case [2009] AC 1391. He submits that the *Hampshire Land/Belmont* principle only applies to prevent attribution of the directors' fraud to Bilta if it can properly be regarded as the victim of that fraud. The true victim was not Bilta but HMRC who suffered loss from what the pleading accepts was a carousel fraud in which Bilta was a key participant. He relies in particular on the references in paras 15–17 of the amended particulars of claim to first line and second line buffers (all features of a carousel fraud) and to the express reference to a carousel in para 22(9). Even without travelling outside the terms of the pleading, it is apparent, he submits, that Bilta's formulation of the terms and purpose of the conspiracy in para 14 does not accurately describe what the parties were allegedly engaged upon. Bilta's inability to pay its VAT liabilities was not the consequence of the conspiracy but an essential feature of the fraud on HMRC.

71 It follows, he submits, that Bilta was not in truth a victim but rather a villain and that, as in the *Stone & Rolls* case, its loss was simply a secondary consequence of the fraudulent scheme it participated in. It cannot therefore rely on *Hampshire Land* and its claim against the defendants does therefore amount to it relying on its own fraud to found a cause of action against its co-conspirators.

72 In the alternative, Mr Maclean adopts the one-man company approach favoured by Lord Walker and Lord Brown in the *Stone & Rolls* case which excludes the operation of the *Hampshire Land* rule due to the absence of any independent directors or shareholders. He relies in particular on what Lord Walker said at paras 173–174 quoted above. Here also there were no innocent participators in the company who could be said to be prejudiced by its inability to recover compensation for the consequences of the directors' fraud and the loss which it has suffered in the form of the claim by HMRC is not therefore sufficient to prevent attribution of the directors' fraud to the company.

73 Sir Andrew Morritt C decided that the ratio in the *Stone & Rolls* case is not applicable to a case in which the claim is based on a breach of duty which extends beyond the interests of the fraudsters as shareholders. Here the directors always had a duty under section 172 to consider the interests of the creditors. Mr Maclean says that this is unsustainable because it fails to engage with the reasoning which underlines the decision of the majority. Unless there are innocent directors or shareholders there is no-one from whom the fraudulent directors can be assumed to wish to conceal their conduct. The notional desire on their part to conceal their wrongdoing from the creditors is not relevant to whether the company should be fixed with knowledge of their fraud. They are not part of the directing mind and will of the company and the position of the directors in relation to them cannot

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therefore be determinative of whether the directors' conduct should be attributed to the company. A

74 It is said that there would be other anomalies. It would mean, for example, that a distinction would exist between a fraudster who acted as a sole trader and one who carried out the fraud using an off the shelf company. In the former case, it would not be possible for the trustee to sue the fraudster for the loss to his creditors because it would amount to an action by the fraudster against himself. But, on Sir Andrew Morritt C's reasoning, the company would be entitled to maintain such an action. Sir Andrew Morritt C appeared to think that if the defendants are right there would be a lacuna in the law. But in most cases involving an insolvent company, this will be filled by the statutory cause of action for fraudulent trading vested in liquidators by section 213 of the Insolvency Act. B

75 I am not convinced by any of these submissions. This court is, in my view, bound by the decisions in the *Belmont* case [1979] Ch 250 and *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 to hold that a director even of a one-man company can be held liable to account for breaches of fiduciary duty which he commits against the company. As Lord Scott and Lord Mance point out in their speeches in *Stone & Rolls*, the fact that the fraudulent director is the directing mind and will of the company has never been regarded as an answer to a claim by the company against the directors for a breach of duty committed against the company. And, for the reasons I have set out earlier in this judgment, in that context the company is to be treated as the victim even though the loss which it suffers from the breach may be the compensation which it has had to pay to a third party who has been damaged by the fraud. Although loss of that kind may not be sufficient to prevent attribution under the *Belmont/Hampshire Land* principles when what is at issue is the company's own liability to a third party, like Lord Mance, I cannot see why it should have the same effect when the company is the claimant and the fraudulent directors and their associates are the defendants. Nothing that was said in the *McNicholas* or *Bank of India* cases suggests otherwise. C D E

76 It is said by Mr Maclean that the *Belmont* analysis is rendered inapplicable by this being a conspiracy to defraud HMRC as part of a carousel fraud. But that, in my view, is a point to be decided at the trial. For the purposes of an application for summary judgment, the claim to be considered is that summarised in para 14 of the amended particulars of claim. If, on a further examination of the evidence, it transpires that the conspiracy (if proven) had a different object and involved a different unlawful act then the claim will fail for that reason alone. But, for present purposes, we are bound, in my view, to take the pleaded conspiracy as it stands. F G

77 On this basis, Bilta was the intended and only victim and the *Belmont* principles apply to the claim unless Mr Maclean is right on his second submission that they have no application in relation to a one-man company. For the reasons explained earlier, I would, however, have come to the same conclusion even if the true object of the conspiracy had been HMRC. In the context of a claim against the directors and the defendants for breach of fiduciary duty, the company is the victim regardless of whether its loss was consequential on that to a third party. The *Stone & Rolls* case H

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A [2009] AC 1391 decided that this did not apply for the purpose of a claim against its auditors but that is not what we have to consider in this case.

78 The second line of argument based on the sole actor exception requires us to consider whether we should apply such a rule to the claim against the directors and their co-conspirators in this case and whether we are compelled in any event to apply that principle as a result of the decision in the *Stone & Rolls* case. Both Lord Walker and Lord Brown decided the B appeal in the *Stone & Rolls* case on that basis. But Lord Phillips expressed no concluded view on it and Lord Scott and Lord Mance were strongly opposed to its importation into English law.

79 My own view is that in the context of a claim by the company against its fraudulent directors, the rule has no place in English law and would directly contradict the protection given to creditors under sections 172 and 239 of the C Companies Act 2006 which applies regardless of whether the company is what Lord Walker described as a one-man company or one in which there are innocent directors and shareholders. As Lord Mance pointed out, the application of the sole actor exception in the United States is balanced by the creditors having a direct right of action against those responsible for the fraud.

80 Lord Walker considered that the adoption of the sole actor exception could be justified as being in line with what the English courts have decided D in the liability cases. But that, in my view, ignores the contextual difference between the two situations which calls for a much more nuanced approach to the question of attribution and not a mechanistic application of a rule regardless of the circumstances and the nature of the claim. I prefer the analysis of Lord Scott and Lord Mance contained in the passages from their speeches which I have quoted which, in my view, properly recognise these E differences.

81 But are we bound by the *Stone & Rolls* case to apply the sole actor exception in this case? I do not believe that we are. The issue on that appeal concerned a claim by the company against its auditors who were not party to the fraud on the bank but were negligent in not alerting the company to its existence. Both this court and the House of Lords have decided that the F *Hampshire Land* case [1896] 2 Ch 743 did not prevent attribution in that case. There is, however, a significant difference between the liability of an auditor for failing to notify the company about what was taking place and a conspiracy against the company by its directors and others to deprive it of its assets. The claim against the auditors was a claim against a third party who owed no fiduciary duties as such to the company or its creditors based on what in the context of that claim was secondary damage caused to the G company by a separate breach of duty on the part of the company's own director. It is therefore readily distinguishable from what we have to consider. The decision in the *Stone & Rolls* case [2009] AC 1391 should be confined in my view to the claim and the facts in that case.

82 For these reasons, we are not bound in my view to hold that the sole actor exception is now an established feature of English law for all purposes nor should we do so. It was relied on by only two out of the five members of H the Appellate Committee and in a quite different context. The House of Lords did not overrule the *Belmont* case [1979] Ch 250 or *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 and we are bound to give effect to them. The general adoption of the sole actor exception in relation to directors or accessories such as the defendants in this case is also

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inconsistent with the reasoning of the Supreme Court in the passage from Lord Sumption JSC's speech in *Prest v Prest* [2013] 2 AC 415 which I quoted earlier in this judgment. Mr Maclean's submission that a rejection of the sole actor exception will create a disparity between the insolvency of a company and that of an individual is simply the result of a company having a separate legal personality with the consequences now reaffirmed by the Supreme Court in *Prest v Prest*. It has nothing to do with the adoption or not of the sole actor exception.

83 I would therefore dismiss the appeal against Sir Andrew Morritt C's refusal to dismiss the claim by Bilta.

Section 213

84 Section 213 of the Insolvency Act 1986 provides:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> "(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

85 The only issue is whether the defendants are "any persons" within the meaning of section 213(2).

86 Mr Maclean submits that in the absence of express words or necessary implication a statute will be presumed to apply only to persons within the jurisdiction. This rule of statutory construction can, he says, be traced back to *Ex p Blain; In re Sawers* (1879) 12 Ch D 522, 526, per James LJ but was given modern expression by Lord Scarman in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145 where he said:

> "Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction."

87 The facts of the present case are that Jetivia is domiciled and carries on business in Switzerland and Mr Brunschweiler is domiciled in France. Neither has any assets in England and neither is alleged to have been present in England at any time material to the acts relied on for the purposes of the section 213 claim. Their only connection with the jurisdiction is that they sold EUAs to Bilta and are alleged to have been parties to the conspiracy pleaded in para 14 of the amended particulars of claim. They will not therefore be caught by section 213 unless it applies to all persons who were knowingly parties to the fraudulent trading regardless of where they were at the material time.

88 The defendants contend that section 213 cannot have been intended by Parliament to apply to the entire world. But Sir Andrew Morritt C rejected this argument relying in terms of authority on the decision of this court in *In re Paramount Airways Ltd* [1993] Ch 223 which concerned the scope of section 238 of the 1986 Act which allows the court to set aside or

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A adjust the effect of a transaction entered into by the company "with any person at an undervalue": see section 238(2). In the *Paramount Airways* case the transaction in question had been entered into with a bank in Jersey. The bank claimed that section 238 did not have extraterritorial effect. Sir Donald Nicholls V-C said, at p 239, that although there were powerful arguments for applying some limitation on the scope of the section, there was no one simple formula which was compelling:

B

> "In my view the solution to the question of statutory interpretation raised by this appeal does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in
> C respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression 'any person' in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation
> D along the lines of *Ex p Blain*, 12 Ch 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."

89 Mr Parker QC for the liquidators also drew our attention to *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 where it was held that orders made under section 133 of the 1986 Act for the public examination of officers had extraterritorial effect and *Revenue and Customs Comrs v Begum*
E [2011] BPIR 59 where section 423 had been construed in the same way.

90 The short answer to this part of the appeal is that there are no grounds for distinguishing between section 213 and section 238 in terms of whether Parliament intended them to have extraterritorial effect. Both use the same unqualified language ("any person") and the reasoning of the Court of Appeal in the *Paramount Airways* case applies in my view with equal force to section 213.

F

Conclusions

91 I would therefore dismiss these appeals.

RIMER LJ

92 I agree.

G

LORD DYSON MR

93 I also agree.

Appeal dismissed with costs.
Permission to appeal refused.

H

SUSAN DENNY, Barrister

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Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
AWB Geneva SA v. North America Steamships Limited [2007] 2 Lloyd's Rep 31	Canada	8
Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825	United Kingdom	11
Bilta (UK) Ltd v. Nazir [2014] Ch 52 (CA)	United Kingdom	12
Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
In re C (A Bankrupt) BVIHC 0080/2013	British Virgin Islands	15
Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852	United Kingdom	18
Jyske Bank (Gibraltar) Ltd v. Spjeldnaes [2000] BCC 16	United Kingdom	19
Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

Exhibit List

	Jurisdiction	Exhibit Number
Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
Picard v. Bernard L Madoff Investment Securities LLC BVIHCV140/2010	British Virgin Islands	22
Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
Stichting Shell Pensioenfonds v. Krys [2015] AC 616; [2014] UKPC 41	United Kingdom	25
Other Authorities		
McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
Cases Cited by *Amici Curiae*		
A, B, C & D v. E , HCVAP 2011/001	Anguilla	28
Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 13

A

The Law Reports

Appeal Cases

B

Supreme Court

C

Bilta (UK) Ltd (in liquidation) and others *v* Nazir and others (No 2)

[2015] UKSC 23

2014 Oct 14, 15;
2015 April 22

Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath, Lord Toulson, Lord Hodge JJSC

D

Company — Fraud — Knowledge of company — Company's claim for conspiracy to defraud — Whether defence of ex turpi causa non oritur actio available to company's directors or those alleged to have conspired with them — Companies Act 2006 (c 46), ss 172, 239

Insolvency — Winding up — Fraudulent trading — Statutory provision making persons party to fraudulent trading liable to contribute to company's assets — Whether having extraterritorial effect — Insolvency Act 1986 (c 45), s 213

E

The first and second defendants were the sole directors of the first claimant, a company incorporated in England and registered for the purposes of VAT. The company purchased carbon credits on the Danish Emissions Trading Agency from traders carrying on business outside the United Kingdom, including the sixth defendant, a company incorporated in Switzerland the sole director of which was the seventh defendant. Accordingly the purchases were zero-rated for VAT. The first and second defendants as directors owed fiduciary duties to the company under sections 172 and 239 of the Companies Act 2006[1]. The second and third claimants, the company's liquidators, claimed that a conspiracy existed to injure and defraud the company by trading in carbon credits and dealing with the resulting proceeds in such a way as to deprive the company of its ability to meet its VAT obligations on such trades. It was claimed that the defendants were knowingly parties to the business of the company with intent to defraud creditors and for other fraudulent purposes, and should therefore be ordered under section 213 of the Insolvency Act 1986[2] to contribute to the company's assets. The sixth and seventh defendants, who were

F

G

[1] Companies Act 2006, s 172: see post, para 124.

S 239: "(1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company. (2) The decision of the company to ratify such conduct must be made by resolution of the members of the company. (3) Where the resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member . . . (5) For the purposes of this section— (a) 'conduct' includes acts and omissions . . . (7) This section does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company."

H

[2] Insolvency Act 1986, s 213: see post, para 107.

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claimed to have dishonestly assisted the conspiracy, applied for orders that the claim be summarily dismissed as against each of them on the grounds, among others, that (1) the claim by the company was precluded by an application of the maxim ex turpi causa non oritur actio on the basis that the pleaded conspiracy disclosed the use of the company by its directors and their associates to carry out a carousel fraud, the only victim of which was the Revenue and Customs Commissioners, and since the company was a party to the fraud it could not claim against the other conspirators for losses which it had suffered as a result of the fraud which it had carried out, and (2) the liquidators' claim for fraudulent trading under section 213 of the 1986 Act was bound to fail because the section had no extraterritorial effect. The application was refused on the grounds, among others, that the defence of ex turpi causa non oritur actio was not available to the defendants, and section 213 of the 1986 Act was of extraterritorial effect. The Court of Appeal upheld that decision.

On appeal by the sixth and seventh defendants—

Held, dismissing the appeal, (1) that in most circumstances the acts and state of mind of its directors and agents could be attributed to a company by applying the rules of the law of agency, but ultimately the key to any question of attribution was always to be found in considerations of context and the purpose for which the attribution was relevant; that where the purpose of the attribution was to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result would not necessarily be the same as it would be in a case where the purpose was to apportion responsibility between the company and a third party; that where a company had been the victim of wrongdoing by its directors, or of which its directors had notice, that wrongdoing or knowledge of the directors could not be attributed to the company as a defence to a claim brought against the directors by the company's liquidators, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors might be attributed to the company in other types of proceedings; and that, accordingly, the defence of ex turpi causa non oritur actio was not available to the defendant directors against the company's claim because the defendants' wrongful activities could not be attributed to the company in the proceedings brought by the liquidators (post, paras 7–9, 39–48, 84, 86–97, 181, 202, 208).

Tinsley v Milligan [1994] 1 AC 340, HL(E), *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, PC, *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, HL(E), *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629, CA and *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 218 considered.

(2) That an English court winding up an English company had worldwide jurisdiction over the company's assets and their proper distribution; that section 213 of the Insolvency Act 1986 had extraterritorial effect so that an order winding up a company registered in Great Britain had worldwide effect and provided a remedy against any person who had knowingly become a party to the carrying on of business with a fraudulent purpose of a now insolvent company; and that, accordingly, section 213 could be invoked against the defendants (post, paras 10, 53, 106–111, 213–214).

In re Paramount Airways Ltd [1993] Ch 223, CA approved.

Per Lord Toulson and Lord Hodge JJSC. The fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties of a company which is able to meet its liabilities, because in the case of the former the director's duty towards the company requires him to have proper regard for the creditors and prospective creditors. The purpose of the inclusion of the creditors' interests within the scope of the fiduciary duty of the directors of an insolvent company towards the company is so that the directors should not be off the hook if they acted in disregard of the creditors' interests. It would be contradictory and

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contrary to the public interests if in such circumstances their control of the company should provide a means for them to be let off the hook on the ground that their illegality tainted the liquidators' claim (post, paras 123, 130).

Decision of the Court of Appeal [2013] EWCA Civ 968; [2014] Ch 52; [2013] 3 WLR 1167; [2014] 1 All ER 168; [2014] 1 BCLC 302 affirmed.

The following cases are referred to in the judgments:

Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461, HL(Sc)
Abrath v North Eastern Railyway Co (1886) 11 App Cas 247, HL(E)
Arab Bank plc v Zurich Insurance Co [1999] 1 Lloyd's Rep 262
Ashmore Benson Pease & Co Ltd v AV Dawson Ltd [1973] 1 WLR 828; [1973] 2 All ER 856, CA
Attorney General's Reference (No 2 of 1982) [1984] QB 624; [1984] 2 WLR 447; [1984] 2 All ER 216, CA
Attorney General's Reference (No 2 of 1999) [2000] QB 796; [2000] 3 WLR 195; [2000] 3 All ER 182; [2000] 2 BCLC 257, CA
Bank of Credit and Commerce International SA, In re (No 15); Morris v Bank of India [2005] EWCA Civ 693; [2005] 2 BCLC 328; [2005] BCC 739, CA
Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191; [1996] 3 WLR 87; [1996] 3 All ER 365, HL(E)
Belmont Finance Corpn Ltd v Williams Furniture Ltd [1979] Ch 250; [1978] 3 WLR 712; [1979] 1 All ER 118, CA
Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2) [1980] 1 All ER 393, CA
Berg Sons & Co Ltd v Mervyn Hampton Adams [1993] BCLC 1045; [2002] Lloyd's Rep PN 41
Blain, Ex p; In re Sawers (1879) 12 Ch D 522, CA
Bowman v Secular Society Ltd [1917] AC 406, HL(E)
Brink's-Mat Ltd v Noye [1991] 1 Bank LR 68, CA
Caparo Industries plc v Dickman [1990] 2 AC 605; [1990] 2 WLR 358; [1990] 1 All ER 568; [1990] BCLC 273, HL(E)
Citizens' Life Assurance Co Ltd v Brown [1904] AC 423, PC
Clark v Oceanic Contractors Inc [1983] 2 AC 130; [1983] 2 WLR 94; [1983] 1 All ER 133, HL(E)
Courage Ltd v Crehan (Case C-453/99) EU:C:2001:465; [2002] QB 507; [2001] 3 WLR 1646; [2002] ICR 457; [2001] All ER (EC) 886; [2001] ECR I-6297, ECJ
Cox v Ergo Versicherung AG [2014] UKSC 22; [2014] AC 1379; [2014] 2 WLR 948; [2014] 2 All ER 926, SC(E)
Crehan v Inntrepreneur Pub Co CPC [2004] EWCA Civ 637; [2004] 2 CLC 803, CA
Cross v Kirkby The Times, 5 April 2000; [2000] CA Transcript No 321, CA
Director of Public Prosecutions v Kent and Sussex Contractors Ltd [1944] KB 146; [1944] 1 All ER 119, DC
Duomatic Ltd, In re [1969] 2 Ch 365; [1969] 2 WLR 114; [1969] 1 All ER 161
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685; [1994] 1 BCLC 464, CA
Euro-Diam Ltd v Bathurst [1990] 1 QB 1; [1988] 2 WLR 517; [1988] 2 All ER 23, CA
Everet v Williams (1725) (unreported); but noted (1893) 9 LQR 197
Ferguson v Wilson (1866) LR 2 Ch App 77
Gray v Thames Trains Ltd [2009] UKHL 33; [2009] AC 1339; [2009] 3 WLR 167; [2009] 4 All ER 81, HL(E)
Gluckstein v Barnes [1900] AC 240, HL(E)
Hall v Hebert [1993] 2 SCR 159
Hampshire Land Co, In re [1896] 2 Ch 743
Holman v Johnson (1775) 1 Cowp 341
Houghton (JC) & Co v Nothard Lowe & Wills Ltd [1928] AC 1, HL(E)

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Hounga v Allen (Anti-Slavery International intervening) [2014] UKSC 47; [2014] 1 WLR 2889; [2014] ICR 847; [2014] 4 All ER 595, SC(E)
King, decd, In re [1963] Ch 459; [1963] 2 WLR 629; [1963] 1 All ER 781, CA
Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722
Lancashire County Council v Municipal Mutual Insurance Ltd [1997] QB 897; [1996] 3 WLR 493; [1996] 3 All ER 545, CA
Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705, HL(E)
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55; [2015] AC 430; [2014] 3 WLR 1257; [2014] Bus LR 1217; [2015] 1 All ER 671, SC(E)
Lister v Hesley Hall Ltd [2001] UKHL 22; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] ICR 665; [2001] 2 All ER 769, HL(E)
Lloyd v Grace Smith & Co [1912] AC 716, HL(E)
Mackinnon v Donaldson Lufkin & Jenrette Securities Corpn [1986] Ch 482; [1986] 2 WLR 453; [1986] 1 All ER 653
McNicholas Construction Co Ltd v Customs and Excise Comrs [2000] STC 553
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All ER (Comm) 1099; [2008] 2 Lloyd's Rep 128, CA
Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43; [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2009] 2 BCLC 382, HL(E)
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; [1995] 3 WLR 413; [1995] 3 All ER 918; [1995] 2 BCLC 116, PC
Moore v I Bresler Ltd [1944] 2 All ER 515, DC
Moulin Global Eyecare Trading Ltd v Inland Revenue Comr [2014] HKFCA 22; 17 HKCFAR 218; [2014] HKC 323
Nelson v Nelson (1995) 184 CLR 538
PCW Syndicates v PCW Reinsurers [1996] 1 WLR 1136; [1996] 1 All ER 774; [1996] 1 Lloyd's Rep 241, CA
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1; [1992] BCLC 710, CA
ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA Civ 1338; [2013] QB 840; [2013] 2 WLR 939; [2012] 2 Lloyd's Rep 679, CA
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556; [1980] 1 Lloyd's Rep 545, HL(E)
Prest v Prest [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1; [2013] 4 All ER 673; [2014] 1 BCLC 30, SC(E)
R v Gomez [1993] AC 442; [1992] 3 WLR 1067; [1993] 1 All ER 1, HL(E)
R v ICR Haulage Ltd [1944] KB 551; [1944] 1 All ER 691, CCA
R (Best) v Chief Land Registrar [2015] EWCA Civ 17; [2016] QB 23; [2015] 3 WLR 1505; [2015] 4 All ER 495, CA
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; [1995] 3 WLR 64; [1995] 3 All ER 97, PC
Safeway Stores Ltd v Twigger [2010] EWCA Civ 1472; [2011] Bus LR 1629; [2011] 2 All ER 841; [2011] 1 Lloyd's Rep 462, CA
Salomon v A Salomon & Co Ltd [1897] AC 22, HL(E)
Schmid v Hertel (Case C-328/12) EU:C:2014:6; [2014] 1 WLR 633, ECJ
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980; [1993] BCLC 1139, CA
Stichting Shell Pensioenfonds v Krys [2014] UKPC 41; [2015] AC 616; [2015] 2 WLR 289; [2015] 2 All ER (Comm) 97; [2015] 1 BCLC 597, PC
Stone & Rolls Ltd v Moore Stephens [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125; [2009] 2 Lloyd's Rep 537; [2009] 2 BCLC 563, HL(E)
Tesco Stores Ltd v Brent London Borough Council [1993] 1 WLR 1037; [1993] 2 All ER 718, DC

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A *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1971] 2 WLR 1166; [1971] 2 All ER 127, HL(E)
Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E)
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250, CA
Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2) [1998] 1 WLR 294; [1998] 4 All ER 82; [1998] 1 Lloyd's Rep 322; [1998] 2 BCLC 485

B The following additional case was cited in argument

Gourdain v Nadler (Case C-133/78) EU:C:1979:49; [1979] ECR 733, ECJ

APPEAL from the Court of Appeal

In September 2009 the second and third claimants, Kevin John Hellard and David Anthony Ingram, as the provisional liquidators of the first
C claimant, Bilta (UK) Ltd ("Bilta"), commenced proceedings in Bilta's name against the defendants, Muhammad Nazir, Chetan Chopra, Pan I Ltd, Aman Ullah Khan, Sheikh Zulfiqar Mahmood, Jetivia SA, Urs Brunschweiler, Trading House Group Ltd (a company incorporated in the British Virgin Islands) and Muhammad Fayyaz Shafiq (also known as Fayyaz Shafiq Rana), alleging conspiracy to injure and default Bilta. On 25 November 2009 Bilta was compulsorily wound up and the second and third claimants were
D appointed liquidators. The proceedings were amended on 13 October 2011 to include claims under section 213 of the Insolvency Act 1986 for fraudulent trading. The first and second defendants were the sole directors of Bilta, the fourth and fifth defendants were the directors of the third defendant, and the seventh defendant was the sole director of the sixth defendant.

E By an application notice issued on 22 December 2011 the sixth and seventh defendants sought orders that the claim be summarily dismissed on the grounds that (1) the claim made by Bilta was precluded by the application of the maxim ex turpi causa non oritur actio, (2) the claim under section 213 of the 1986 Act had to fail because that section had no extraterritorial effect, and (3) both claims were outside the jurisdiction of the court because they constituted the enforcement of a revenue debt of a foreign
F state. By the time of the hearing of the application none of the defendants save the sixth, seventh and ninth was participating in the proceedings. On 30 July 2012 Sir Andrew Morritt C refused the application and granted permission to appeal.

The sixth and seventh defendants appealed. On 31 July 2013 the Court of Appeal (Lord Dyson MR, Rimer and Patten LJJ) dismissed the appeals
G [2014] Ch 52.

On 11 February 2014 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Carnwath and Lord Toulson JJSC) granted the sixth and seventh defendants permission to appeal, pursuant to which they appealed, and granted the Revenue and Customs Commissioners permission to intervene in the appeal by written submissions only.

H The facts are stated in the judgments.

Alan Maclean QC and *Colin West* (instructed by *Macfarlanes LLP*) for the sixth and seventh defendants.

As a matter of law Bilta's claims against the defendants are barred for illegality under the doctrine ex turpi causa non oritur actio. If the pleaded

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allegations can be proved several parties, including Bilta, participated in a large-scale and very probably criminal fraud against the revenue in respect of VAT receipts. It is not open to Bilta as a party to that fraud to sue the other alleged participants in fraud for losses which Bilta has suffered or liabilities which it has incurred by reason of its participation in the fraud.

Bilta presents its claim on the basis that the fraud was carried out against it rather than by it. The victim of the fraud was the revenue. Bilta's role was as villain and not victim. Bilta was a company of no substance the only purpose of which was to perpetrate the fraud and its trading transactions had no legitimate purpose whatsoever. They were artificial transactions the sole purpose of which was to generate payments by way of VAT which those in control of Bilta intended should be the object of massive fraud on the revenue.

That Bilta would incur large VAT liabilities which it would not pay was not simply a consequence of the fraud in this case. It was the critical mechanism on which the fraud depended. Bilta was a central participant in a major VAT fraud, yet it seeks to bring a claim seeking compensation where the subject matter of its claim is the very proceeds of the fraud which it perpetrated. Its commission of the fraud is inextricably linked with the insolvency of the company which it inevitably entailed.

The defence of illegality rests upon the foundation of public policy. It would be quite unrealistic to regard Bilta as innocent or as a victim of the wrongdoing which was its sole purpose and single activity. English law will not permit a fraudulent company such as Bilta to advance a claim based on the assertion that the fraud was carried out against it rather than by it. The test is satisfied for the doctrine of ex turpi causa non oritur actio to apply and it does not matter if the relevant acts were not authorised by Bilta.

[Reference was made to *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 18; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *Hounga v Allen (Anti-Slavery International intervening)* [2014] 1 WLR 2889; *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391; *Tinsley v Milligan* [1994] 1 AC 340; *Gray v Thames Trains Ltd* [2009] AC 1339; *In re Hampshire Land Co* [1896] 2 Ch 743; *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629; *Berg Sons & Co Ltd v Mervyn Hampton Adams* [1993] BCLC 1045 and *Schmid v Hertel* (Case C-328/12) [2014] 1 WLR 633.]

The application of the ex turpi causa doctrine to companies depends upon the principles of attribution, namely, the principles whereby the knowledge and states of mind of individuals are attributed to companies in the management of which they are involved or on whose behalf they act. The ordinary rule of attribution is that the acts and states of mind of those who are the company's directing mind will be attributed to the company.

The Court of Appeal relied for its reasoning on the "context" in which the process of attribution fell to be made, holding that a claim against Bilta was a separate "context" from a claim by Bilta against its former directors and that as such the attribution rules operated differently in each sphere. However there was only one fraud and only one conspiracy. As a result there is only one relevant context.

It is illogical to regard there being two separate "contexts" calling for the application of two separate attribution rules, depending on whether Bilta is the claimant or the defendant. Once the court has determined that, vis-à-vis

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A the revenue, Bilta was engaged in a VAT fraud, any attempt by Bilta to bring proceedings against other participants in that fraud based on that participation or inextricably linked with it runs squarely into the ex turpi causa principle.

The Court of Appeal's approach permits a party to a fraudulent conspiracy to sue other parties to that conspiracy for the losses resulting to it from breaches of duty allegedly committed against it as part and parcel of B the carrying into effect of the fraudulent conspiracy. That approach is contrary to principle. Once Bilta has been identified as itself a participant in the fraud it cannot then seek to sue the other participants in the fraud by relying upon the fiduciary duties owed to it by its directors.

If Bilta can sue the sixth defendant for the losses resulting to Bilta from its involvement in the fraud, the sixth defendant must equally be able to sue C Bilta for losses resulting to it, on the same basis, namely that Bilta dishonestly assisted the sixth defendant's director, the seventh defendant, to breach his fiduciary duties to the sixth defendant by involving it in the fraud. The result would be that Bilta's action against the sixth defendant would fail for circuity of action.

[Reference was made to *Citizens' Life Assurance Co Ltd v Brown* [1904] D AC 423; *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250; *In re Hampshire Land Co* [1896] 2 Ch 743; *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391; *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629 and *Attorney General's Reference (No 2 of 1982)* [1984] QB 624.]

The application of the ex turpi causa doctrine does not mean that Bilta's creditors will be left without any remedy or recourse. Bilta's liquidators E have statutory powers pursuant to the Insolvency Act 1986 to bring proceedings against those who were knowing parties to fraudulent or wrongful trading by Bilta. Such proceedings are brought by the liquidators themselves and not Bilta and they are not open to the objection of arising ex turpi causa.

Section 213 of the 1986 Act does not apply to the sixth and seventh defendants because it does not have extraterritorial effect. The sixth F defendant is a Swiss company with no presence in the United Kingdom and the seventh defendant has no connection to England, having lived in France and worked in Switzerland at the material times.

[Reference was made to *Ex p Blain; In re Sawers* (1879) 12 Ch D 522; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90 and *In re* G *Paramount Airways Ltd* [1993] Ch 223.]

The approach of the Court of Appeal in *In re Paramount Airways Ltd* is contrary to principle. That case was wrongly decided and should be overruled. The ordinary approach in English law and the universal approach under various European instruments which now govern jurisdiction in many contexts is that jurisdiction be determined once and for all at the outset of the proceedings. If any factual questions arise as to jurisdictional connections H which have to be established, it is for the claimant to establish them to the standard of a good arguable case.

Thus if the jurisdictional test for the making of an order under section 213 is whether a defendant has a sufficient connection with England, that ought to be determined at the start of the claim and not at the end of the trial. If there is

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not demonstrated the necessary sufficient connection with England the defendant ought not to be subject to trial here at all. In the present case the sixth and seventh defendants have no connection at all with England and the liquidators' claims under section 213 of the 1986 Act do not apply to them.

Christopher Parker QC and *Rebecca Page* (instructed by *Gateley LLP*) for the claimants.

Bilta was the primary victim of the conspiracy. The pleaded case was that the conspiracy was one to defraud and deprive it of its assets leaving it insolvent. The Court of Appeal rightly applied a conventional analysis as set out in *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250 and held that the directors' knowledge of an illegal transaction could not be imputed to Bilta. The same conclusion would apply even if the true object of the conspiracy were the revenue. *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 is distinguishable from the present case and does not support the defendants' case.

[Reference was made to *Gourdain v Nadler* (Case C-133/78) [1979] ECR 733 and *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 218.]

The defendants and their accomplices inflicted an intentional injury on Bilta in breach of the directors' fiduciary duties. The reliance on ex turpi causa in those circumstances is misconceived. Such a defence arises where a company has committed a wrong against a third party. It can have no application to a claim by a company against its own directors and their accomplices for a fraud committed on itself or through itself on its constituent elements such as its shareholders and creditors.

The argument that the victim was not the company, Bilta, but its creditor, the revenue, overlooks the fact that the wrong complained of is breach of fiduciary duty which is necessarily a wrong against the company because the duty was owed to the company and not to its creditors. The fraud is one which gives rise to a right of action by the company for breach of fiduciary duty: there is no right of action by the creditor and, had the revenue brought a claim for breach of fiduciary duty by the directors, it would have been struck out. The same would apply to claims for dishonest assistance or knowing receipt. The loss to creditors is a reflective loss in respect of which it would not be allowed to sue.

The only wrongdoing identified on the pleadings is the wrong done to the company. It has never been suggested that as a matter of public policy a company cannot sue when it is the intended victim of an agent's dishonesty. Public policy is best served by the ex turpi causa defence failing in this case so that the economic consequences can be visited on those who perpetrated the fraud on Bilta to the detriment of its creditor, the revenue. Public policy would not be best served by allowing those who perpetrated the fraud to rely on their own knowledge of the fraud to defend such a claim. The courts have long recognised that such a situation would be absurd and the law of agency and principles of attribution have evolved to prevent a fraudster seeking to defend claims in that way.

The defendants must establish that the law attributes to Bilta the unlawful conduct, not just knowledge, of its directors and sole shareholder. A director is not authorised to misappropriate company assets. As between the director and the company his acts cannot be said to be the acts of the

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company at all. Equally the fraud of a director on a company will be ultra vires the company since it is outside the scope of the company's powers. It will be a breach of fiduciary duty for a director to appropriate or simply to pay away company assets.

The conduct of the directors cannot be attributed to Bilta simply because it is a one-man company. The separate legal personality of the company cannot be ignored where the company suffers loss and is therefore, for the purposes of its claim against the directors and their accomplices, the victim.

Section 213 of the Insolvency Act 1986 is of the widest formulation and on its face is of unlimited territorial scope. It concerns fraud in relation to the businesses of English companies or companies being wound up in England. Where a defendant voluntarily submits to the jurisdiction there is a presumption that English legislation will apply unless it can be shown that the statute is one which does not apply to foreign residents or there is insufficient connection with the jurisdiction. There would be no good reason for Parliament to wish to limit its reach to those who happened to be resident in England. Properly construed section 213 applies to the defendants and the court has jurisdiction to hear the section 213 claim.

In re Paramount Airways Ltd [1993] Ch 223 was correctly decided and its reasoning applies to section 213.

Maclean QC replied.

Michael Gibbon QC (instructed by *Howes Percival*) for the intervener made written submissions.

The court took time for consideration.

22 April 2015. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY PSC (with whom LORD CLARKE OF STONE-CUM-EBONY and LORD CARNWATH JJSC agreed)

Introductory

1 The facts giving rise to this appeal can be shortly summarised, although they are more fully set out in the judgments of Lord Sumption JSC at paras 56–59, and of Lord Toulson and Lord Hodge JJSC at paras 113–116 below.

2 Bilta (UK) Ltd is an English company which was compulsorily wound up in November 2009 pursuant to a petition presented by HMRC. Bilta's liquidators then brought proceedings against, inter alia, its two former directors, Mr Chopra, who was also its sole shareholder, and Mr Nazir; and Jetivia SA, a Swiss company and its chief executive, Mr Brunschweiler, who is resident in France ("the four defendants").

3 The pleaded claim alleges that the four defendants were parties to an unlawful means conspiracy to injure Bilta by a fraudulent scheme, which involved Messrs Chopra and Nazir breaching their fiduciary duties as directors, and Jetivia and Mr Brunschweiler ("the appellants") dishonestly assisting them in doing so. The liquidators claim (i) through Bilta, (a) damages in tort from each of the four defendants, (b) compensation based on constructive trust from the appellants, and (ii) directly from each of the four defendants, a contribution under section 213 of the Insolvency Act 1986.

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4 The case against the four defendants is based on the contention that between April and July 2009, Messrs Chopra and Nazir caused Bilta to enter into a series of transactions relating to European Emissions Trading Scheme Allowances with various parties, including Jetivia, and that those transactions constituted what are known as carousel frauds. The effect of the transactions was that they generated (i) an obligation on Bilta to account to HMRC for output VAT and (ii) an obligation on HMRC to pay a slightly lower sum by way of input VAT to another company. While the input VAT was paid by HMRC, it was inherent in the fraud that Bilta would always be insolvent and unable to pay the output VAT to HMRC. The amount of output VAT for which Bilta consequently remains liable is said to be in excess of £38m.

The application to strike out

5 The appellants applied to strike out Bilta's claim against them on the ground that (i) Bilta could not maintain the proceedings in view of the principle ex turpi causa non oritur actio, or, to put it another way, the appellants were bound to defeat the claims against them on the basis of an illegality defence, and (ii) in so far as the claims were based on section 213, it could not be invoked against the appellants as it does not have extraterritorial effect. The application was dismissed by Sir Andrew Morritt C, whose decision was upheld by the Court of Appeal [2014] Ch 52. The appellants now appeal to the Supreme Court.

6 In common with all members of the court, I consider that this appeal should be dismissed because the Court of Appeal were right to hold that (i) illegality cannot be raised by Jetivia or Mr Brunschweiler as a defence against Bilta's claim because the wrongful activity of Bilta's directors and shareholder cannot be attributed to Bilta in these proceedings, and (ii) section 213 of the Insolvency Act 1986 has extraterritorial effect.

Attribution

7 So far as attribution is concerned, it appears to me that what Lord Sumption JSC says in his paras 65–78 and 82–97 is effectively the same in its effect to what Lords Toulson and Hodge JJSC say in their paras 182–209. Both judgments reach the conclusion which may, I think be stated in the following proposition. Where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings.

8 It appears to me that this is the conclusion reached by Lord Sumption JSC and Lords Toulson and Hodge JJSC as a result of the illuminating discussions in their respective judgments—in paras 65–78 and 82–95 and paras 182–209.

9 Particularly given the full discussion in those passages, I do not think that it would be sensible for me to say much more on the topic. However,

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I would suggest that the expression "the fraud exception" be abandoned, as it is certainly not limited to cases of fraud—see per Lord Sumption JSC at para 71 and Lords Toulson and Hodge JJSC at para 181. Indeed, it seems to me that it is not so much an exception to a general rule as part of a general rule. There are judicial observations which tend to support the notion that it is, as Lord Sumption JSC says in his para 86, an exception to the agency-based rules of attribution, which is based on public policy—or common sense, rationality and justice, according to the judicial observations quoted in paras 72, 73, 74, 78 and 85 of Lord Sumption JSC's judgment. However, I agree with Lord Mance JSC's analysis at paras 37–44 of his judgment, that the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question.

Section 213 of the 1986 Act

10 I agree with Lord Sumption JSC and Lords Toulson and Hodge JJSC for the reasons they give in paras 107–110 and 210–218 that section 213 of the 1986 Act has extraterritorial effect, at least to the extent of applying to individuals and corporations resident outside the United Kingdom.

The matters in dispute

11 There are some issues on which Lord Sumption JSC and Lords Toulson and Hodge JJSC differ. In that connection, I think that there are three areas of disagreement to which it is right to refer, and, taking them in the order in which it is most convenient to discuss them, they are as follows.

12 First, there is disagreement as to the basis on which a defence based on illegality, or ex turpi causa, is to be approached—compare Lord Sumption JSC at paras 60–63 and 98–100 with Lords Toulson and Hodge JJSC at paras 170–174. Secondly, Lords Toulson and Hodge JJSC would also dismiss this appeal on the attribution issue on the ground of statutory policy (see their paras 122–130), whereas Lord Sumption JSC would not (see his paras 98–102). Thirdly, there are differences between Lord Sumption JSC and Lords Toulson and Hodge JJSC as to the proper interpretation of two cases, namely *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 (see Lord Sumption JSC at paras 79–81 and Lords Toulson and Hodge JJSC at paras 134–155), and *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629 (see Lord Sumption JSC at para 83 and Lords Toulson and Hodge JJSC at paras 156–162).

The proper approach to the illegality defence

13 First, then, there is the proper approach which should be adopted to a defence of illegality. This is a difficult and important topic on which, as the two main judgments in this case show, there can be strongly held differing views, and it is probably accurate to describe the debate on the topic as involving something of a spectrum of views. The debate can be seen as epitomising the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case.

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14 In these proceedings, Lord Sumption JSC considers that the law is stated in the judgments in the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, which he followed and developed (with the agreement of three of the four other members of the court, including myself and Lord Clarke JSC) in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430. He distinguishes the judgment of Lord Wilson JSC in *Hounga v Allen (Anti-Slavery International intervening)* [2014] 1 WLR 2889 as involving no departure from *Tinsley v Milligan,* but as turning on its own context in which "a competing public policy required that damages should be available even to a person who was privy to her own trafficking" (para 102). By contrast Lord Toulson JSC (who dissented from that approach in the *Les Laboratoires* case) and Lord Hodge JSC favour the approach adopted by the majority of the Court of Appeal in *Tinsley v Milligan* and treat that of Lord Wilson JSC in para 42ff of *Hounga v Allen* as supporting that approach.

15 In my view, while the proper approach to the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine Justices) as soon as appropriately possible, this is not the case in which it should be decided. We have had no real argument on the topic: this case is concerned with attribution, and that is the issue on which the arguments have correctly focussed. Further, in this case, as in the two recent Supreme Court decisions in the *Les Laboratoires* and *Hounga* cases, the outcome is the same irrespective of the correct approach to the illegality defence.

16 It would, in my view, be unwise to seek to decide such a difficult and controversial question in a case where it is not determinative of the outcome and where there has been little if any argument on the topic. In *Les Laboratoires*, the majority did opine on the proper approach not because it was necessary to decide the appeal, but because they considered that the Court of Appeal (who had reached the same actual decision) had adopted an approach which was inconsistent with *Tinsley.* Similarly in *Hounga*, as Lord Sumption JSC has shown in para 99, it may well not have been necessary to consider the proper approach to the illegality defence, but it none the less remains the fact that it was the subject of argument, and that Lord Wilson JSC did express a view on the point, and two of the four other members of the court agreed with his judgment.

17 *Les Laboratoires* provides a basis for saying that the approach in *Tinsley* has recently been reaffirmed by this court and that it would be inappropriate for this court to visit the point again. However, it was not argued in *Les Laboratoires* that *Tinsley* was wrongly decided, and, as Lord Toulson JSC pointed out in his judgment, the majority decision was reached without addressing the reasoning in *Hounga.* Lord Sumption JSC is right to say that, unless and until this court refuses to follow *Tinsley*, it is at the very least difficult to say that the law is as flexible as Lords Toulson and Hodge JJSC suggest in their judgment, but (i) in the light of what the majority said in *Hounga* at paras 42–43, there is room for argument that this court has refused to follow *Tinsley*, and (ii) in the light of the Law Commission report *The Illegality Defence* (2010) (Law Com No 320), the subsequent decisions of the Court of Appeal, and decisions of other common law courts, it appears to me to be appropriate for this court to address this difficult and controversial issue—but only after having heard and read full argument on the topic.

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The role of statutory policy in this case

18 As well as dismissing this appeal on the attribution issue on the same grounds as Lord Sumption JSC, Lords Toulson and Hodge JJSC would also dismiss the appeal on the grounds of statutory policy. They suggest that it would make a nonsense of the statutory duty contained in section 172(3) of the Companies Act 2006 (and explained by them in their paras 125–127), if directors against whom a claim was brought under that provision could rely on the ex turpi causa or illegality defence. That defence would be based on the proposition, relied on by the appellants in this case, that, as the directors in question (here the first and second defendants, Mr Nazir and Mr Chopra) were, between them, the sole directors and shareholders of Bilta, their illegal actions must be attributed to the company, and so the defence can run.

19 I agree with Lords Toulson and Hodge JJSC that this argument cannot be correct. Apart from any other reason, it seems to me that Lord Mance JSC must be right in saying in his para 47 that, at least in this connection, the 2006 Act restates duties which were part of the common law. It also appears to me to follow that, if Lords Toulson and Hodge JJSC are right about the proper approach to the illegality principle, then their reasoning in paras 128–130 would be correct. However, I would not go further than that, because, as I have already indicated, this is not an appropriate case in which this court should decide conclusively (in so far as the issue can ever be decided conclusively) on the right approach to the illegality principle. It is unnecessary to decide the right approach even in order to determine whether the illegality defence can be run in relation to the section 172(3) claim in the present case.

20 That is, of course, because it is clear, for the very reasons given by Lord Toulson and Lord Hodge JJSC in paras 126–130 that a claim against directors under section 172(3) cannot be defeated by the directors invoking the defence of ex turpi causa. It is clear from "the language of the rule ([as] it is in a statute) and its content and policy" that the "act (or knowledge or state of mind) was *for this purpose* [not] intended to count as the act etc of the company", to quote and apply the test laid down by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507, set out by Lord Sumption JSC at the end of his para 67.

The proper analysis of Stone & Rolls v Moore Stephens and of Safeway Foodstores Ltd v Twigger

21 In para 3.32 of the report referred to above, the Law Commission observed that "it is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence", explaining that, in their view at any rate, "there was no majority reasoning" with the members of the committee "reaching different conclusions on how the defence should be applied". The confusing nature of the decision has been commented on in a number of articles (see eg David Halpern, "Stone & Rolls Ltd v Moore Stephens: An Unnecessary Tangle" (2010) 73 MLR 487, Peter Watts, "Audit Contracts and Turpitude" (2010) 126 LQR 14 and "Illegality and Agency Law: Authorising Illegal Action" [2011] JBL 213, Eilis Ferran, "Corporate Attribution and Directing Mind and Will" (2011) 127 LQR 239 and Mary

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Watson, "Conceptual Confusion: Organs, Agents and Identity in the English Courts" (2011) 23 Sing Ac Law Jo 762).

22 These critics have been joined by Lord Walker of Gestingthorpe himself, who was of course a member of the majority in *Stone & Rolls*. In the course of his illuminating judgment in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 218, he described the decision in *Stone & Rolls* as a "controversial exception" to a general rule and referred to its facts as "extreme and exceptional"—see para 133. In para 106, he rightly added that the judgment of Patten LJ in the Court of Appeal in the present case had "achieved a welcome clarification of the law in this area". Casting further doubt on the decision in *Stone & Rolls*, in para 101 of *Moulin Global* Lord Walker NPJ recanted part of his reasoning in the House of Lords.

23 It seems to me that the view that it is very hard to seek to derive much in the way of reliable principle from the decision of the House of Lords in *Stone & Rolls* is vindicated by the fact that, in their judgments in this case, Lord Sumption JSC and Lords Toulson and Hodge JJSC have reached rather different conclusions as to the effect of the majority judgments.

24 Particularly given the difference between them as to the ratio decidendi of Lord Phillips of Worth Matravers's opinion, and subject to what I say in the next four paragraphs, I am of the view that, so far as it is to be regarded as strictly binding authority, *Stone & Rolls* is best treated as a case which solely decided that the Court of Appeal was right to conclude that, on the facts of the particular case, the illegality defence succeeded and that the claim should be struck out. I believe that this largely reflects the views of both Lord Sumption JSC (see his para 81) and Lords Toulson and Hodge JJSC (see their para 152–154).

25 But it would be unsatisfactory for us to leave the case without attempting to provide some further guidance as to its effect, in so far as we fairly can. For that purpose I welcome Lord Sumption JSC's enumeration of the three propositions which he suggests in his para 80 can be derived from *Stone & Rolls*. With the exception of the first, I agree with what he says about them, although even the second and third propositions are supported by only three of the judgments at least one of which is by no means in harmony with the other two.

26 Subject to that, I agree that the second and third of the propositions which Lord Sumption JSC identifies in his para 80 can be extracted from three of the judgments in *Stone & Rolls*. Those propositions concern the circumstances in which an illegality defence can be run against a company when its directing mind and will have fraudulently caused loss to a third party and it is relying on the fraud in a claim against a third party. The second proposition, with which I agree, is that the defence is not available where there are innocent shareholders (or, it appears, directors). The third proposition, with which I also agree, is that the defence is available, albeit only on some occasions (not in this case, but in *Stone & Rolls* itself) where there are no innocent shareholders or directors.

27 I need say no more about the second proposition, which appears to me to be clearly well founded. As to the third proposition, I agree with Lords Toulson and Hodge JJSC that it appears to be supported (at least in relation to a company in sound financial health at the relevant time) by the reasoning in the clear judgment of Hobhouse J in *Berg, Sons & Co Ltd v*

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Mervyn Hampton Adams [2002] Lloyd's Rep PN 41, which was referred to with approval and quoted from in *Stone & Rolls* by Lord Phillips of Worth Matravers (at paras 77–79) and Lord Walker (at paras 150, 158–161), and indeed by Lord Mance, dissenting (at paras 258–260).

28 However, I note that Lord Mance suggests that it should be an open question whether the third proposition would apply to preclude a claim against auditors where, at the relevant audit date, the company concerned was in or near insolvency. While it appears that the third proposition, as extracted from three judgments in *Stone & Rolls*, would so apply, I have come to the conclusion that, on this appeal at least, we should not purport definitively to confirm that it has that effect. I am of the view that we ought not shut the point out, in the light of (a) our conclusion that attribution is highly context-specific (see para 9 above), (b) Lord Walker's change of mind (see para 22 above), (c) the fact that the three judgments in *Stone & Rolls* which support the third proposition) are not in harmony (in the passages cited at the end of para 27 above), and (d) the fact that the third proposition is in any event not an absolute rule (see the end of para 26 above).

29 I cannot agree that the first proposition identified by Lord Sumption JSC, namely that the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality, can be derived from *Stone & Rolls* (whether or not the proposition is correct in law, which I would leave entirely open, although I see its attraction). I agree that, in paras 27–28, Lord Phillips accepted that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it, albeit that that was ultimately an obiter conclusion. More importantly, I do not think that Lord Walker accepted that proposition at paras 132–133: he merely identified an issue as to whether the company was "primarily . . . liable for the fraud practised on KB, or was merely vicariously liable for the fraud of Mr Stojevic", but as he then went on to accept that the Court of Appeal "was clearly right in holding that" the company "was primarily . . . liable", he did not have to address the point in question.

30 Subject to these points, the time has come in my view for us to hold that the decision in *Stone & Rolls* should, as Lord Denning MR graphically put it in relation to another case in *In re King, decd* [1963] Ch 459, 483, be put "on one side in a pile and marked 'not to be looked at again' ". Without disrespect to the thinking and research that went into the reasoning of the five Law Lords in that case, and although persuasive points and observations may be found from each of the individual opinions, it is not in the interests of the future clarity of the law for it to be treated as authoritative or of assistance save as already indicated.

31 I turn, finally, to *Safeway Stores Ltd v Twigger*. Lord Sumption JSC has accurately summarised the effect of the decision in his para 83. Lords Toulson and Hodge JJSC deal with it a little more fully and much more critically in their paras 157–162. I would take a great deal of persuading that the Court of Appeal did not arrive at the correct conclusion in that case. However, I do not believe that it would be right on this appeal to express a concluded opinion as to whether the case was rightly decided, and, if so, whether the reasoning of the majority or of Pill LJ was correct. It is unnecessary to reach any such conclusion and the points were not argued in detail before us: indeed, they were hardly addressed at all.

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LORD MANCE JSC

32 The respondent, Bilta (UK) Ltd ("Bilta"), claims damages from the appellants for losses suffered through its involvement in a carousel fraud on the Revenue. The defendants in the proceedings include Bilta's two directors, Mr Chopra who was also its sole shareholder and Mr Nazir, as well as a Swiss company, Jetivia SA ("Jetivia"), and Jetivia's chief executive, Mr Brunschweiler. Jetivia and Mr Brunschweiler are the appellants in this appeal. The scheme involved the purchase of carbon credits by Bilta from sources outside the United Kingdom (so not subject to VAT), followed by their resale (mostly at a loss, if one takes the basic resale price excluding VAT) to UK companies registered for VAT, and the remission of the proceeds to Jetivia and other offshore companies. Inevitably, the scheme rendered Bilta at all material times insolvent, it cannot meet its liabilities to the Revenue and the present claim is brought by liquidators, for the ultimate benefit no doubt of the Revenue as Bilta's creditors.

33 The appellants' defence is that Bilta was through its directors and shareholder party to illegality which precludes it pursuing its claim. I have read with great benefit the judgments prepared by Lords Toulson and Hodge JJSC, by Lord Sumption JSC and by Lord Neuberger of Abbotsbury PSC. Neither they, nor I understand any other member of the court, consider that the defence can succeed, and I agree that it cannot. But there are some differences in reasoning, particularly regarding the general approach to be adopted to illegality. Save perhaps for a slight difference of view (in para 52 below) regarding *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629, I agree on all points in substance with Lord Neuberger PSC.

34 This is not, in my view, the occasion on which to embark on any re-examination either of the House of Lords' decision in *Tinsley v Milligan* [1994] 1 AC 340 or of the Supreme Court's recent decisions in *Hounga v Allen* [2014] 1 WLR 2889 and *Les Laboratoires Servier v Apotex Inc* [2015] AC 430. There was no challenge to or detailed examination of any of these decisions. I agree however that these cases and their inter-relationship merit further examination by this court whenever the opportunity arises.

35 The present appeal raises the question whether a company can pursue its directors and sole shareholder for breaches of duty towards the company depriving it of its assets. Lord Toulson and Lord Hodge JJSC consider that the straightforward answer to the question is that that it would deprive the duties which the shareholder-directors owed Bilta of all content, if the defence of illegality were open to the appellants. But they consider that, if analysed in terms of attribution, the case is not one where the shareholder-directors' acts and state of mind can or should be attributed to Bilta. More generally, they favour a policy-based approach to illegality, but I will not examine that possibility, in view of what I have said in para 34.

36 Lord Sumption JSC in contrast sees the case as turning on rules of attribution, which he views as applying "regardless of the nature of the claim or the parties involved" (para 86) and amongst which he identifies a rule that the acts and state of mind of a directing mind and will be attributed to a company. But he qualifies the effect of his analysis by reference to a policy-based "breach of duty exception" which covers the present case in order "to avoid, injustice and absurdity", as Lord Walker of Gestingthorpe NPJ put it in a passage in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr*, 17 HKCFAR 218, which Lord Sumption JSC quotes in para 85. Later in his

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judgment however in para 92, he modifies this approach by describing it as no more than a "valuable tool of analysis".

37 In common, as I see it, with Lords Neuberger PSC, Toulson and Hodge JJSC, and for reasons which I set out in paras 39–44 below, I do not think it appropriate to analyse the present case as one of prima facie attribution, which is then negatived under a breach of duty exception. As Lord Sumption JSC's judgment demonstrates, it would, however, make no difference to the outcome in this case, if the matter were to be so analysed, though the plethora of difficult authority to which such an analysis has given rise, far from proving its value, argues for what is to my mind a simpler and more principled analysis.

38 One way or another, it is certainly unjust and absurd to suggest that the answer to a claim for breach of a director's (or any employee's) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it. A company has its own separate legal personality and interests. Duties are owed to it by those officers who constitute its directing mind and will, similarly to the way in which they are owed by other more ordinary employees or agents. All the shareholders of a solvent company acting unanimously may in certain circumstances (which need not here be considered, since it is not suggested that they may apply) be able to authorise what might otherwise be misconduct towards the company. But even the shareholders of a company which is insolvent or facing insolvency cannot do this to the prejudice of its creditors, and the company's officers owe a particular duty to safeguard the interest of such creditors. There is no basis for regarding the various statutory remedies available to a liquidator against defaulting officers as making this duty or its enforcement redundant.

39 Rules of attribution are as relevant to individuals as to companies. An individual may him- or herself do the relevant act or possess the relevant state of mind. Equally there are many contexts in which an individual will be attributed with the actions or state of mind of another, whether an agent or, in some circumstances, an independent contractor. But in relation to companies there is the particular problem that a company is an artificial construct, and can only act through natural persons. It has no actual mind, despite the law's persistent anthropomorphism—as to which see the references by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507A, 509G–H to the absence of any "ding an sich", and by Professor Eilis Ferran in "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239, 239–240 to the distracting effect of references to a company's "brain and nerve centre" or "hands".

40 As Lord Hoffmann pointed out in *Meridian Global*, pp 506–507, the courts' task in all such situations is to identify the appropriate rules of attribution, using for example general rules like those governing estoppel and ostensible authority in contract and vicarious liability in tort. It is well-recognised that a company may as a result of such rules have imputed to it the conduct of an ordinary employee, and this is so also in the context of illegality. By acquiescing in the overloading of the hauliers' lorries in *Ashmore Benson Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828 the consignors' assistant transport manager and his assistant made the haulage contract unenforceable at the instance of the consignors, who were unable to

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recover when a lorry toppled over damaging the goods being carried. But it is not always appropriate to apply general rules of agency to answer questions of attribution, and this is particularly true in a statutory context. Particular statutory provisions may indicate that a particular act or state of mind should only be attributed when undertaken or held by a company's "directing mind and will": see eg *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, cited in *Meridian Global*, pp 507–509. In contrast in *Meridian Global* itself the company was for criminal purposes attributed with the conduct and knowledge of the senior portfolio manager who, without knowledge of the board or managing director, had entered into the relevant transaction of which the company had failed to give notice as required by the legislation.

41 As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company? Lord Walker NPJ said recently in *Moulin Global*, para 41 that: "One of the fundamental points to be taken from *Meridian* is the importance of context . . . in any problem of attribution." Even when no statute is involved, some courts have suggested that a distinction between the acts and state of mind of, on the one hand, a company's directing mind and will or "alter ego" and, on the other, an ordinary employee or agent may be relevant in the context of third party relationships. This is academically controversial: see Professor Peter Watts, "The Company's Alter Ego—An Impostor in Private Law" (2000) 116 LQR 525; Neil Campbell and John Armour, "Demystifiying the Civil Liability of Corporate Agents" [2003] CLJ 290. Any such distinction cannot in any event override the need for attention to the context and purpose in and for which attribution is invoked or disclaimed.

42 Where the relevant rule consists in the duties owed by an officer to the company which he or she serves, then, whether such duties are statutory or common law, the acts, knowledge and states of mind of the company must necessarily be separated from those of its officer. The purpose of the rule itself means that the company cannot be identified with its officers. It is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. This is so even though the officer is the directing mind and will of the company. The same clearly also applies even if the officer is also the sole shareholder of a company in or facing insolvency. Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors.

43 At the same time, however, if the officer's breach of duty has led to the company incurring loss in the form of payments to or liability towards third parties, the company must be able as part of its cause of action against its officer to rely on the fact that, in that respect, its officer's acts and state of mind were and are attributable to the company, causing it to make such payments or incur such liability. In other words, it can rely on attribution for one purpose, but disclaim attribution for another. The rules of attribution for the purpose of establishing or negating vicarious liability to

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A third parties differ, necessarily, from the rules governing the direct relationship inter se of the principal and agent.

44 It follows that I would, like Lords Toulson and Hodge JJSC (para 191), endorse the observations of Professors Peter Watts and Francis Reynolds QC as editors of *Bowstead & Reynolds on Agency*, 19th ed (2010), para 8-213, in relation to the argument that a principal should be
B attributed with the state of mind of his agent who has defrauded him, so as to relieve either the agent or a third party who had knowingly assisted in the fraud:

> "Such arguments by defendants, though hazarded from time to time, are plainly without merit. However, in such situations imputation has no reason to operate. The rules of imputation do not exist in a state of
C nature, such that some reason has to be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed."

The same point is made in rephrased terms in their 20th ed (2014), para 8-213:

> "The simple point is that, were the principal deemed to possess the agent's knowledge of his own breaches of duty, and thereby to have
D condoned them, the principal could never successfully vindicate his rights . . . there is no need for an exception as such. The putative defence that the exception is used to rebut is premised on the fallacy that a principal is prima facie deemed to know at all times and for all purposes that which his agents know. As observed already, imputation has never operated in such a way. Before imputation occurs, there needs to be some
E purpose for deeming the principal to know what the agent knows. There is none in this type of case."

45 The breach of duty exception has been more plausibly deployed in situations where the issue is the legal effect of relations between the company and a third party. For example, in *JC Houghton & Co v Nothard Lowe & Wills* [1928] AC 1, the issue was whether the knowledge of the directors of
F the latter company should be attributed to it, with the effect that the latter company could and should be treated as estopped from denying that it had consented to a particular arrangement with a third party company. However, the arrangement was one that was against the company's interests and for the benefit of the third party company which the directors also controlled and which was in financial difficulties. In the words of Viscount
G Dunedin, both common sense and authority in the form of *In re Hampshire Land Co* [1896] 2 Ch 743 led to the conclusion that, although "It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company", that cannot be so if the knowledge of an infringement of the company's rights is "only brought home to the man who himself was the artificer of such infringement" (pp 14–15). Even in this context it may be questioned whether an analysis involving prima facie
H imputation subject to exception is necessary or fruitful: see Professor Peter Watts's critique in "Imputed Knowledge in Agency Law—Excising the Fraud Exception" (2001) 117 LQR 300, 316 et seq Since it leads to a right result and involves a different context to the present, I need however say no more about that here.

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46 With regard to *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 I do not propose to say very much. The potential qualification on the application of the maxim ex turpi causa, which the majority accepted in the case of a company with innocent shareholders indicates that they too must ultimately have regarded context as having at least some relevance to attribution, and Lord Walker NPJ has in *Moulin* now explicitly withdrawn from the position that attribution operates independently of context: see paras 41 and 101. More fundamentally, the context in which issues of attribution arose in *Stone & Rolls* was different from the present. The company's claim was against its auditors rather than against an officer. Lord Phillips at least in the majority clearly saw that as important, in particular in the light of what he viewed as the scope of an auditor's duty. I remain of the view, which I expressed in para 265 in *Stone & Rolls*, that this ought to have been the central issue in that case, not a preliminary issue about ex turpi causa into which the majority view, that the claim even though pursued for the benefit of the company's creditors should fail, was in the event fitted. I note that Professor Eilis Ferran takes a similar view in her article, cited at para 39 above, at p 251; see also the statement by Professor Peter Watts, "Audit Contracts and Turpitude" (2010) 126 LQR 14, that "Ultimately, what divided the judges in *Stone & Rolls* was determining the classes of innocent parties whose interests the contract of audit is designed to protect" (p 14).

47 I say nothing of course about the correct answer to a question addressed in terms of what an auditor's duty would or should have been. However, so far as concerns the nature and enforceability of a company's claim for misconduct by its directing mind and sole shareholder, I remain of the views expressed in paras 224–225 in *Stone & Rolls*:

> "224. . . . before the House Mr Sumption's submission was that S & R could only claim against Mr Stojevic on a narrow basis for abstraction of its moneys (a proprietary claim like that mentioned by O'Connor LJ in *Caparo* . . .: see para 214 above); and that any claim against him for damages for breach of duty as an officer would be barred by the maxim ex turpi causa because it would involve pleading S & R's fraud on the banks. I do not accept this submission. It would mean that, if one element of Mr Stojevic's fraud on the banks had involved persuading the banks to pay the funds direct into an account represented as being S & R's but in fact Mr Stojevic's, S & R could not sue Mr Stojevic. Mr Stojevic's common law duty as a director to S & R was to conduct its affairs honestly and properly. Section 172(1) of the Companies Act 2006 now states the duty, in terms expressly based on common law rules and equitable principles (see section 170(3)), as being to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'—a duty made expressly 'subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company': see section 172(3). Section 212 of the Insolvency Act 1986 provides a summary remedy available in the course of winding up against anyone who is or has been an officer of the company in respect of, inter alia, 'any misfeasance or breach of any fiduciary or other duty in relation to the company'. (This is in addition to the specific remedies that apply in

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A circumstances of fraudulent or wrongful trading under sections 213 and 214.)

"225. As between S & R and Mr Stojevic, Mr Stojevic's fraud on the banks was and is just as objectionable as the later abstraction of moneys to which it was designed to lead. In holding a director responsible in such a case, a company is as a separate legal entity enforcing duties owed to it
B by the director. It is not acting inconsistently, or asking the court to act inconsistently, with the law. It is a remarkable proposition, that the directing mind of a company can commit the company to a scheme of fraud and then avoid liability in damages if the company would have to plead and rely on this scheme to establish such liability."

48 Like Lord Neuberger PSC, I would not endorse Lord Sumption JSC's
C suggestion (paras 79 and 80) that *Stone & Rolls* establishes an apparently general and context-unspecific distinction between personal and vicarious liability as central to the application of the illegality defence. Outside the statutory sphere, where such a distinction originated and has been found useful, there is very little authority for any such distinction, and there is certainly none for its application as a key to a resolution of issues of
D attribution in the context of illegality. Its origin in that context lies in a concession by counsel (Mr Jonathan Sumption QC), no doubt tactically well-judged, in *Stone & Rolls* (p 1443B–C). The only member of the House who referred to this concession as a requirement, along with turpitude, of an ex turpi causa defence was Lord Phillips, but he did so expressly on the basis that (para 24): "Those . . . are valid qualifications to the defence of ex turpi
E causa in the context in which it is raised on this appeal. They are not, however, of general application to the defence of ex turpi causa."

49 As I have already noted in para 40 above, with reference to the *Ashmore, Benson* case, it is not the law that the ordinary principles of attribution are replaced in the case of a company, any more than they are in the case of an individual, by some general principle that the only relevant conduct or state of mind is that of someone who is or can be treated as an
F alter ego or directing mind and will of the relevant company or individual. In his article "Audit Contracts and Turpitude", to which I have referred in para 46 above, at p 17, Professor Watts says this about the way in which the concept of directing mind and will entered the debate in *Stone & Rolls*:

"Their Lordships were drawn into recognising the mind-and-will
G concept by Mr Sumption QC's concession on the auditor's behalf . . . that a claimant cannot be caught by the ex turpi causa rule except as a result of his own conduct, 'not conduct for which he is vicariously liable or which is otherwise attributed to him under principles of the law of agency'. This is simply wrong. Generally speaking, the ex turpi causa rule will preclude a principal from taking advantage of an agent's illegal acts (see
H e g *Apthorp v Nevill* (1907) 23 TLR 575 for a human principal, and *Ashmore Benson Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828, CA for a company). None the less, as we have noted, context is important with the ex turpi rule, and in the case of contracts designed to deal with the risks of agents' dishonesty (such as audit and insurance contracts) the law looks to where guilt really lies."

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50 With regard to the three points for which Lord Sumption JSC suggests in para 80 that *Stone & Rolls* is authority, it follows from what I have said in paras 48–49 that I do not agree that the case is authority for the first point, viz that the illegality defence is only available to a company where it is "directly" as opposed to vicariously responsible for the illegality. As Professor Watts says, there are no doubt some limited contexts in which this may be the appropriate analysis, but there is no such general rule. I agree with Lord Sumption JSC's second point, viz that the House rejected the auditor's argument that merely because Mr Stojevic was the company's mind and will and sole owner, his conduct and state of mind should be attributed to *Stone & Rolls* in relation to its claim against its auditors. I have already pointed out in para 46 above that the majority was thereby at least accepting that context must have some relevance. The third point appears a factually correct representation of the outcome of *Stone & Rolls*, though the present appeal does not raise the correctness in law of that outcome, which may one day fall for reconsideration.

51 I turn to a defence of circuity of action which the appellants suggest arises on this appeal. The claim against Jetivia and Mr Brunschweiler is that they dishonestly assisted Mr Chopra's and Mr Nazir's breaches of duty towards Bilta, or were co-conspirators with Mr Chopra and Mr Nazir. On the face of it, Jetivia and Mr Brunschweiler cannot raise a defence of illegality if Mr Chopra and Mr Nazir cannot. The suggestion is that Jetivia could have a defence of circuity of action. This is, I understand, on the basis that any liability on its part arose from a conspiracy between Bilta, through Mr Chopra and Mr Nazir, and Mr Brunschweiler. Apart from this being unpleaded, I cannot, at present at least, see how a company (here Jetivia) which is through its director or other agent held liable to another company (here Bilta) for dishonestly assisting or conspiring with the latter company's directors or agents to cause loss to the latter company can then turn round and say that it has been damaged by the former company by the very liability which it has incurred to the former company. That would turn the law governing dishonest assistance and conspiracy on its head.

52 I sympathise with the views expressed by Lords Toulson and Hodge JJSC in paras 156–162 regarding the Court of Appeal decision in *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629, but any decision about its correctness must be for another day, after full argument.

53 For the reasons given by Lords Sumption, Toulson and Hodge JJSC and again in agreement with Lord Neuberger PSC, I consider that section 213 of the Insolvency Act 1986 has extraterritorial effect, and do not regard any reference to the Court of Justice as necessary.

54 It follows that I also would dismiss the appeal.

LORD SUMPTION JSC

55 The main issue on this appeal is the scope of the rule of public policy ex turpi causa non oritur actio. "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act": *Holman v Johnson* (1775) 1 Cowp 341, 343 (Lord Mansfield CJ). It is convenient to call this the illegality defence, although the label is not entirely accurate for it also applies to a very limited category of acts which are immoral without being illegal.

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The proceedings

56 Bilta (UK) Ltd is an English company which was ordered to be wound up by the High Court on 29 November 2009 on the application of Her Majesty's Revenue and Customs. Before that order was made, its sole directors were Mr Chopra and Mr Nazir. Mr Chopra was also Bilta's sole shareholder.

57 The present proceedings were brought by Bilta (through its liquidators) against the two former directors and a Swiss company, Jetivia SA, together with Jetivia's chief executive Mr Brunschweiler. There are other defendants also, but for present purposes they can be ignored. The appeal arises out of a preliminary issue on the pleadings as between Bilta on the one hand and Jetivia and Mr Brunschweiler on the other. In summary, Bilta's pleaded allegation is that between April and July 2009 the two directors caused Bilta to engage in fraudulent trading in carbon credits (European Emissions Trading Scheme Allowances) recorded on the Danish Emission Trading Registry. The fraud was very simple. At the relevant time carbon credits traded between parties both of whom were in the United Kingdom were treated as taxable supplies subject to VAT at the standard rate of 15%, but if either the buyer or the seller of the credit was outside the United Kingdom, the sale was not subject to VAT. Bilta bought carbon credits free of VAT from Jetivia. It resold them back-to-back to UK companies registered for VAT. In most cases, the onsale price of the credits net of VAT was artificially fixed at a level marginally below Bilta's purchase price, thus enabling Bilta's UK buyer to sell them on at a small profit. The proceeds of Bilta's sales, together with the VAT thereon, were paid either to Bilta and then on to Jetivia, or directly by the UK buyers to Jetivia or an offshore company called THG. Since Bilta had no other business and no assets other than the cash generated by its sales, the result was to make the company insolvent and to generate a liability on Bilta's part to account to HMRC which it was unable to satisfy.

58 As against the directors, Bilta's claim is that in breach of their fiduciary duties they organised and participated in a conspiracy to

> "defraud and injure [Bilta] . . . by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive [Bilta] of its ability to meet its VAT obligations on such trades, namely to pass the money (which would otherwise have been available to [Bilta] to meet such liability) to accounts offshore, including accounts of Jetivia . . ." (Amended particulars of claim, para 14(a).)

As against Jetivia and Mr Brunschweiler, the allegation is that they were (i) liable as parties to the same conspiracy (ii) accountable as constructive trustees on the footing of knowing assistance in the dishonest diversion of book-debts due to Bilta. Jetivia, but not Mr Brunschweiler, is also said to be liable to account on the footing of knowing receipt of the proceeds of those book-debts. As against all parties, there is in addition a claim for fraudulent trading under section 213 of the Insolvency Act 1986.

59 The victim identified in the pleading is Bilta. It is not in terms pleaded that it was any part of the object of the scheme to defraud HMRC. Patten LJ in the Court of Appeal considered that the case had to be decided without regard to the possibility that HMRC were a victim. But that, with respect, seems unrealistic. In *Everet v Williams* (1725), the famous case in

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which two highwaymen sought an account of their partnership profits, they did not plead the nature of their business. But that did not prevent the court from looking through the gaps and circumlocutions to the substance of the transaction: see (1893) 9 LQR 197. The substance of the transactions in issue on this appeal, if the pleaded facts are true, is a fraud on HMRC, who will be the real losers. The pleadings describe a classic "missing trader" fraud. Whether it was technically a carousel fraud (in which the trader sells to a connected entity, arranges for the latter to obtain a VAT refund, then pays away the VAT collected and disappears) or the simpler so-called "acquisition fraud" where he simply disappears without accounting for VAT, does not matter. The common feature of both is the intention of the fraudster to collect VAT and disappear before it can be accounted for, and this is the aspect of the scheme which founds the pleaded case of conspiracy. The dishonesty alleged against the directors consists wholly in their having removed assets of Bilta which would otherwise have been available to pay creditors, in particular HMRC.

The illegality defence

60 Although it begs many questions, the most succinct and authoritative statement of the law remains that of Lord Mansfield CJ in *Holman v Johnson* 1 Cowp 341, 343:

> "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis."

Thus stated, the law of illegality is a vindication of the public interest as against the legal rights of the parties. The policy is one of judicial abstention, by which the judicial power of the state is withheld where its exercise in accordance with ordinary rules of private law would give effect to advantages derived from an illegal act.

61 In the two centuries which followed Lord Mansfield CJ's apparently simple proposition, it was among the most heavily litigated rules of common law, and by the end of the 20th century it had become encrusted with an incoherent mass of inconsistent authority. The main reason for this was the unfortunate tendency of the common law to fragmentation, as judges examined each case in its own factual and legal context without regard to broader legal principle. By the time that the illegality defence came before the Court of Appeal in *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, the law of illegality had generated a mass of sub-rules, each appropriate to its own context, a state of affairs which necessarily gave rise to difficulty when the law had to be applied to situations which were either new or not classifiable according to existing categories. The Court of Appeal resolved this problem by treating the whole body of authority as illustrative of a process which was essentially discretionary in nature. Kerr LJ, delivering the only reasoned

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judgment, expressed that principle at p 35 by saying that the test was whether

> "in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts."

That question, he suggested, needed to be approached "pragmatically and with caution, depending on the circumstances". This view of the law was unanimously rejected by the House of Lords four years later in *Tinsley v Milligan* [1994] 1 AC 340. Lord Goff of Chievely, delivering the leading judgment on this point, said, at p 363, that it

> "would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules, ultimately derived from the principle of public policy enunciated by Lord Mansfield CJ in *Holman v Johnson*."

62 The Law Commission struggled valiantly with the issue in the early years of this century, and at one point proposed a structured statutory discretion of the kind which has been adopted in New Zealand. It abandoned this proposal in the expectation that the courts would reintroduce a measure of the flexibility which *Tinsley v Milligan* had rejected. But *Tinsley v Milligan* is binding authority, subject to review in this court, and in the 20 years since it was decided, the highest court has never been invited to overrule it. In those circumstances, the law has moved in a different direction, accepting that the illegality defence depends on a rule of law which applies regardless of the equities of any particular case but seeking to rationalise an area that has generated a perplexing mass of inconsistent case law. In its recent decision in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430, paras 19–20, this court reaffirmed the principle that the illegality defence is based on a rule of law on which the court is required to act, if necessary of its own motion, in every case to which it applies. It is not a discretionary power on which the court is merely entitled to act, nor is it dependent on a judicial value judgment about the balance of the equities in each case: In the light of the rejection of the public conscience test, it is incumbent on the courts to devise principled answers which are no wider than is necessary to give effect to the policy stated by Lord Mansfield CJ and are certain enough to be predictable in their application.

63 In *Les Labratoires Servier*, it was pointed out that the illegality defence commonly raised three questions: (i) what are the "illegal or immoral acts" which give rise to the defence? (ii) what relationship must those acts have to the claim? (iii) on what principles should the illegal or immoral acts of an agent be attributed to his principal, especially when the principal is a company? *Les Laboratoires Servier* was about the first of the three questions. It is authority for the proposition that the illegality defence is potentially engaged by any act of the claimant which is criminal or dishonest or falls into a limited number of closely analogous categories. It is not disputed that the acts alleged in this case were of that kind. Various tests have been proposed for the connection which the law requires between the illegal act and the claim, but it has not been disputed that any of them would

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be satisfied on the facts alleged in this case. It is obvious, and apparent from the pleadings, that the claim against both the directors and Jetivia is directly founded on the VAT frauds.

64 The sole question on this part of the appeal is therefore the third. As applied to the present case, it is whether the dishonesty which engages the illegality defence is to be attributed to Bilta for the specific purpose of defeating its claim against the directors and their alleged co-conspirators. The question is whether the defence is available to defeat an action by a company against the human agent who caused it to act dishonestly for damages representing the losses flowing from that dishonesty. The Chancellor of the High Court and Court of Appeal both held that it was not. While there are dicta in the judgments below, especially in the Court of Appeal, which range wider than is really necessary, their essential reason was the same, namely that the agent was not entitled to attribute his own dishonesty to the company for the purpose of giving himself immunity from the ordinary legal consequences of his breach of duty. For reasons which I shall explain below, I think that the courts below were right about that, and I understand that view to be shared by every other member of the court.

Attribution

65 English law might have taken the position that a company, being an artificial legal construct, was mindless. If it had done that, then legal wrongs which depended on proof of some mental element such as dishonesty or intention could never be attributed to a company and the present question could not arise. In the early years of English company law, there were powerful voices which denied that a tort dependent on proof of a mental element could be committed by a company. For many years this view was principally associated with Lord Bramwell, who in a well known dictum in *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247, 250–251, declared that a fictitious person was "incapable of malice or of motive" even if the whole body of its directors or shareholders in general meeting approved its acts for improper reasons. This question was, however, settled as far as English civil law was concerned by the end of the 19th century. As Lord Lindley put it in *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, 426, once companies were recognised by the law as legal persons, they were liable to have the mental states of agents and employees such as dishonesty or malice attributed to them for the purpose of establishing civil liability. In the criminal law, the notion that a corporation was incapable of committing an offence requiring mens rea persisted rather longer. It was asserted in both the first edition (1909) and the second edition (1933) of *Halsbury's Laws of England*. But it was rejected in a series of decisions in 1944: see *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146; *R v ICR Haulage Ltd* [1944] KB 551; *Moore v I Bresler Ltd* [1944] 2 All ER 515. It is now well established that a company can be indicted for conspiracy to defraud (*R v ICR Haulage Ltd*) or manslaughter before statute intervened in 2007 (*Attorney General's Reference (No 2 of 1999)* [2000] QB 796), provided that an agent with the relevant state of mind can be sufficiently identified with it. It cannot be emphasised too strongly that neither in the civil nor in the criminal context does this involve piercing the corporate veil. It is simply a recognition of the fact that the law treats a company as thinking through agents, just as it acts through them.

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A 66 It follows that in principle, the illegality defence applies to companies as it applies to natural persons. This is the combined effect of the company's legal personality and of the attribution to companies of the state of mind of those agents who for the relevant purpose can be said to think for it. But the principles can only apply to companies in modified form, for they are complex associations of natural persons with different interests, different B legal relationships with the company and different degrees of involvement in its affairs. A natural person and his agent are autonomous in fact as well as in law. A company is autonomous in law but not in fact. Its decisions are determined by its human agents, who may use that power for unlawful purposes. This gives rise to problems which do not arise in the case of principals who are natural persons.

67 The question what persons are to be so far identified with a company C that their state of mind will be attributed to it does not admit of a single answer. The leading modern case is *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, i e the board of directors acting as such or for some purposes the general body of shareholders. Lord D Hoffmann, delivering the advice of the Privy Council, observed that the primary rule of attribution together with the principles of agency and vicarious liability would ordinarily suffice to determine the company's rights and obligations. However, they would not suffice where the relevant rule of law required that some state of mind should be that of the company itself. He explained, at p 507:

E "This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of F the defendant himself."

The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its "directing mind and will" for all purposes. This was the situation in the case where the expression "directing mind and will" was first coined, *Lennard's Carrying Co Ltd v Asiatic* G *Petroleum Co Ltd* [1915] AC 705. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the H particular function in question, without necessarily being its directing mind and will for other purposes [1995] 2 AC 500, 507:

"This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as

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the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." (And see pp 509–511.)

68 A modern illustration of the attribution of knowledge to a company on the basis that its agent was its directing mind and will for all purposes is *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, where the Privy Council was concerned with the knowledge required to make a company liable as a constructive trustee on the footing of knowing assistance in a dishonest breach of trust. The defendants were a one-man company, BLT, and the one man, Mr Tan. At pp 392–393, Lord Nicholls of Birkenhead, delivering the advice of the Board, observed that Mr Tan had known the relevant facts and was therefore liable. "By the same token, and for good measure, BLT also acted dishonestly. [Mr Tan] was the company, and his state of mind is to be imputed to the company." On the other hand, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 did not concern a one-man company. The issue was whether knowledge of the origin of funds received for investment by Dollar Land Holdings, a public company, could be imputed to it so as to found a liability to account as a constructive trustee on the footing of knowing receipt. Lord Hoffmann, delivering the leading judgment of the Court of Appeal and applying the principles which he would later explain in *Meridian Global*, held that the company was fixed with the knowledge of one Mr Ferdman, its part-time chairman and a non-executive director, because he had acted as its directing mind and will for the particular purpose of arranging its receipt of the tainted funds.

69 These refinements can give rise to nice questions of fact. But their application in a case like the present one is perfectly straightforward. On the pleaded facts, Mr Chopra and Mr Nazir were the directing organ of Bilta under its constitution. They constituted the board. Mr Chopra was also the sole shareholder. As between Bilta and Jetivia it is common ground on the pleadings that they were the "directing mind and will" of Bilta for all purposes, and certainly in relation to those of its functions which are relevant in these proceedings.

70 The search for a test of a company's direct or "personal" liability has sometimes been criticised as a distraction or an artificial anthropomorphism, and it is certainly true that English law might have developed along other lines. As it is, the distinction between a liability which is direct or "personal" and one which is merely vicarious is firmly embedded in our law and has had a considerable influence on the way it has developed in relation to both kinds of liability. Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment, however humble and remote he may be from the decision-making process, and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions (*Lloyd v Grace Smith & Co* [1912] AC 716), indeed even if they are criminal (*Lister v Hesley Hall Ltd* [2002] 1 AC 215). Personal or direct liability, on the other hand, has always been

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fundamental to the application of rules of law which are founded on culpability as opposed to mere liability. One example, as Lord Hoffmann pointed out in *Meridian Global*, is provided by the rules governing criminal responsibility, which do not usually recognise vicarious responsibility. Another is the class of statutory provisions dependent on a company's personal misconduct, such as a shipowner's right to limit his liability for a loss which is not attributable to his "personal act or omission": see article 4 of the Convention on Limitation of Liability for Maritime Claims (1976) (Merchant Shipping Act 1995, Schedule 7, Part I), a principle derived from the 19th century Merchant Shipping Acts of the United Kingdom. A third example is provided by the illegality defence, which the House of Lords held in *Stone & Rolls v Moore Stephens* [2009] AC 1391 to apply only to direct and not to vicarious responsibility. It is, for example, the reason why public policy precludes recovery under a liability policy in respect of a criminal act where the insured's liability is personal or direct, but not where it is purely vicarious: *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, 907. As cases like this illustrate, if the illegality defence were to be engaged merely by proof of a purely vicarious liability, it would apply irrespective of any question of attribution, to any case in which the human wrongdoer was acting within the scope of his employment. This would extend the scope of the defence far more widely than anything warranted by the demands of justice or the principle stated by Lord Mansfield CJ. On the footing that the attribution of culpability is essential to the defence, the concept of a "directing mind and will" remains valuable. It describes a person who can be identified with the company either generally or for the relevant purpose, as distinct from one for whose acts the company is merely vicariously liable.

The exception: breach of the agent's duty to the company

71 Bilta's answer to this, which was accepted by both the judge and the Court of Appeal, is that the dishonesty of Mr Chopra and Mr Nazir is not to be attributed to Bilta, because in an action for breach of duty against the directors there cannot be attributed to the company a fraud which is being practised against it by its agent, even if it is being practised by a person whose acts and state of mind would be attributable to it in other contexts. It is common ground that there is such a principle. It is commonly referred to as the fraud exception, but it is not limited to fraud. It applies in certain circumstances to prevent the attribution to a principal of his agent's knowledge of his own breach of duty even when the breach falls short of dishonesty. In the context of the illegality defence, which is mainly concerned with dishonest or criminal acts, this exception from normal rules of attribution will normally arise when it is sought to attribute to a principal knowledge of his agent's fraud or crime but that is not inherent in the underlying principle. I shall call it the "breach of duty exception".

72 The breach of duty exception is commonly referred to as the *Hampshire Land* principle, after the judgment of Vaughan Williams J in *In re Hampshire Land Co* [1896] 2 Ch 743. This case did not involve any allegation of fraud. The facts were that the Hampshire Land Company had borrowed money from a building society. The borrowing required the authority of the shareholders in general meeting, but their authority, although it was given, was vitiated by defects in the notice by which it was

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summoned. The issue was whether a building society was affected by notice of the irregularity so as to be prevented from relying on the internal management rule. The contention was that the building society was on notice because its secretary happened also to be the secretary of the borrower, and in the latter capacity he knew the facts. In the course of discussing that question, the judge observed, at p 749:

> "if Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed on the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud."

73 Vaughan Williams J's dictum was subsequently adopted by two members of the House of Lords in *JC Houghton & Co v Nothard Lowe & Wills* [1928] AC 1, where the issue was whether a company was bound by an arrangement adverse to the company's interest which had been made by two of its directors for their own benefit and was never approved by the board. It was contended that the knowledge of the two directors could be attributed to the company so as to found a case of acquiescence. Viscount Dunedin (at p 14) summarily rejected the suggestion that the company could be treated as knowing about a director's breach of duty by virtue only of the knowledge of the defaulting director himself:

> "My Lords, there can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself particeps criminis, that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer, but authority is not wanting."

He then cited the dictum of Vaughan Williams J. Viscount Sumner agreed, observing (p 19) that it would be "contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency".

74 These dicta are concerned only with the attribution of knowledge. The argument which they reject is that there is no breach of duty because the company must be deemed to know the facts and therefore cannot be misled or must be supposed to have consented. They are not concerned with the ambit of the illegality defence or the breach of duty exception to it. For the first full consideration of the exception, one must move forward seven decades to the decision of the Court of Appeal in *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, which is the starting point for

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A the modern law. That case arose out of an elaborate scheme, to which Belmont's directors were party, to extract value from Belmont by causing it to buy the shares of a company called Maximum at a considerable overvalue. This was a breach of the fiduciary duties of the directors. Their object was to recycle the profit on the sale of Maximum so that it could be used to fund the purchase by three companies associated with the directors of Belmont's own shares. This was not only a breach of the directors' B fiduciary duty but a criminal contravention of what was then section 54 of the Companies Act 1948. Belmont subsequently went into liquidation, and an action was brought in its name by receivers for damages for breach of duty against the directors who had authorised the transaction, and for an account on the footing of knowing receipt against the three companies. The plaintiff was met by the illegality defence. The judge dismissed the action at C the close of the plaintiff's case on that ground, holding that the company was a party to the conspiracy. This was because it must be taken to have known, through its directors, that the asset was over-valued and that the purpose of the transaction was to fund the purchase of Belmont's shares. Reversing the judge, Buckley LJ said, at pp 261–262:

> D "But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected E by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal. So in my opinion the plaintiff company should not be regarded as a party to the conspiracy, on the ground of lack of the necessary guilty knowledge."

75 In *Attorney General's Reference (No 2 of 1982)* [1984] QB 624 two F men were charged with theft from a company which they wholly owned and controlled. The issue was whether, for the purpose of section 2(1)(b) of the Theft Act 1968, they had appropriated the property of another "in the belief that [they] would have the other's consent if the other knew of the appropriation and the circumstances of it". The argument was that they must have had that belief because the company had no other will than theirs, so that it must be taken to consent to whatever they consented to. This G argument had been accepted by the trial judge but it failed in the Court of Appeal for two reasons. One turned on the construction of the Theft Act and is of no present relevance. The other was that the decision in *Belmont Finance* "directly contradicts the basis of the defendants' argument in the present case. There can be no reason, in our view, why the position in the criminal law should be any different".

H 76 In *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68, gold had been stolen from Brink's Mat's warehouse and delivered to a company called Scadlynn to be melted down, recast and sold. The directors and sole shareholders of Scadlynn, who were well aware that the gold was stolen, caused the proceeds to be paid into the company's bank account and then paid away, thus leaving it without assets to meet its liabilities to Brink's Mat.

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The appeal arose out of an application by Brink's Mat to amend the pleadings so as to add a number of claims against the bank. The proposed amendments proceeded on the basis that since the payments into Scadlynn's bank account represented property to which Brink's Mat was beneficially entitled, it was entitled to enforce Scadlynn's rights against the bank. It was alleged that the bank was liable to Scadlynn as a constructive trustee on the footing of knowing receipt and that Brink's Mat was entitled to enforce that liability for its own benefit. One of the issues which arose was whether Scadlynn would have been precluded from advancing a claim against the bank because it had known (through its directors) about the origin of the gold. Mustill LJ, rejecting this argument, considered that

> "the corporate entity named Scadlynn was, however odd the notion may seem at first sight, the victim of wrongful arrangements to deprive it improperly of a large part of its assets": p 72.

Nicholls LJ, agreeing, observed (p 73):

> "On the facts alleged in the proposed amendments, Scadlynn was at all material times being used by Chappell and Palmer and others for a fraudulent purpose, viz, to realize the proceeds of sale of the robbery. But the plaintiff was not implicated in any such fraudulent purpose. On the contrary, along with the owners of the gold, the plaintiff was the intended victim of the scheme. Likewise, Scadlynn itself was an intended victim, in that Scadlynn was being used as a vehicle for committing a fraud on its creditors and a fraud on those beneficially interested in property held by Scadlynn. In those circumstances the fraudulent purposes of those controlling Scadlynn are not to be imputed to the company itself: see *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, per Buckley LJ, at pp 261–262."

77 *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 was a decision of Rix J arising out of a claim under the Third Parties (Rights against Insurers) Act 1930 against the liability insurer of a valuer. The valuer was alleged to have issued fraudulent valuations to induce banks to lend money to third parties. The valuations had been issued by a Mr Browne, who was the managing director and also a personal assured. The insurer defended the claim on the ground that the company was not entitled to indemnity under the policy because Browne's dishonesty was attributable to it by virtue of his knowledge. Rix J thought that Browne would on ordinary principles of attribution have been treated as the directing mind and will of the valuer for the relevant purpose (pp 278–279). But he rejected the illegality defence because it was inconsistent with the terms of the contract of insurance under which Mr Browne and the company were separately insured each for his own interest (pp 272–273). It followed that only Mr Browne would be precluded from recovering. The attribution of his knowledge to the company would be contrary to the agreement to insure their interests separately. The company's liability was therefore purely vicarious. Having made these points, Rix J dealt briefly (and obiter) at pp 282–283 with the question of attribution. He said that although Browne's valuations were frauds on the lending banks, the valuer itself should be treated as a "secondary victim", first because Browne's frauds exposed it to liability to the banks, and secondly because Browne's conduct

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involved "such a breach of duty to [the valuer] as in justice and common sense must entail that it is impossible to infer that the knowledge of his own dishonesty was transferred to [the valuer]". He thought that the position might well be different in the case of a one-man company.

78 *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 arose out of a classic VAT fraud against the Customs and Excise. The fraudsters submitted invoices to McNicholas for VAT in respect of non-existent goods and services. The company's site managers, who were in league with them, procured the VAT to be paid to them. The VAT was then reclaimed as input tax from the Customs and Excise. The scheme inflicted a loss on the Customs & Excise but the net financial effect on the company was neutral. The Customs & Excise claimed statutory penalties on the basis that that the company's conduct was dishonest. This case was simply about attribution. The illegality defence did not arise, for McNicholas was claiming nothing. Dyson J held that as a matter of construction the statute implicitly fixed the company with the knowledge of those of its employees who handled its VAT payments, including the site managers. The company argued that knowledge of the fraud should nevertheless not be imputed to it because it was a victim of the fraud, which exposed it to statutory penalties. Rejecting this argument (at paras 55–56), the judge said:

> "55. In my judgment, the tribunal correctly concluded that there should be attribution in the present case, since the company could not sensibly be regarded as a victim of the fraud. They were right to hold that the fraud was 'neutral' from the company's point of view. The circumstances in which the exception to the general rule of attribution will apply are where the person whose acts it is sought to impute to the company knows or believes that his acts are detrimental to the interests of the company in a material respect . . . It follows that, in judging whether a company is to be regarded as the victim of the acts of a person, one should consider the effect of the acts themselves, and not what the position would be if those acts eventually prove to be ineffective. As the tribunal pointed out, in *In re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456 the company suffered a large fine for contempt of court on account of the wrongful acts of its managers. The fact that their wrongful acts caused the company to suffer a financial penalty in this way did not prevent the acts and knowledge of the managers from being attributed to it.
>
> "56. The [breach of duty exception] is founded in common sense and justice. It is obvious good sense and justice that the act of an employee should not be attributed to the employer company if in truth, the act is directed at, and harmful to, the interests of the company. In the present case, the fraud was not aimed at the company. It was not intended by the participants in the fraud that the interests of the company should be harmed by their conduct."

The Court of Appeal approved this reasoning in rejecting a somewhat similar argument in *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] BCC 739. The facts of this case, baldly summarised, were that BCCI had placed deposits with Bank of India on unusual terms as part of a scheme to window-dress its accounts at the

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year-end. The liquidators of BCCI brought proceedings against Bank of India under section 213 of the Insolvency Act 1986 on the ground that it had been knowingly party to the carrying on of business by BCCI with intent to defraud. The judge found that the general manager of the Bank of India had deliberately turned a blind eye to what was going on, and that his knowledge was attributable to the bank. The bank advanced an argument somewhat similar to that which had been advanced by McNicholas before Dyson J. The Court of Appeal rejected it for the same reason, namely that the general manager's acts were not targeted at Bank of India: see paras 114–118.

79 This was the state of the authorities when *Stone & Rolls v Moore Stephens* [2009] AC 1391 came before the courts. Stone & Rolls was a company created solely for the purpose of defrauding banks. It never did anything else. The author of the frauds was a Mr Stojevic, its sole director, manager and shareholder. The action was brought by the company at the instance of its liquidators against the auditors on the basis that if they had exercised due skill and care, they would have discovered that the company had no legitimate business. The course of frauds against the bank would then have ceased earlier than it actually did. They claimed the losses said to have been incurred as the direct result of the company's course of fraudulent behaviour continuing for longer than it would otherwise have done. The House of Lords held that the illegality defence applied and upheld the order of the Court of Appeal striking out the proceedings. It is a difficult case to analyse, because it was decided by a majority comprising Lord Phillips, Lord Walker and Lord Brown and there are significant differences between the reasoning of Lord Walker (with whom Lord Brown agreed) and Lord Phillips. But the fact that they differed on critical points does not undermine the authority of their speeches on those points on which they were agreed.

80 Lord Phillips and Lord Walker were agreed on three points for which the case is accordingly authority. The first was that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it: see Lord Phillips, at paras 27–28. Lord Walker refers to this at paras 132–133 and must have taken the same view, for if vicarious liability was enough to engage the illegality defence the attribution of Mr Stojevic's knowledge to the company (with which the whole of the rest of his speech is concerned) would have been irrelevant. This is because the company was vicariously liable for Mr Stojevic's defaults whether or not it was treated as privy to them. Secondly, the majority was agreed in rejecting the primary argument of the auditors that once it was shown that the directing mind and will of a company (whether generally or for the relevant purpose) had caused it to defraud a third party and that the company was relying on that fraud to found its cause of action, the illegality defence necessarily barred the claim. Both Lord Phillips (para 63) and Lord Walker (para 173) rejected this submission as too broad, because it would involve the attribution of the agent's dishonesty to the company even if there were innocent directors or shareholders. Accordingly, both of them regarded it as critical that Stone & Rolls was a "one-man company", i e a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders. Third, Lord Phillips and Lord Walker were agreed that, as between a "one-man" company and a third party, the latter could raise the illegality defence on account of the agent's dishonesty, at any rate where it was not itself involved in the dishonesty.

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A 81 There are difficulties about treating *Stone & Rolls* as authority for any wider principles than these. There are two main reasons for this. The first is that Lord Phillips and Lord Walker differed in their reasons for holding that the illegality defence could be taken against a one-man company. Lord Walker adopted the "sole actor" principle, a label which he derived from the case law of the United States, but which he supported by reference to ordinary principles of English company law. Lord Phillips on
B the other hand was guided by the principle that a loss is recoverable only if the relevant duty was to protect against loss of that kind: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. He regarded this as expressing a rule of policy, which led him to conclude that Mr Stojevic constituted the entire constituency whose interests the auditors were bound to protect. It followed in his opinion that there was no reason not to
C attribute his state of mind to the company for the purposes of the illegality defence. The second reason is that Lord Phillips's view that it was no part of the purpose of an audit report to protect the interests of current or prospective creditors was peculiarly his own. Although Lord Walker agreed with it (see para 168), the proposition was not part of his reasoning on the impact of illegality. This has proved more controversial than any other feature of the reasoning in the case: see, for example, Eilis Ferran,
D "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239, paras 251–257. The scope of an auditor's duty and its relationship to the illegality defence may one day need to be revisited by this court, but it is not an issue in this appeal.

Application to claims by the company against the defaulting agent

E 82 The real issue in the present case is a different one. Does the illegality defence bar a claim by the company against the dishonest agent who procured the fraud, in the same way as it bars a claim by the company against an honest outsider who is said to be liable to indemnify them? In *Stone & Rolls* the question whether the illegality defence would have been available to Mr Stojevic to defeat an action by the company did not arise
F directly, but it was considered by every member of the committee. Lord Phillips did not express a concluded view. Lord Walker presumably thought that the company could not have sued Mr Stojevic, since he regarded them as co-conspirators and likened their case to an action for an account between highwaymen (paras 187–188). Lord Scott of Foscote and Lord Mance thought that Mr Stojevic could not have raised the defence against the company. Since then the position as between the company and its dishonest
G agent has reached the Court of Appeal twice, in *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629, where the illegality defence succeeded, and in the present case where it failed. The same question was considered, although it did not arise directly, by the Court of Final Appeal of Hong Kong in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 218 (decided on 13 March 2014), in which Lord Walker NPJ gave the leading judgment.

H 83 *Safeway Stores* was an action against a number of directors and senior employees of a supermarket group who by exchanging pricing information with competitors had caused the company to contravene section 2 of the Competition Act 1998. Under section 36 of the Act, the company became liable to a penalty, provided that the OFT was satisfied

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that it had committed the infringement "intentionally or negligently". Safeway was not a one-man company, but the statutory scheme had the peculiarity, which was critical to the reasoning of the Court of Appeal, that the offence was not capable of being committed by the individuals directly responsible. The Act imposed the prohibition and the resulting penalty only on the company. It was held that this required the attribution of the infringement to the company and its non-attribution to the defendants. On that ground, it was held that to apply the breach of duty exception so as to allow recovery of the penalty from the defendants would be inconsistent with the statutory scheme. The decision is not authority for any proposition applying more generally.

84 In the present case, the Court of Appeal dealt with the question as a matter of general principle and reached a different conclusion. Patten LJ, delivering the leading judgment, considered that the answer depended on the duty which was sought to be enforced and the parties between whom the issue was raised. In an action against the company by a third party who had been defrauded, the company was responsible. But it did not follow that the company was to be treated as responsible for a fraud for the purposes of an action against the dishonest director. In such an action, the illegality defence cannot be available, whether the damages claimed arose from the liability which the company was caused to incur to a third party or from the direct abstraction of the company's assets. Patten LJ's reasoning on these points is encapsulated in paras 34–35 of his judgment:

> "34. . . . attribution of the conduct of an agent so as to create a personal liability on the part of the company depends very much on the context in which the issue arises. In what I propose to refer to as the liability cases like *El Ajou, Tan, McNicholas* and *Morris,* reliance on the consequences to the company of attributing to it the conduct of its managers or directors is not enough to prevent attribution because, as Mummery LJ pointed out, it would prevent liability ever being imposed. As between the company and the defrauded third party, the former is not to be treated as a victim of the wrongdoing on which the third party sues but one of the perpetrators. The consequences of liability are therefore insufficient to prevent the actions of the agent being treated as those of the company. The interests of the third party who is the intended victim of the unlawful conduct take priority over the loss which the company will suffer through the actions of its own directors.
>
> "35. But, in a different context, the position of the company as victim ought to be paramount. Although the loss caused to the company by its director's conduct will be no answer to the claim against the company by the injured third party, it will and ought to have very different consequences when the company seeks to recover from the director the loss which it has suffered through his actions. In such cases the company will itself be seeking compensation by an award of damages or equitable compensation for a breach of the fiduciary duty which the director or agent owes to the company. As between it and the director, it is the victim of a legal wrong. To allow the defendant to defeat that claim by seeking to attribute to the company the unlawful conduct for which he is responsible so as to make it the company's own conduct as well would be to allow the defaulting director to rely on his own breach of duty to defeat

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A the operation of the provisions of sections 172 and 239 of the Companies Act whose very purpose is to protect the company against unlawful breaches of duty of this kind. For this purpose and (it should be stressed) in this context, it ought therefore not to matter whether the loss which the company seeks to recover arises out of the fraudulent conduct of its directors towards a third party (as in *McNicholas* and *Morris)* or out of
B fraudulent conduct directed at the company itself which Sir Andrew Morritt C accepted was what is alleged in the present case. There is a breach of fiduciary duty towards the company in both cases."

Patten LJ declined to apply the sole actor principle for two reasons. First, he considered that it had no place in the context of a claim by the company against the fraudulent director, because it would be inconsistent with the
C duty of the directors to have regard to the interests of creditors and to the statutory restrictions on the ratification of breaches of the duty of directors. Secondly, he regarded it as having the support of only Lord Walker and Lord Brown in *Stone & Rolls* and did not accept that it was "now an established feature of English law for all purposes"

85 *Moulin Global Eyecare Trading Ltd* was an application for judicial review of the decision of the Hong Kong Commissioner of Inland Revenue to
D reject a claim by Moulin for the repayment of tax overpaid in a previous years of assessment. Repayment had been claimed on the ground that the company's profits for the reference year had been fraudulently inflated by certain of its then directors. The commissioner contended that no repayment could be claimed because the dishonesty of the directors was attributable to the company. In the Court of Final Appeal the claim failed
E because neither of the two provisions of the Inland Revenue Ordinance relied on applied as a matter of construction. For present purposes, the relevant provision was section 70A which provided for the reopening of an assessment on the ground of "error". Lord Walker NPJ, with whom the majority of the court agreed, held that there was no error because for the purpose of preparing the company's tax returns, its directing mind and will
F consisted of the two directors who knew the facts and had deliberately falsified them. Their dishonesty was therefore to be attributed to the company. "A deliberate lie is not an 'error' for the purposes of that section." Lord Walker NPJ considered that the ordinary rules of attribution should apply unless the breach of duty exception was engaged. He resiled from the view that he had expressed in *Stone & Rolls* (at para 145) that the fraud exception applied generally to any issue as to a company's notice,
G knowledge or complicity. Reviewing the authorities in the light of the Court of Appeal's decision in the present case, he concluded that the breach of duty exception was in fact of limited application. Its rationale was to prevent the illegality defence from barring a claim by a company against its own agents. He summarised the proper scope of the exception as follows, in para 80:

H "The situation to which it most squarely applies (and some would say, the only situation to which it should properly be applied) is where a director or senior employee of a company seeks to rely on his own knowledge of his own fraud against the company as a defence to a claim by the company against him (or accomplices of his) for compensation for the loss inflicted by his fraud. The injustice and absurdity of such a

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> defence is obvious, and for more than a century judges have had no hesitation in rejecting it." A

It is clear that Lord Walker NPJ numbered himself among the "some" who would say that this was the only situation in which the fraud exception should properly be applied. At para 106(4) of his summary, he said:

> "The underlying rationale of the fraud exception is to avoid the injustice and absurdity of directors or employees relying on their own awareness of their own wrongdoing as a defence to a claim against them by their own corporate employer." B

And at para 106(6):

> "But the exception does not apply to protect a company where the issue is whether the company is liable to a third party for the dishonest conduct of a director or employee." C

86 The problem posed by the authorities is that until the Court of Appeal's decision in this case, they have generally treated the imputation of dishonesty to a company as being governed by tests dependent primarily on the nature of the company's relationship with the dishonest agent, the result of which is then applied universally. This was the point made by Lord Walker in *Stone & Rolls* at para 145, from which he resiled in *Moulin*. The fundamental point made by the Court of Appeal in this case and the Court of Final Appeal in *Moulin* is that, while the basic rules of attribution may apply regardless of the nature of the claim or the parties involved, the breach of duty exception does not. I agree with this. It reflects the fact that the rules of attribution are derived from the law of agency, whereas the fraud exception, like the illegality defence which it qualifies, is a rule of public policy. Viewed as a question of public policy, there is a fundamental difference between the case of an agent relying on his own dishonest performance of his agency to defeat a claim by his principal for his breach of duty; and that of a third party who is not privy to the fraud but is sued for negligently failing to prevent the principal from committing it. D E

87 There are three situations in which the question of attribution may arise. First, a third party may sue the company for a wrong such as fraud which involves a mental element. Secondly, the company may sue either its directors for the breach of duty involved in causing it to commit that fraud, or third parties acting in concert with them, or (as in the present case) both. Third, the company may sue a third party who was not involved in the directors' breach of duty for an indemnity against its consequences. F G

88 In the first situation, the illegality defence does not arise. The company has no claim which could be barred, but is responding to a claim by the third party. It will be vicariously liable for any act within the course of the relevant agent's employment, and in the great majority of cases no question will arise of attributing the wrong, as opposed to the liability, to the company. Where the law requires as a condition of liability that that the company should be personally culpable, as Lord Nicholls appears to have assumed it did in *Royal Brunei Airlines*, the sole function of attribution is to fix the company with the state of mind of certain classes of its agents for the purpose of making it liable. The same is true in cases like *McNicholas*, involving statutory civil penalties for quasi-criminal acts. It is also true of H

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A cases like *El Ajou* where the relevant act (receipt of the money) was unquestionably done by the company but the law required as a condition of liability that it should have been done with knowledge of some matter. This will commonly be the case with proprietary claims, where vicarious liability is irrelevant.

89 A claim by a company against its directors, on the other hand, is the paradigm case for the application of the breach of duty exception. An agent owes fiduciary duties to his principal, which in the case of a director are statutory. It would be a remarkable paradox if the mere breach of those duties by doing an illegal act adverse to the company's interest was enough to make the duty unenforceable at the suit of the company to whom it is owed. The reason why it is wrong is that the theory which identifies the state of mind of the company with that of its controlling directors cannot apply when the issue is whether those directors are liable to the company. The duty of which they are in breach exists for the protection of the company against the directors. The nature of the issue is therefore itself such as to prevent identification. In that situation it is in reality the dishonest directors who are relying on their own dishonesty to found a defence. The company's culpability is wholly derived from them, which is the very matter of which complaint is made.

90 This would be obvious if the company were suing the agent for a criminal or dishonest act committed against it where there was no third party involved: for example where the agent had embezzled the company's funds and made off with them. This was the situation before the Court of Appeal in *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, when the notion of attribution and the inference of consent were alike rejected. The position would have been no different if consent had been more than an inference, for example because the fraudsters had procured the company's express consent in their capacity as its sole directors or shareholders: see *Prest v Prest* [2013] 2 AC 415, 491. As Lord Browne-Wilkinson put it in *R v Gomez* [1993] AC 442, 497,

> "it would offend both common sense and justice to hold that the very control which enables such people to extract the company's assets constitutes a defence to a charge of theft from the company. The question in each case must be whether the extraction of the property from the company was dishonest, not whether the alleged thief has consented to his own wrongdoing."

Where the directors simply embezzle the company's funds the question of attribution arises but the illegality defence does not. There is no wrongdoing by the company. But the analysis would be precisely the same if there were. This was the position in *Belmont Finance Ltd v Williams Furniture Ltd* [1979] Ch 250, where the directors' scheme for abstracting the company's assets necessarily involved a criminal contravention by the company of the Companies Act 1948. The Court of Appeal declined to attribute knowledge of the conspiracy to the company so as to make it party to the scheme. This was because the company's claim was against the directors who had authorised the transaction. They could not raise the illegality defence by fixing the company with knowledge of their own plans, for the same reason that the defendants in *Attorney General's Reference (No 2 of 1982)* could not raise the defence of consent on that basis. This is so whether the

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company is a one-man company or not, because the objection to the attribution of the culpable directors' state of mind to the company is that they are being sued for abusing their powers. It is the same objection whether they were one, some or all of the directors and whether or not they were also shareholders. In *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 398, it was held on appeal from the judgment after trial that the directors' knowledge was not to be attributed to Belmont although the transaction was formally approved by the board and completed under the company's seal. If the fraudulent agent cannot raise the defence of illegality in these circumstances, the same must be true of third parties who are under an ancillary liability for participating in the fraudulent agent's wrong: co-conspirators, aiders and abetters, knowing assisters and receivers, and so on. That was the basis on which in *Belmont Finance* it was held that the companies who sold the Maximum shares at an overvalue and acquired Belmont's shares were potentially liable along with the culpable directors of Belmont.

91 The position is different where the company is suing a third party who was not involved in the directors' breach of duty for an indemnity against its consequences. In the first place, the defendant in that case, although presumably in breach of his own distinct duty, is not seeking to attribute his own wrong or state of mind to the company or to rely on his breach of duty to avoid liability. Secondly, as between the company and the outside world, there is no principled reason not to identify it with its directing mind in the ordinary way. For a person, whether natural or corporate, who is culpable of fraud to say to an innocent but negligent outsider that he should have stopped him in his dishonest enterprise is as clear a case for the application of the illegality defence as one could have. *Stone & Rolls* was a case of just this kind. Leaving aside the admittedly important question of the scope of an auditor's duty, if the illegality defence had not applied in that case, it could only have been because (i) the company was treated in point of law as a mindless automaton, or (ii) the defence could never apply to companies even in circumstances where it would have applied to natural persons. Neither proposition is consistent with established principle.

92 The technique of applying the general rules of agency and then an exception for cases directly founded on a breach of duty to the company is a valuable tool of analysis, but it is no more than that. Another way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in *Meridian Global* that the attribution of legal responsibility for the act of an agent depends on the purpose for which attribution is relevant. Where the purpose of attribution is to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result will not necessarily be the same as it is in a case where the purpose is to apportion responsibility between the company and a third party.

93 This makes it unnecessary to address the elusive distinction between primary and secondary victimhood. That distinction could arise only if the application of the breach of duty exception depended on where the loss ultimately fell, or possibly on where the culpable directors intended it to fall. If, however, the application of the exception depends on the nature of the

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duty and the parties as between whom the question arises, the only question is whether the company has suffered any loss at all.

Application to Bilta

94 As between Bilta and its former directors, the present action is brought to recover compensation for breach of the duties which they owed to the company. They are alleged to have broken those duties by causing it to conduct its business in a manner calculated to prevent it from meeting its obligation to account to HMRC for VAT. In particular, they are alleged to have caused the proceeds of the sales to UK purchasers, together with the VAT charged on them, to be paid out to Jetivia. Those proceeds were either the property of Bilta (in those cases where they reached Bilta's accounts), or were owed to Bilta (in those cases where they were paid by the UK purchasers directly to Jetivia). In either case, they represented assets of Bilta. Since the issue thus stated arises directly between the company and its directors, the fraud exception applies and the illegality defence cannot lie. Whether the payment out to Jetivia of funds which may represent the fruits of the fraud is truly a loss may well be a difficult question, but it is a different question which will have to be examined in the light of all the facts at a trial. It does not affect the application of the fraud exception.

95 Jetivia and Mr Brunschweiler are in no different position from the directors, since the claim against them is that they were party to the directors' misfeasance. They are said to have participated in the conspiracy to defraud Bilta, and to have knowingly assisted the directors' breach of their fiduciary duties. The claim against Jetivia for an account on the footing of knowing receipt is likewise based on an allegation of participation in the directors' misfeasance, since it is based on that company's knowledge (through Mr Brunschweiler) that the receipts represented assets of Bilta which the directors had caused to be paid to Jetivia in breach of their fiduciary duties.

96 Before leaving these questions I should briefly refer to two further arguments of the appellants. The first is that if Jetivia is liable to Bilta for conspiring with Bilta's directors, then Bilta is liable on the same basis to Jetivia for conspiring with Mr Brunschweiler against Jetivia. The claim therefore fails for circuity. The Court of Appeal ignored this ingenious and problematical argument, and I would do so too. The facts which would be necessary to found it are not agreed or even pleaded. The second argument is that Bilta has suffered no loss because they had not been deprived of any assets that they had legitimately acquired. In the words of Lord Phillips in *Stone & Rolls*, at para 5, "if a person starts with nothing and never legitimately acquires anything, he cannot realistically be said to have suffered any loss". Lord Walker (para 171) agreed. These observations were, however, made with reference to the facts of that case, which had been found in great detail by Toulson J in parallel proceedings between the defrauded banks and Stone & Rolls. It is not in my opinion appropriate to examine how far they are analogous to the facts of the present case at a stage of the proceedings when those facts are far from clear.

97 For these reasons, which substantially correspond to those of the Court of Appeal and those expressed by Lord Toulson and Lord Hodge JJSC in the second part of their judgment (on attribution), I would dismiss the

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appeal on the illegality defence. So far as that point is concerned, this is enough to decide the present appeal.

Policy

98 I add to my judgment on this point only because Lord Toulson and Lord Hodge JJSC would also decide the appeal on the ground that the application of the illegality defence is inconsistent with a statutory policy requiring directors to have regard to the interests of the creditors of an insolvent or prospectively insolvent company. Since I am unwilling to follow them down that route, I should briefly explain why.

99 Given that the illegality defence is based on public policy, it is understandable that policy should have been invoked in a number of academic and judicial analyses of these problems. It is, however, important to bear in mind the proper role of policy in the law of illegality, for arguments based on it can easily degenerate into the kind of discretionary weighing of the equities which was rejected in *Tinsley v Milligan* and *Les Laboratoires Servier v Apotex Inc.* The fact that the illegality defence is based on policy does not entitle a court to reassess the value or relevance of that policy on a case-by-case basis. In a broad sense, any rule of law which imposes civil liability in respect of a wrong may be described as a reflection of legal policy. It does not follow that the courts may apply the illegality defence or not according to the relative importance which they attach to the policy underlying it by comparison with desirability of allowing an otherwise sound claim to succeed. This was the essential problem about the reasoning of the Court of Appeal in *Les Laboratoires Servier*, which explains why this court felt unable to adopt that reasoning while arriving at the same result.

100 The illegality defence is based on the subordination of private rights and liabilities to certain interests belonging to the public sphere. The underlying rationale, as I sought to explain in *Les Laboratoires Servier*, at paras 23 and 25, is that the rights of private parties to remedies in private law may be overridden if the claims based on them are founded on "acts which are contrary to the public law of the state and engage the public interest". These are acts which engage what in French and other civil law systems would be categorised as interests belonging to the ordre public or, as a writer has put it, "that part of law that is not at the free disposition of private individuals": Roel de Lange, "The European Public Order, Constitutional Principles and Fundamental Rights" [2007] Erasmus Law Review 3, 11. This is why a judge, as a public officer, may be required to take a point on illegality of his own motion, contrary to the ordinary adversarial practice of the English courts. And it is why ordinary private wrongs, sounding in tort or contract, do not give rise to the illegality defence.

101 Courts normally examine the policy rationale of a rule of law in order to discover what the rule is, not in order to decide whether they approve of its application in a particular case. The scope for conflict between competing public policies is therefore limited. It is, however, implicit in the reasoning in *Les Laboratoires Servier* that there is one situation in which an examination of competing policies may be required, and that is where a competing public policy (as opposed to a competing legal interest) requires the imposition of civil liability notwithstanding that the

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A claim is founded on illegal acts. A good example is a claim for damages for breach of EU or national competition law, which may in certain circumstances succeed notwithstanding that it is founded on a contract or other act which is unlawful: *Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507, paras 34, 36; *Crehan v Inntrepreneur Pub Co CPC* [2004] 2 CLC 803, paras 149–153. This was because the correction by an award of damages of the economic effects of the breach of public competition law is
B required in order to give effect to its purpose.

102 More recently, a somewhat similar question came before this court in a very different context in *Hounga v Allen* [2014] 1 WLR 2889. This was a claim for unlawful discrimination in relation to the claimant's dismissal. Eighteen months before her dismissal, Ms Hounga's employer had conspired with her to bring her into the United Kingdom under a false identity and had
C arranged for her to receive a visitor's visa for six months. The factual basis on which the appeal was argued was that

> "by dismissing her Mrs Allen discriminated against Miss Hounga in that on racial grounds, namely on ground of nationality, she treated Miss Hounga less favourably than she would have treated others": see para 3.

D It was contended that in these circumstances the claim was barred because it was founded on the illegal conspiracy. There was no doubt that the relevant illegality constituted turpitude and no issue about attribution. The question was whether the employee's unlawful entry into the United Kingdom was sufficiently connected to her dismissal. Because Ms Hounga had no right to work in the United Kingdom, her contract of employment was illegal and
E unenforceable. But she had a distinct cause of action for the statutory tort of discrimination: see paras 24–25. To make good that cause of action Ms Hounga did not rely, and did not need to rely on the circumstances in which she had entered into the United Kingdom, either by way of pleading or by way of evidence. They were in reality no more than background facts. The reliance test, which had been adopted in *Tinsley v Milligan*, is the
F narrowest test of connection which is consistent with the existence of an illegality test at all, and by that test, Ms Hounga would certainly have been entitled to succeed. But in *Cross v Kirkby* The Times, 5 April 2000; [2000] CA Transcript No 321 the Court of Appeal had suggested a wider test of connection, dependent on whether the illegal act was "inextricably bound up with" the facts on which the cause of action depended even if it was unnecessary to rely on it. This would have substantially extended the range
G of cases in which the illegality defence could apply. Lord Wilson JSC (with whom Baroness Hale of Richmond DPSC and Lord Kerr of Tonahmore JSC agreed), regarded the question whether the "inextricable connection" test applied to the facts of that case as the "bigger question": see para 41. He answered it by holding that international conventions against human trafficking required that compensation should be available, so that the
H "inextricably bound up" test could not be applied in those circumstances. The court was not purporting to depart from *Tinsley v Milligan* without saying so. It simply recognised the case before it as one in which a competing public policy required that damages should be available even to a person who was privy to her own trafficking. Lord Hughes JSC (with whom Lord Carnwath JSC agreed) did not agree with the majority's construction of the

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relevant conventions, but agreed in the result on the ground that the illegal entry was not sufficiently closely connected with the dismissal. The result was that although the panel disagreed on the effect of the conventions, so far as the law of illegality was concerned, there was no inconsistency between their approaches. On the footing that the conventions required a right of damages to be available, the illegality defence failed on both grounds. The result of *Hounga v Allen* would have been exactly the same even if Ms Hounga had entered the United Kingdom legally or had done so illegally by her own unaided efforts (so that no question of trafficking arose) and the Allens had merely known of and taken advantage of that fact. In its recent decision in *R (Best) v Chief Land Registrar* [2016] QB 23, the Court of Appeal was divided on the significance of *Hounga* although it was able to decide the case without reference to it. Arden LJ expressed some scepticism about its significance as a statement of principle of general application. It will be apparent from what I have said that I have considerable sympathy for her approach.

103 In the present case, Lord Toulson and Lord Hodge JJSC have suggested that such a relevant countervailing public policy may be found in the rule requiring the directors of an actually or potentially insolvent company to have regard to the interests of creditors. I would prefer to leave this question open for two reasons.

104 The first is that it is not by any means clear that the duty of directors to have regard to the interests of creditors does require the imposition of civil liability notwithstanding the illegality defence. It is true that many of the central principles and detailed rules of company law are matters of public policy. They do not simply sound in private law. This is in particular true of those rules which impose duties for the benefit of third parties, such as creditors, who are not party to the contract of incorporation. These rules include rules for the conservation of capital, and for ensuring that companies do not trade while insolvent. More generally, section 172 of the Companies Act 2006, which includes among the general duties of directors a duty to "promote the success of the company for the benefit of its members as a whole", treats the interests of members as corresponding to those of employees, suppliers, customers and, in certain respects the public at large. The common law goes further than this, treating the interests of an actually or prospectively insolvent company as synonymous with those of its creditors: *West Mercia Safetyware v Dodd* [1988] BCLC 250. The duty to have regard to the interests of creditors is not one of the general duties of directors identified in the statute, but the common law duty is preserved by section 172(3) of the Act, notwithstanding the directors' obligation to serve the interests of members. However, it does not follow that the public policy reflected in these principles requires the imposition of civil liability on directors notwithstanding the illegality defence. One reason is that although the general duties of directors have effect notwithstanding any enactment or rule of law, by way of exception to this the company may in principle validly authorise something which would otherwise be a breach of those duties: Companies Act 2006, section 180(4)(5). Another is that the Companies Acts confer on the liquidator of a company in the course of winding up a wide range of statutory powers which enable effect to be given to these principles whether or not an ordinary civil action is available. These include not only provisions for misfeasance proceedings against directors and other officers,

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A but provisions for recovering the dissipated assets of insolvent companies from third parties. These points were not fully developed in argument, and I do not think that it is desirable to resolve them on the present appeal. As presently advised, I cannot accept that sections 172 and 180 are a sufficient answer to Jetivia's reliance on the illegality defence.

105 There is, however, a more fundamental reason why I would prefer not to go down this path in the present case, which is that it is unnecessary and undesirable. This is a case about attribution. It was approached in that way in both courts below, and that seems to me to be realistic. The problem about the policy argument is that it focuses too narrowly on the status of Mr Chopra and Mr Nazir as directors and on the insolvency of this particular company given the way in which they caused it to carry on business. In my opinion, it is perfectly clear that the illegality defence would fail even if these particular features of the facts were not present, just as in *Hounga v Allen*, the illegality defence would have failed even if Ms Hounga had not been trafficked. The company would be entitled to claim against Mr Chopra and Mr Nazir (and any collaborator of theirs) for their breach of duty to the company even if those gentlemen had not been directors but mere agents who happened to be the company's directing mind and will for the relevant particular purpose. It is equally clear that the company would be entitled to claim against them if it were solvent. I am unwilling to decide this case on a basis which invites distinctions between different situations which are irrelevant to the principle that we are applying. I would be extremely reluctant to see the law of illegality revert to the multiplicity of micro-topics and sub-rules which once characterised it. I agree with Lord Toulson and Lord Hodge JJSC that Occam's Razor is a valuable analytical tool, but only if it is correctly understood. Entia non sunt multiplicanda praeter necessitatem. Do not gratuitously multiply your postulates.

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Insolvency Act 1986, section 213

106 This is a short point and a straightforward one.

107 Section 213 of the Insolvency Act provides:

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> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> "(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

G

The appellants' case is that the provision has no extraterritorial effect and therefore no application to Jetivia which is domiciled in Switzerland or Mr Brunschweiler, who is domiciled in France. In effect the submission is that in subsection (2) "any persons" means only persons in the United Kingdom. In my opinion this argument is misconceived.

H

108 Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the

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loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.

109 The English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution. That jurisdiction is not universally recognised, but it is recognised within the European Union by articles 3 and 16 of Council Regulation (EC) No 1346/2000. In *Schmid v Hertel* (Case C-328/12) [2014] 1 WLR 633 the Court of Justice of the European Union considered these articles in the context of the jurisdiction of the German courts to make orders setting aside transactions with a bankrupt. It held not only that articles 3 and 16 applied to such orders, but that member states must be treated as having power to make them notwithstanding any limitations under its domestic law on the territorial application of its courts' orders.

110 Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets. None of them have any express limits on their territorial application. Another such provision, section 238, which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in *In re Paramount Airways Ltd* [1993] Ch 223. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213.

111 I would accordingly dismiss the appeal on this point also.

LORD TOULSON and LORD HODGE JJSC

112 When the directors of a company involve it in a fraudulent transaction, is the company barred by the doctrine of illegality from suing them and their accessories for losses caused by their breach of fiduciary duty? Secondly, does section 213 of the Insolvency Act 1986 ("IA 1986"), which empowers a liquidator of a company registered in the United Kingdom to seek financial contributions from persons involved in the company's fraudulent trading, have extraterritorial effect? These questions arise on an appeal by Jetivia SA ("Jetivia") and Mr Brunschweiler against the dismissal of their applications for the summary dismissal or striking out of the claims against them.

113 Bilta (UK) Ltd ("Bilta"), a company incorporated in England, seeks through its joint liquidators, Mr Hellard and Mr Ingram, to recover

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A damages or equitable compensation in respect of its alleged loss. As against the directors, Bilta claims damages for conspiracy or equitable compensation for breach of fiduciary duty. The conspiracy is alleged to have been an unlawful means conspiracy, and the unlawful means are the directors' alleged breach of their fiduciary duties. As against Jetivia and Mr Brunschweiler, Bilta claims damages for conspiracy or compensation for dishonest assistance in the directors' breach of their fiduciary duties. Since the matter comes before the court on Jetivia's and Mr Brunschweiler's application for the claims against them to be summarily struck out or dismissed, it is to be assumed for present purposes that the factual allegations made in Bilta's amended particulars of claim are capable of proof, and there is no need to repeat the word "alleged" whenever referring to the defendants' conduct. The liquidators also pursue a separate claim for fraudulent trading under section 213 of IA 1986. Jetivia is a Swiss company and Mr Brunschweiler, who is resident in France, is its sole director.

114 Bilta had two directors, Mr Nazir and Mr Chopra ("the directors"), who are the first and second defendants. Mr Chopra owned all the issued shares. Bilta was registered for the purposes of VAT. Its only trading activity, which took place between 22 April and 21 July 2009, was trading in European Emissions Trading Scheme Allowances ("EUAs"), which are commonly known as carbon credits. EUAs were treated as taxable supplies under the Value Added Tax Act 1994 until 31 July 2009. Since then they have been zero-rated. The VAT status of supplies of the EUAs at the relevant time explains Bilta's activities.

115 In short, Bilta bought large numbers of EUAs from overseas suppliers, including Jetivia, free of VAT, and sold them in the UK with VAT to companies described as "first line buffers", which immediately sold them on. The price for which Bilta sold the EUAs was lower before VAT than the price at which it bought, and Bilta was therefore never going to be in a position to meet its liabilities to HM Revenue and Customs ("HMRC"). Bilta had minimal capital and was insolvent virtually from the outset. The money payable to Bilta, including the VAT due to HMRC, was either paid to Bilta and paid on by it to its overseas supplier, or was paid by the first line buffer (or a later company in the chain) directly to Bilta's supplier, or was otherwise paid to offshore accounts. At the end of the chain the EUAs would be resold to a company outside the UK, generating a right to a VAT refund. It is a familiar kind of carousel or missing trader fraud.

116 Bilta was insolvent throughout the period of its trading in EUAs. In that three-month period, Bilta sold more than 5·7m EUAs for about £294m. Its liability for VAT on those transactions amounts to £38,733,444. It did not submit any VAT returns to HMRC. On the application of HMRC Mr Hellard and Mr Ingram were appointed provisional liquidators of Bilta on 29 September 2009. They commenced the company's claim against the defendants who were its directors and other parties, including the appellants. The company was compulsorily wound up on 25 November 2009. The proceedings were amended on 13 October 2011 to include the liquidators' claims under section 213 of IA 1986.

117 Patten LJ has set out the principal allegations in Bilta's particulars of claim in his impressive judgment [2014] Ch 52, paras 9–14. We can therefore summarise them very briefly. Bilta's pleaded case focuses on the injury done to it rather than to HMRC. It alleges that the appellants among

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others were parties to a conspiracy to defraud and injure it by depriving it of the money needed to pay its VAT liabilities and thereby rendering it insolvent. The conspirators knew that their fraudulent scheme involved the breach by Mr Nazir and Mr Chopra of their fiduciary duties as directors of Bilta. Against its directors Bilta claims compensation for breach of fiduciary duty, damages for unlawful means conspiracy and a contribution under section 213 of IA 1986. Against the appellants Bilta alleges that they were parties to the conspiracy to defraud it, that they are liable for dishonestly assisting Mr Nazir and Mr Chopra in the breaches of their fiduciary duties to it and (under section 213) for carrying on its business with intent to defraud creditors.

118 On 30 July 2012 Sir Andrew Morritt, the Chancellor of the High Court, dismissed the appellants' application for summary dismissal of the claims [2014] Ch 52. He held that the maxim ex turpi causa non oritur actio (no action may be founded on illegal or immoral conduct) was not available as a defence to Bilta's directors or the appellants and that section 213 of IA 1986 had extraterritorial effect. The Court of Appeal (Lord Dyson MR, Rimer and Patten LJJ) in a judgment dated 31 July 2013 dismissed the appellants' appeal.

119 The principal issues raised by this appeal in relation to the defence based on the maxim ex turpi causa are (i) the purpose of that maxim and its application in relation to Bilta's claims and (ii) the circumstances in which and mechanisms by which the knowledge of directors and other persons is attributed to a legal person such as a registered company. The other issue is whether section 213 of IA 1986 has extraterritorial effect. We deal with each in turn.

Illlegality: ex turpi causa non oritur actio

120 At the heart of Bilta's claims is the allegation that the directors acted in breach of their fiduciary duties to the company, in concert with others including Jetivia and its director, Mr Brunschweiler. Although the directors have played no part in the current proceedings, it is rightly accepted by the parties to the appeal that in relation to the defence of illegality there is no distinction to be drawn between the position of Jetivia and Mr Brunschweiler and that of the directors. The primary question for the court is whether Bilta's claim against the directors for breach of fiduciary duty is barred by the doctrine of illegality. If so, the claim for damages for conspiracy must equally fail, since the breach of fiduciary duty constitutes the unlawful means on which Bilta relies. And the converse also applies.

121 The appellants argue that Bilta's claims against its directors are barred by reason of the criminal nature of its conduct under their control. Its function was to serve as a vehicle for defrauding HMRC, and it is submitted that the doctrine of illegality bars it from suing the directors who caused its participation in the scheme, and their co-conspirators, as a means of recovering the company's loss for the benefit of the company's creditors.

122 In any case where the defence of illegality is raised, it is necessary to begin by considering the nature of the particular claim brought by the particular claimant and the relationship between the parties. So we start with the nature of the directors' duty to Bilta.

123 It is well established that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties

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A of a company which is able to meet its liabilities, because in the case of the former the director's duty towards the company requires him to have proper regard for the interest of its creditors and prospective creditors. The principle and the reasons for it were set out with great clarity by Street CJ in *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722, 730:

> "In a solvent company the proprietary interests of the shareholders
B entitle them as the general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace
C the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

124 This passage was cited with approval by Dillon LJ in *West Mercia*
D *Safetywear v Dodd* [1988] BCLC 250, 252–253. The principle now has statutory recognition in the Companies Act 2006. In Part 10, Chapter 2 of the Act, concerning the general duties of directors, section 172 provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole . . .
E "(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

125 Section 180(5) provides that the general duties under the Act have effect (except as otherwise provided or the context otherwise requires) notwithstanding any enactment or rule of law. A director of an insolvent company is not directly a fiduciary agent of the creditors and cannot be sued
F by an individual creditor for breach of the fiduciary duty owed by the director to the company: *Yukong Line Ltd v Rendsburg Investments Corpn (No 2)* [1998] 1 WLR 294.

126 Instead, the protection which the law gives to the creditors of an insolvent company while it remains under the directors' management is through the medium of the directors' fiduciary duty to the company, whose
G interests are not to be treated as synonymous with those of the shareholders but rather as embracing those of the creditors.

127 Such protection would be empty if it could not be enforced. To give effect to it, this action is brought by the liquidators in the name of the company to recover, for the benefit of the creditors, the loss caused to the company by the directors' breach of their fiduciary duty.

H 128 It is argued on behalf of the appellants that it would offend against the doctrine of illegality for the claim to succeed. It is said that the fact that the errant directors were in sole control of the company makes it unlawful for the company to enforce their fiduciary duty towards it. If this were the law, it would truly deserve Mr Bumble's epithet—"a ass, a idiot". For it would make a nonsense of the principle which the law has developed for the

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protection of the creditors of an insolvent company by requiring the directors to act in good faith with proper regard for their interests.

129 It has been stated many times that the doctrine of illegality has been developed by the courts on the ground of public policy. The context is always important. In the present case the public interest which underlies the duty that the directors of an insolvent company owe for the protection of the interests of the company's creditors, through the instrumentality of the directors' fiduciary duty to the company, requires axiomatically that the law should not place obstacles in the way of its enforcement. To allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required. It would not promote the integrity and effectiveness of the law, but would have the reverse effect. The fact that they were in sole control of the company and in a position to act solely for their own benefit at the expense of the creditors, makes it more, not less, important that their legal duty for the protection of the interests of the creditors should be capable of enforcement by the liquidators on behalf of the company.

130 For that reason in our judgment this appeal falls to be dismissed. The courts would defeat the very object of the rule of law which we have identified, and would be acting contrary to the purpose and terms of sections 172(3) and 180(5) of the Companies Act 2006, if they permitted the directors of an insolvent company to escape responsibility for breach of their fiduciary duty in relation to the interests of the creditors, by raising a defence of illegality to an action brought by the liquidators to recover, for the benefit of those creditors, the loss caused to the company by their breach of fiduciary duty. In everyday language, the purpose of the inclusion of the creditors' interests within the scope of the fiduciary duty of the directors of an insolvent company towards the company is so that the directors should not be off the hook if they act in disregard of the creditors' interests. It would be contradictory, and contrary to the public interest, if in such circumstances their control of the company should provide a means for them to be let off the hook on the ground that their illegality tainted the liquidators' claim.

131 There would be much to say for ending this judgment at this point, except that it would be wrong not to identify the principal counter arguments and show that we have considered them. There is an attendant risk, in going on at further length, of losing sight of the simple and central point that the defence of illegality would undermine the rule of law, reinforced by Act of Parliament, which exists for the protection of those for whose benefit the action is brought, namely the creditors who have a right to such assets as the liquidators may recover in the name of the company. We see no need, for example, to get into the subject of attribution and the *Hampshire Land* principle in order to decide the appeal, but in discussing it (as we do below) we hope by the end to achieve some simplicity and clarity.

132 We turn to the question whether any authorities present an impediment to this approach and whether they require reconsideration.

133 Mr Alan Maclean QC's primary submission was that it follows from the decision of the House of Lords in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 that Bilta's claims are barred by the doctrine of

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A illegality by reason of its being a "one-man company" which engaged in deliberate fraud.

134 *Stone & Rolls* has been a much debated and much criticised case. A lot of the criticism stems from the fact that there were five judgments running to nearly 100 pages, the judges were divided three to two, and differing reasons were given by the majority. The claim was by a company in
B liquidation against the firm of chartered accountants, who had acted as its auditors, for negligence and breach of contract in failing to detect and report that the company's business consisted mainly of defrauding banks (by obtaining credit through presenting false documents purportedly relating to commodity trading which was fictitious). The company was under the complete control of a Mr Stojevic. When the bank which was the principal victim discovered the fraud it sued the company and Mr Stojevic and
C obtained judgment for over $90m. The judgment was unpaid, the company was put into liquidation and it brought proceedings through the liquidators against the accountants for the benefit of the creditors. Negligence was admitted, but the accountants applied successfully to strike out the action on the ground of illegality. The shares in the company were held by an Isle of Man company, whose shareholders were nominee companies acting under a
D trust. In the proceedings brought by the bank Mr Stojevic was evasive about the beneficial interest behind the trust, although he acknowledged that he had a beneficial interest in the company, and there was no evidence to suggest that any innocent person had a share in it. All but one of the House of Lords (Lord Scott) proceeded on the basis that the company was Mr Stojevic's company in the fullest sense.

135 The opinions of the majority (Lords Phillips, Walker and Brown),
E although differently expressed in various ways, have in common that they identified two features which were critical to their analysis. One concerned the scope of the accountants' duty. The other was the fact that no one who had any part in the ownership or management of the company was unaware of the fraud which the accountants failed to detect and report. Put shortly, the majority (in disagreement with Lord Mance) held that the accountants
F owed no contractual or tortious duty of care in respect of the interests of the creditors, notwithstanding that the company's solvency depended on the fraud being undetected. Their sole duty was to report to the company the matters which the directors and shareholders ought to know for the purpose of making informed decisions. If those people were already aware of and complicit in the fraud, that fact provided a complete barrier to the claim. Lord Phillips was explicit that the case turned critically on whether the
G auditor's duty extended to protecting those for whose benefit the claim was brought. He also observed that one fundamental proposition appeared to him to underlie the reasoning of Lord Walker and Lord Brown—that the duty owed by an auditor to the company was for the benefit of the interests of the shareholders, but not those of the creditors—and that here lay the critical point of difference of opinion between them and Lord Mance: para 68.

H 136 While it would shorten this judgment considerably if we were to say simply that the present case is plainly distinguishable from *Stone & Rolls* on its facts, since this case concerns directors who unquestionably owed duties for the protection of the interests of the creditors (unlike the auditor, according to the opinions of the majority in *Stone & Rolls*), the case has

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caused so much difficulty that it would be wrong for us to leave it there. It is therefore necessary to analyse the judgments in closer detail before expressing our final view about its status.

137 Lord Phillips summarised his conclusions (para 18) before developing his analysis. He said that those for whose benefit the claim was brought (the creditors) fell outside the scope of any duty owed by the accountants; and that the sole person for whose benefit the accountants' duty was owed (Mr Stojevic, who owned and ran the company) was himself the person responsible for the fraud. In those circumstances he said that ex turpi causa afforded a defence.

138 Lord Phillips made some comments about the law of illegality and the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340. He rejected the idea that *Tinsley v Milligan* laid down a universal test of ex turpi causa. It was concerned with the effect of illegality on title to property. It established that once title had passed, it could not be attacked on the basis that it passed pursuant to an illegal transaction. If title could be asserted without reliance on the illegality, the defendant could not rely on illegality to defeat the title: para 21. But he did not believe that it was right to proceed generally on the basis that the reliance test could automatically be applied as a rule of thumb, because it was necessary to consider the policy underlying the ex turpi causa maxim in order to decide whether the defence was bound to defeat the claim: para 25.

139 Lord Phillips said that the underlying policy in relation to contractual obligations could be divided into two principles: the court will not enforce a contract which is expressly or impliedly forbidden by statute or is entered into with the intention of committing an illegal act; and the court will not assist a claimant to recover a benefit from his own wrongdoing. In the instant case the claim is not brought for the benefit of the shareholder/directors, but for the benefit of the defrauded creditors for whose benefit the relevant duty was owed. Whereas in *Stone & Rolls* no such duty was owed for the benefit of the creditors, in this case it was. On Lord Phillips's analysis of *Tinsley v Milligan* there is no inconsistency between that decision and the reasons which we have given for dismissing this appeal.

140 Lord Phillips considered the consequences of the primary argument advanced by the accountants in a case where the company carried on a legitimate business and had honest shareholders, but the person who was in charge of running it ("its directing mind and will") involved it in fraudulent trading, which its auditors negligently failed to discover and report. In such circumstances any claim by the company for the benefit of the shareholders, whose interests the auditors should have protected, would according to the accountants' argument be barred by the very wrongdoing which the auditors' negligence had allowed to occur: paras 29–30. Lord Phillips did not accept that if Stone & Rolls had been a company with independent shareholders, which had been "high-jacked" by Mr Stojevic, its claim would necessarily have been defeated by reason of the reliance test or the underlying principle of public policy: para 63.

141 Lord Phillips considered that where a company's complaint was that its directing mind and will had infected it with turpitude, if ex turpi causa was not to apply, "the reason should simply be that the public policy underlying it does not require its application": para 60. That would be a

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very easy conclusion where all the shareholders were innocent: para 61. He considered that the situation would be more problematic if some shareholders were innocent and some were not, but it was not necessary for the court to solve that problem in the case of *Stone & Rolls*, because it had no innocent shareholders. In short, whether ex turpi causa applied was dependent on identifying the underlying public policy and on identifying for whose benefit the action was being brought.

142 In *Stone & Rolls* (as in the present case) there was a good deal of argument about "attribution" and the application of the so-called *Hampshire Land* principle (*In re Hampshire Land Co* [1896] 2 Ch 743), but in a passage which is important to Lord Phillips's analysis he said that the real issue was not whether the fraud should be attributed to the company but whether ex turpi causa should defeat the company's claim for breach of the auditor's duty, and that this depended critically on whether the scope of the auditor's duty extended to protecting those for whose benefit the claim was brought: para 67.

143 Lord Phillips proceeded to examine that issue and he concluded that the accountants owed no duty for the protection of the company's creditors. (That, of course, places them in stark contrast with the directors of an insolvent company.) In examining that question Lord Phillips cited with approval the decision of Hobhouse J in *Berg Sons & Co Ltd v Mervyn Hampton Adams* [2002] Lloyd's Rep PN 41. That was also a claim by a company in liquidation, brought for the benefit of its creditors (banks and discount houses), against a firm of chartered accountants which had acted as the company's auditors. The company operated under the sole control of a Mr Golechha, who was the beneficial owner of its entire share capital. The accountants were found to have acted with lack of proper skill in accepting too readily assurances given to them by Mr Golechha about the recoverability of certain debts owed to the company. The judge found that the auditors ought to have qualified the company's accounts. At the relevant time the company was not insolvent, but it was accepted (as indeed the accountants had said in a letter to Mr Golechha) that it was foreseeable that the company's bankers and discount houses with whom it did business might place some reliance on its audited accounts. The company asserted, but did not prove, that Mr Golechha's conduct had been fraudulent. The claim failed on various grounds, including reasons directly comparable to the position in *Stone & Rolls*.

144 Lord Phillips quoted (paras 78 and 79) the following passages from Hobhouse J's judgment:

> "It follows [from the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605] that the purpose of the statutory audit is to provide a mechanism to enable those having a proprietary interest in the company or being concerned with its management or control to have access to accurate financial information about the company. Provided that those persons have that information, the statutory purpose is exhausted. What those persons do with the information is a matter for them and falls outside the scope of the statutory purpose. In the present case the first plaintiffs have based their case not on any lack of information on the part of Mr Golechha but rather on the opportunity that the possession of the auditor's certificate is said to

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have given for the company to continue to carry on business and to borrow money from third parties. Such matters do not fall within the scope of the duty of the statutory auditor."

"However one identifies the company, whether it is the head management, or the company in general meeting, it was not misled and no fraud was practised on it. This is a simple and unsurprising consequence of the fact that every physical manifestation of the company Berg was Mr Golechha himself. Any company must in the last resort, if it is to allege that it was fraudulently misled, be able to point to some natural person who was misled by the fraud. This the plaintiffs cannot do."

145 Lord Phillips observed that this comment demonstrated that *Hampshire Land* had no application to the facts of that case, but that it also had wider implications: para 80. It supported the proposition that the law could not rationally hold the auditor liable when the entire shareholder body and the entire management was embodied in a single individual who knew everything because he had done everything. The passages set out above correspond with and support the twin factors to which we have referred (para 26) as central to the reasoning of the majority—the limited nature of the auditors' duty, and the knowledge of everyone involved in the ownership and management of the company about the matters which the auditors failed to discover and report to them. Lord Phillips returned to those points at the end of his judgment: para 86.

146 Lord Walker concluded that he would apply what he referred to as the "sole actor" principle to a claim made against its former auditors by a company in liquidation, where the company was a one-man company engaged in fraud, and the auditors were accused of negligence in failing to call a halt to the fraud: para 168. He defined what he meant by a one-man company, by reference to what Hobhouse J had said in *Berg Sons & Co Ltd v Mervyn Hampton Adams*, as

"a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned": para 161.

He cited *Berg Sons & Co Ltd v Mervyn Hampton Adams* as a clear case of a one-man company, which did not involve fraud, but in which every physical manifestation of the company was Mr Golechha himself who knew all about the irrecoverable loans; and there is a clear echo of Hobhouse J's judgment in Lord Walker's explanation for rejecting Stone & Rolls' claim: para 168. He said that any duty of care owed by the auditors was to the company as a whole, not to current or prospective creditors, and that there was no protection which the auditors could give to the company if the only human embodiment of the company knew all about its fraudulent activities.

147 Lord Walker's judgment was a great deal more detailed than that summary, because he considered the various arguments advanced by the company, but his critical reasoning was that the auditors were in a very different position from the company's directors (para 190), their duty of care was limited in the way that he identified, and the company's sole actor knew all that was to be known.

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148 Lord Brown agreed with Lord Walker. He said that the claim against the accountants ran diametrically counter to the principles established in *Caparo Industries plc v Dickman* [1990] 2 AC 605 and was difficult to reconcile with Hobhouse J's decision in *Berg Sons & Co Ltd v Mervyn Hampton Adams*: para 202. In that case (see para 144 above) Hobhouse J had said that the claim against the accountants was based on the opportunity which possession of the auditor's certificate was said to have given for the company to continue to carry on business and borrow money, but such matters did not fall within the scope of the auditor's duty. Similarly, said Lord Brown, the assumed negligence of the accountants had enabled the company to continue to carry on business, in this case stealing rather than borrowing from third parties.

149 What divided the minority (Lords Scott and Mance) from the majority is that they took a different view about the classes of parties in respect of whose interests the auditors owed a duty of care. They both regarded the insolvency of the company as critical, but Lord Mance set out his reasoning more fully. He held that just as a director's fiduciary duty to a company which is insolvent or bordering on insolvency embraces a duty to the company's creditors, a parallel principle applied to the auditor, so that the duty of care owed by an auditor to such a company embraced a duty to have regard to the interests of the creditors. He distinguished *Berg Sons & Co Ltd v Mervyn Hampton Adams* because in that case the company was solvent at each audit date: paras 260 and 265. He said that the fact that Stone & Rolls was insolvent at each audit date was critical. He defined the issue as being whether the auditors' duty to the company extended, like the directors', beyond the protection of the interests of shareholders in a situation where the auditors ought to have detected the company's insolvency. He observed that the centrality of this issue may have been obscured by the spread of argument over other issues: para 265. He considered that it was not inconsistent with *Caparo* to hold that the company was entitled to pursue a claim against the auditors for loss resulting from its breach of its duty in failing to detect that the company was subject to a continuing fraudulent scheme in circumstances in which it was insolvent: paras 269–271.

150 Lord Scott emphasised the public policy foundation of the doctrine of illegality. For this reason he differentiated between an action for damages for breach of the auditors' duty of care brought by a solvent company and a similar action brought by an insolvent company. If the company had remained solvent, an action against the auditors which would have enabled Mr Stojevic to benefit from any damages would have offended the ex turpi causa rule. But the company was insolvent and there was no possibility of Mr Stojevic benefitting from any damages recoverable from the accountants. There was therefore no public policy reason to bar an action against the auditors based on their breach of duty. "The wielding of a rule of public policy" he said, "in circumstances where public policy is not engaged constitutes, in my respectful opinion, bad jurisprudence": paras 119–122.

151 Critics of *Stone & Rolls* for being over long and diffuse have a fair point, and commentators and practitioners have found the case difficult. Lord Walker NPJ himself commented in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* 17 HKCFAR 218 that it is difficult to extract a clear ratio from the speeches of the majority, and he praised the Court of

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Appeal in the present case for achieving a welcome clarification of the law: paras 100, 106. We have endeavoured to apply Occam's razor in concentrating on the critical features of the case: the scope of the auditors' duty and the inability of the company to show that anyone who had any part in the ownership or management of the company was misled by the auditors' negligence, which was a prerequisite for the company's claim to succeed.

152 Much of the difficulty of *Stone & Rolls* is that the treatment of the issues was more roundabout, for example with much discussion of principles of attribution. We have already referred to the fact that Lord Phillips considered that the real issue was not about attribution, but about the scope of the auditors' duty, and to Lord Mance's comment that the centrality of this issue had been obscured by the spread of argument over other issues. The centrality of the point was further emphasised by the parallel with *Berg Sons & Co Ltd v Mervyn Hampton Adams* which each of the majority drew in their judgments. That parallel had nothing to do with the fraudulent nature of Stone & Rolls' business. The restricted nature of the auditors' duty and the knowledge of those in charge of the company had the same significance whether the nature of the business was fraudulent (*Stone & Rolls*) or not (*Berg Sons & Co Ltd v Mervyn Hampton Adams*). Likewise, Lord Mance's ground for distinguishing *Berg Sons & Co Ltd v Mervyn Hampton Adams* had nothing to do with whether the business was lawful or fraudulent. Lord Mance distinguished Hobhouse J's decision because the insolvency of Stone & Rolls at the time of the statutory audits made all the difference in his view to the scope of the auditors' duty. We are not of course concerned in this case to revisit the point of disagreement between Lord Mance and the majority on that question. The finding that all whose interests were the subject of the auditors' duty of care knew the facts which the auditors failed to detect was dispositive. The conclusion of the majority that the claim was therefore barred by illegality may be seen as a reflection on the illegal nature of the conduct as a matter of fact and perhaps a perceived need to bring their conclusion within the scope of the issues as argued, but it was not the illegality which on a proper analysis of their reasoning drove the conclusion. As Lord Phillips observed, the fundamental proposition which underlay the reasoning of Lord Walker, Lord Brown and himself was that the auditors owed no duty for the benefit of those for whose benefit the claim was brought. It necessarily followed that the claim should be struck out.

153 Lord Sumption JSC analyses the case differently. There is no disguising the fact that serious difficulties arise from the different ways in which the majority expressed themselves. The Law Commission in its report on *The Illegality Defence* (2010) (Law Com No 320), commented at para 3.32:

> "It is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence. Though there was a majority verdict, there was no majority reasoning, with all their Lordships reaching different conclusions on how the defence should be applied."

154 We conclude that *Stone & Rolls* should be regarded as a case which has no majority ratio decidendi. It stands as authority for the point which it decided, namely that on the facts of that case no claim lay against the auditors, but nothing more.

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155 *Stone & Rolls* in any event does not support Mr Maclean's primary submission that in the present case Bilta's claims are barred because it was a one-man company. The duty of the directors was significantly different from the duty of the statutory auditors, and Stone & Rolls' attempt to compare the two was rejected by the majority (see, for example, Lord Walker at para 190), although it found favour with Lord Mance. The fact that Stone & Rolls was a one-man company was relevant because it meant that the company was unable to point to anyone involved in the ownership or management of the company who was adversely affected by the accountants' failure to discover what that one man had concealed from it. But it does not follow that the person in charge of a one-man company can never be liable for any form of wrongdoing towards the company. As Lord Mance pointed out in *Stone & Rolls* (para 230), the controller of a one-man company who dishonestly strips its assets is guilty of theft from the company: *Attorney General's Reference (No 2 of 1982)* [1984] QB 624. If the majority had agreed with Lord Mance's view as to the scope of the auditors' duty, it is plain from their reasoning that they would not have struck out the action, albeit that it was a one-man company and its activities were fraudulent. They saw the claim as an attempt to get around *Caparo*, whereas Lord Mance saw no conflict with *Caparo*.

156 Mr Maclean also relied on the decision of the Court of Appeal in *Safeway Stores Ltd v Twigger* [2011] Bus LR 1629. The issue was whether a company could recover the amount of financial penalties imposed on it by the Office of Fair Trading, for anti-competitive activity in contravention of the Competition Act 1998, from the directors or employees who were responsible for the illegal activity in breach of their contractual and fiduciary duties to the company. The court held that the claim was barred by the illegality principle.

157 The leading judgment was given by Longmore LJ. His reasoning was as follows: (i) The company's liability to the OFT was not a vicarious liability for the wrongful conduct of its directors or employees, because the Competition Act 1998 did not impose any liability on the directors or employees for which the company could be held vicariously responsible. The liability under the Act was imposed on the company itself, which acted (as any company must) through agents. (ii) The liability was therefore the "personal" liability of the company, so that its claim against the directors and employees was based on its own wrongdoing. (iii) Its claim was therefore barred by illegality. (iv) It was not open to the company to argue that it was a victim of the directors' and employees' misconduct, and to rely on the *Hampshire Land* principle, because the statutory scheme imposed responsibility on the company. (v) It was unnecessary to consider the position if the company's liability had been strict, because the OFT could only impose a penalty under the Competition Act 1998 if the infringement had been committed intentionally or negligently by the company.

158 If that reasoning is sound, it would support Mr Maclean's argument that the doctrine of illegality should apply in the present case, although this would have nothing to do with Bilta being a one-man company.

159 We disagree with the reasoning. We have been greatly helped by the analysis provided by Professor Watts in a characteristically lucid article, "Illegality and Agency Law: Authorising Illegal Action" [2011] JBL 213.

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160 Safeway's direct liability (or "personal" liability in the words of the Court of Appeal) under the Competition Act 1998 arose through the acts of its directors and employees as its agents, but should the company therefore be denied the right to hold its errant directors and employees to account? We agree with Professor Watts's proposition, at p 220, that

> "it simply does not follow that because under the law of agency a principal becomes directly a party to an illegal agreement as a result of its agents' acts, it is thereby to be deprived of its rights under separate contracts, not otherwise illegal, with its employees and other agents to act in its interests and to exercise due care and skill. Indeed, it would not follow even if the 1998 Act *were* found to have invoked some sui juris concept of direct liability other than the law of agency.
>
> "In the absence of some countervailing policy reason, it is not just for someone who falls foul of a statute by reason of the acts of its employees or other agents to add to its burdens and disabilities by depriving it of any recourse against those employees or other agents."

161 Unless there are special circumstances, the innocent shareholders should not be made to suffer twice. The reasoning in *Safeway*, if taken to its logical conclusion, would also mean that the company could not lawfully dismiss the errant employees or directors; for to rely on their misconduct would be to rely on its own misconduct, as Professor Watts has observed. It might be argued that unfair dismissal is different, but that could only be on public policy grounds.

162 Reference to public policy takes us to the only basis on which we consider that the decision of the Court of Appeal in *Safeway* may have been justified. Pill LJ considered that the policy of the Competition Act 1998 would be undermined if undertakings were able to pass on their liability to their employees. That may have been a sound reason for striking out Safeway's claims, and we express no view as to the merits of the decision. We accept that there may be circumstances where the nature of a statutory code, and the need to ensure its effectiveness, may provide a policy reason for not permitting a company to pursue a claim of the kind brought in *Safeway*.

163 In *Bowman v Secular Society Ltd* [1917] AC 406 the House of Lords established the principle that the illegality of a company's objects does not make its existence invalid in law. Put broadly, a company has the same power to act illegally as an individual. Lord Parker of Waddington also stated, at p 439:

> "if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorised by the memorandum."

164 That is a generalisation. It would be harsh on directors if the law were to impose strict liability, and to do so would exceed the general duties of directors set out in the Companies Act 1998. But the reasoning of Longmore LJ would negate the company's right of recourse against the director who acted in breach of his fiduciary duty if his conduct as its agent was such as to give rise to a direct liability of the company to a third party. That would be inconsistent with the dictum of Lord Parker and contrary to

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ordinary principles of agency. As we have said, where the liability arises under a statute, there may in some circumstances be cause to conclude that the statutory scheme would be undermined by allowing the principal to enforce its ordinary right of recourse against its agent, but that would be a departure from ordinary rules of agency based on the specific nature of the statutory scheme and the requirements of public policy arising from it.

165 *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 provides an illustration of the application of Lord Parker's dictum. The proceeds of the theft of gold bullion from a warehouse owned by the plaintiffs were laundered through the bank account of a company called Scadlynn Ltd with Barclays Bank. The directors and sole shareholders of Scadlynn were signatories of the account and drew cheques on it for cash totalling nearly £8m over four months. The plaintiffs sought to enforce rights which Scadlynn was said to possess against the bank in consequence of the payments out of its account. The issue before the Court of Appeal (Mustill and Nicholls LJJ and Sir Roualeyn Cumming-Bruce) was whether the pleading should be permitted. This raised the question, among others, whether it was open to Scadlynn to sue the bank in respect of withdrawals made or authorised by the company's sole directors and shareholders. The court held that there was no reason why Scadlynn, which was being put into compulsory liquidation, should be prevented from enforcing such a claim for the benefit of the creditors who would look to the assets for the satisfaction of their debts. Nicholls LJ described the existence of the directors' fiduciary duties to the company as a means by which the law sought to protect the company's creditors. In that context, Mustill LJ rightly described Scadlyn as being an intended victim of arrangements intended dishonestly to deprive it of a large part of its assets and Nicholls LJ agreed with him.

166 Mr Maclean submitted that there was no scope for applying the *Hampshire Land* principle (so as not to attribute the directors' conduct to Bilta because they were acting in fraud of the company) in the circumstances that Bilta is a one-man company and in any event that Bilta's role in the fraud was that of villain and not victim. The argument proceeds on the false premise that Bilta's role must be characterised in the same way both as between Bilta and HMRC and as between the company and its directors; and that the attribution of the fraud to the company for the first purpose applies equally when considering the second. We do not consider the question of attribution to be the real issue in this case. The real issue is simpler: whether it is contrary to public policy that the company, through the liquidators, should enforce for the benefit of its creditors the duty which the directors owed for the protection of the creditors' interests as part of their fiduciary duty to the company. In this respect we echo Lord Phillips's observation in *Stone & Rolls* (para 67) that the real issue was not whether the fraud should be attributed to the company, but whether ex turpi causa should defeat the company's claim for breach of the auditors' duty. This, as he said, depends critically on whether the scope of that duty extends to protecting those for whose benefit the claim was brought. The answer to that question in the present case is clear. The directors' fiduciary duty to the company did extend to protecting the interests of those for whose benefit the claim is brought. However, because the issue of attribution loomed large in the course of argument (as it did in *Stone & Rolls*), and because the topic has

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caused a fair amount of confusion, we address it below in the hope of providing some clarification.

167 Mr Maclean further submitted that Bilta's claims fall within the illegality principle because the claims are inextricably linked with, and it is relying on, its own dishonest actions. The flaw in this argument is that when a company is insolvent or on the border of insolvency its interests are not equated solely with the proprietary interests of its owners. Company law requires that the interests of creditors receive proper consideration by the shareholders and directors. Although the creditors are not shareholders, as creditors they are recognised at that point as having a form of stakeholding in, or being a constituency of, the company which is under the management of the directors, and their interests are to be protected at law through the directors' fiduciary duty to the company, which encompasses proper regard for the creditors' interests. It is therefore misleading to say that when the company, through the liquidators, brings an action against the directors for breach of that duty, the company (whose interests ex hypothesi include the interests of those for whose benefit the duty is owed and the action is brought) is claiming in respect of "its" dishonest actions.

168 The argument about reliance harks back to *Tinsley v Milligan*. We have referred (at para 138) to Lord Phillips's treatment of that case in *Stone & Rolls* and to his statement that whether ex turpi causa should apply should depend on whether the public policy underlying it required its application. *Tinsley v Milligan* sparked a debate which has continued ever since then. This is not surprising because the judges in that case themselves considered the law to be very unsatisfactory, but they were of the opinion that it was beyond judicial reform, although it was based on public interest and was a common law doctrine. Lord Goff referred to the New Zealand Illegal Contracts Act 1970, which provides that the court may deal with an illegal contract "howsoever as the court in its discretion thinks just". He suggested that there should be a full inquiry, and said that he would be more than happy if a new system could be evolved which was satisfactory in its effect and capable of avoiding indiscriminate results.

169 The Law Commission studied the subject over many years with wide consultation. It did not recommend that the court should have an open ended discretion. However, it agreed with the great majority of consultees and commentators that the law was in an unsatisfactory state if, in the words of Lord Browne-Wilkinson in *Tinsley v Milligan*, "The effect of illegality is not substantive but procedural". The objections were well expressed by McHugh J in the High Court of Australia in *Nelson v Nelson* (1995) 184 CLR 538, para 27 (and many others have written or spoken in similar vein):

> "The [reliance] rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is

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A unsatisfactory, particularly when implementing a doctrine which is founded on public policy."

The Law Commission did not recommend that the solution should be statutory. Its reason or primary reason was not the difficulty of obtaining Parliamentary time for law reform, although that has been a serious problem. Its study of various possible legislative models did not result in it
B finding an altogether satisfactory version, but there also appeared to the Commission to be signs of fresh judicial thinking since *Tinsley v Milligan*. It considered that judicial reform was the best way forward and it made recommendations to that end. The Commission suggested that it was within the power of the courts to develop the law in a way which was neither simply discretionary nor arbitrary and indiscriminate, but which had regard to the
C underlying public policies, and its recommendations were intended to assist the courts in that direction.

170 In *Gray v Thames Trains Ltd* [2009] AC 1339, para 30, Lord Hoffmann said that the doctrine is founded not on a single rationale but number of policy objectives. His observation was echoed by Lord Phillips in *Stone & Rolls* (at para 25). We have given our reasons for saying that application of the doctrine in the present context would undermine the
D purpose and relevant provisions of the Companies Act for the protection of the creditors of insolvent companies through the duty imposed on the directors towards the company.

171 There may be cases which are less clear cut where there are public policy arguments which pull in opposite directions. *Hounga v Allen* [2014] 1 WLR 2889 was such a case. The claimant was a victim of unlawful
E discrimination occurring within the context of a contract of employment, which was contrary to the terms on which the claimant had been permitted to enter the United Kingdom. Lord Wilson JSC, giving the judgment of the majority, adopted Lord Phillips's statement in *Stone & Rolls* that the reliance test was not to be applied automatically but that it was necessary to consider the policy underlying ex turpi causa in order to decide whether it should defeat the claim. He referred next to the test of inextricable link and
F said that he would conclude that the link was missing. But he did not consider that to be the determining question for reasons which he set out in the critical part of his judgment under the heading "Public policy". He said (para 42):

> "The defence of illegality rests on the foundation of public policy . . . 'Rules which rest on the foundation of public policy, not being rules
G which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification': *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?' "

H 172 Lord Wilson JSC examined what, if any, considerations of public policy underlying the doctrine of illegality, in particular the importance of preserving the integrity of the legal system (highlighted by McLachlin J in *Hall v Hebert* [1993] 2 SCR 159), militated in favour of applying the defence to defeat Miss Hounga's claim, and he judged them scarcely to exist. He

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considered next the second question which he had posed in para 42. He concluded that there was an important aspect of public policy to which application of the defence would run counter, namely the protection of victims of trafficking, about which the United Kingdom was party to a European Convention. Lord Wilson JSC described as fanciful the idea that an award of compensation to the claimant would give the appearance of encouraging others to enter into illegal contracts of employment, whereas its refusal might engender a belief among employers that they could discriminate against such employees with impunity (para 44), and he said that to uphold the defence of illegality would run strikingly counter to the prominent strain of current public policy against trafficking and in favour of protection of its victims: para 52. He concluded his judgment by saying: "The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront."

173 Lord Sumption JSC says that the illegality defence is not dependent on a judicial value judgment about the balance of the equities in each case, and he cites *Tinsley v Milligan* and *Les Laboratoires Servier v Apotex Inc* [2015] AC 430. In *Tinsley v Milligan* the House of Lords disapproved the "public conscience" test which had been developed by the Court of Appeal. But that decision did not preclude this court from adopting the approach in *Hounga v Allen* set out above at para 171 above. Lord Wilson JSC's statement was one of principle. It was made after a review of the authorities in which Lord Wilson JSC referred to the rejection of the public conscience test in *Tinsley v Milligan*: para 28. Lord Wilson JSC's statement was part of the ratio decidendi in *Hounga v Allen* because it formed the foundation for the conclusion in the final paragraph of the judgment, to which we have referred at para 172. It is not the court's practice consciously to depart from an earlier decision of the House of Lords or Supreme Court without saying so. No member of the court in *Les Laboratoires Servier* suggested that the court's approach in *Hounga v Allen* had been wrong. The issue in *Les Laboratoires Servier* was whether the doctrine of illegality should be expanded beyond the reach of previous authorities to include a tort of strict liability. The decision is not inconsistent with ratio of *Hounga v Allen*. Some of the dicta are in a different direction from *Hounga v Allen* but that is not a sufficient reason to conclude that the majority consciously meant to disapprove the approach in *Hounga v Allen*. Since the hearing of the appeal, the Court of Appeal has considered *Hounga v Allen* and *Les Laboratoires Servier* in *R (Best) v Chief Land Registrar* [2016] QB 23. Sales LJ, with whom McCombe LJ agreed, analysed them at paras 51–61 and adopted the analytical framework of Lord Wilson JSC in weighing the considerations of public policy in favour of and against applying the ex turpi causa defence in the particular circumstances. He did not consider *Les Laboratoires Servier* to be incompatible with that approach and he applied Lord Wilson JSC's guidance at para 70 and following. Arden LJ dissociated herself from the reliance on *Hounga v Allen* by the majority: paras 111–112. The analysis of Sales LJ accords with our views.

174 The Law Commission's report has been considered in some detail by the Court of Appeal on two occasions, *Les Laboratoires Servier* and *Parkingeye Ltd v Somerfield Stores Ltd* [2013] QB 840. In a chapter in *English and European Perspectives on Contract and Commercial Law:*

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Essays in Honour of Hugh Beale, Professor Andrew Burrows, writing before the decision of this court in *Les Laboratoires Servier* commended these decisions as an example of the work of the Commission helping to influence judicial law reform. The report has not so far been considered in any detail by this court, nor has this court been invited to review the decision in *Tinsley v Milligan*. The differences between Lord Sumption JSC and us suggest to us that there is a pressing need for both. In any future review the court would undoubtedly wish to examine the law in other countries and particularly the judgments of the High Court of Australia in *Nelson v Nelson*, all of which merit reading.

Conspiracy

175 For the reasons explained we have concentrated on the claim against the directors for breach of fiduciary duty, which the appellants are said dishonestly to have assisted. It is difficult to see that the claim for conspiracy adds anything. Mr Maclean argued that the real conspiracy was to injure HMRC and that it is artificial to regard there as having been a conspiracy against Bilta, when it was in truth nothing more than a vehicle for defrauding HMRC. It may be that Bilta will fail to establish the conspiracy alleged, but the merits of that argument are not fit for determination on a summary application. Bilta has a triable case, and the only issue before the court is whether it must fail for illegality. In that respect the appellants are on no stronger ground in relation to conspiracy than in relation to the breach of fiduciary duty relied on as the unlawful means. It is perhaps worth observing that in *Berg Sons & Co Ltd v Mervyn Hampton Adams* [1993] BCLC 1045 Hobhouse J noted that there was no allegation of conspiracy by the accountants and Mr Golechha to defraud the company (p 1066), implying that this would have made a potential difference. In this case there is an allegation of conspiracy between the directors and others to defraud the company. It does not alter the analysis to say that the aim of the dishonest director shareholders was to make a dishonest profit for themselves and their accomplices at the expense of HMRC, for this itself involved a breach of fiduciary duty towards Bilta (representing the interests of its creditors) and the intentional causation of loss to Bilta.

Loss

176 Mr Maclean submitted that Bilta suffered no loss since it began life with negligible assets and never acquired any lawful assets, so it had none to lose. He relied on an obiter dictum of Lord Phillips to similar effect in *Stone & Rolls* (para 5), but Lord Mance observed (para 231) that to cause a deficit to a company making it insolvent is to cause it loss. Lord Phillips described his own remark as an initial impression and it was no part of his reasoning.

177 In *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 one of the arguments advanced by the bank was that Scalynn suffered no loss because it never had any property of its own and held the proceeds of the bullion on trust. The argument was dismissed. Nicholls LJ observed that a director was as much in breach of fiduciary duties which he owed to the company if he misappropriated property of which the company was a trustee as if he misappropriated property belonging beneficially to the company.

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178 A company's profit and loss account and its balance sheet may be positive or negative. When the directors caused Bilta to incur VAT liabilities, and simultaneously caused it to misapply money which should have been paid to HMRC, leaving the company with large liabilities and no means of paying them, the directors caused it to suffer a recognisable form of loss.

Circuity

179 The appellants also submit that if Bilta is entitled to a remedy against Jetivia because it conspired with Bilta's directors, so also is Jetivia entitled to claim against Bilta for conspiring with Mr Brunschweiler against it. There is, it is submitted, circuity of action. In our view Jetivia will be liable only if it is established that it knowingly assisted in the fraud against Bilta, which would result from Mr Brunschweiler's knowledge and actions being attributed to it. We discuss attribution below. If the fraud against HMRC was designed to benefit Jetivia and the other overseas suppliers, we see no reason why there should not be such attribution and doubt if Jetivia would have a claim against Bilta. But, as Lord Sumption JSC states, the facts relevant to this issue have not been pleaded.

Attribution

180 The issue of attribution arises in the context that Mr Nazir and Mr Chopra were the only directors of the company and Mr Chopra was its sole shareholder. Bilta in its amended particulars of claim (at para 42) referred to them as its "directing mind and will". While there is a role in our law for the concept of the directing mind and will of a company, it is important to analyse that role and in particular to avoid the dangers of ascribing human attributes to a non-natural person such as a company.

181 In most circumstances the acts and state of mind of its directors and agents can be attributed to a company by applying the rules of the law of agency. It has become common to speak of "the *Hampshire Land* principle" or the "fraud exception" as the exception to an otherwise general rule that attribution occurs. It is our view that "the fraud exception" is not confined to fraud but is simply an instance of a wider principle that whether an act or a state of mind is to be attributed to a company depends on the context in which the question arises. "The fraud exception", applied to prevent an agent from pleading his own breach of duty in order to bar his principal's claim against him, is the classic example of non-attribution. But it is not the only one.

182 We set out our conclusions on the importance of context to the process of attribution in paras 202–209 below. Before then, we examine the case law which has led us to those conclusions.

183 The starting point in an analysis of attribution is the recognition of the separate personality of the company, which the House of Lords recognised long ago in *Salomon v A Salomon & Co Ltd* [1897] AC 22 and which this court recently confirmed in *Prest v Prest* [2013] 2 AC 415. A company, the creation of law, is, in Lord Halsbury LC's words (*Salomon*, p 33), "a real thing" and has a legal existence even if it is controlled by one person. Because the company is not a natural person it can operate only by the acts of its officers, employees and agents. In *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471, Lord Cranworth LC stated: "The

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A directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can act only by agents." Similar statements about the necessity of agency can be found in *Ferguson v Wilson* (1866) LR 2 Ch App 77 (Cairns LJ, at p 89) and *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423 (Lord Lindley, at p 426).

184 While a company cannot act but through the agency of others, it
B can incur obligations and have rights; and directors, including a sole director who is also the sole shareholder of a company, owe it the general duties set out in sections 171 to 177 of the Companies Act 2006. The company can also incur liability to a third party because the law holds it responsible for the tortious acts and omissions of an employee.

185 Lord Diplock stated the principles in a contractual context in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848:

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> "My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, i e companies, that the parties promise to one another that something will be done . . . Such a contract is the source of primary legal obligations on each party to it to procure that whatever he has promised will be done is done."

D

> "Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which
E the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from 'vicarious liability'—a legal concept which does depend on the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it. In the interests of clarity the expression should, in my view, be confined to liability for
F tort."

186 Such vicarious liability is indirect liability; it does not involve the attribution of the employee's act to the company. It entails holding that the employee has committed a breach of a tortious duty owed by himself, and that the company as his employer is additionally answerable for the employee's tortious act or omission.

G 187 A company can incur direct liability in at least three circumstances. First, the provisions of company legislation, a company's constitution (its articles of association, including provisions of a company's memorandum of association now deemed to be provisions of its articles by section 28 of the Companies Act 2006 ("the 2006 Act")) and the non-statutory rules of company law provide that certain acts of its board of directors are treated as
H the acts of the company. For example, in the Companies (Model Articles) Regulations 2008 (SI 2008/3229), Schedule 3, article 3 provides that "subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company". Similarly, certain resolutions of the shareholders in general meeting are treated as the acts of the company. Further, the

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non-statutory "consent principle", that shareholders who have a right to vote may by unanimous agreement bind the company in a matter in which they had power to do so by passing a resolution at a general meeting (*In re Duomatic Ltd* [1969] 2 Ch 365), is preserved by section 281(6) of the 2006 Act.

188 Secondly, a company can also incur direct liability through the transactions of agents within the scope of their agency (actual or apparent). Thus, when an agent commits his or her company to a contract, the company incurs direct liabilities (and acquires rights) as a party to the contract under ordinary principles of the law of agency.

189 Thirdly, a statute or subordinate legislation or a regulatory body's code or rules of the common law or equity may impose liabilities or confer rights on a company. For example, a company as a legal entity is owed by its directors the general duties set out in sections 171 to 176 of the Companies Act 2006 even when the controlling director is also the sole shareholder.

190 In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, Lord Hoffmann (at p 506) pointed out that it is a necessary part of corporate personality that there should be rules by which acts are attributed to the company. First, he identified the "primary rules of attribution" from company law, which is the first of the direct forms of liability which we describe above. He then referred to the general principles of agency and vicarious liability which in most circumstances determine a company's rights and obligations: p 507B. He recognised that there was a third category where, exceptionally, a rule of law expressly or impliedly excludes attribution on the basis of those general principles. For this third category, which is relevant to the third form of direct liability (above), he stated: "the court must fashion a special rule of attribution for the particular substantive rule". He described the fashioning of that special rule of attribution in these terms (p 507E–F):

> "This is always a matter of interpretation: given that it is intended to apply to a company, how is it intended to apply? Whose act (or knowledge or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

191 The relevance of the context in which the question is asked—"Is X's conduct or state of mind to be treated as the conduct or state of mind of the company for the purpose in hand?"—is not limited to Lord Hoffmann's third category. The legal context, i e the nature and subject matter of the relevant rule and duty, is always relevant to that question. In *Bowstead & Reynolds on Agency*, 20th ed (2014) Professor Peter Watts and Professor Francis Reynolds stated (at para 8-213): "Before imputation occurs, there needs to be some purpose for deeming the principal to know what the agent knows." In the 19th edition the learned editors made the same point in the same paragraph thus: "The rules of imputation do not exist in a state of nature, such that some reason has to be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed." We agree; an analysis of the relevant case law supports that view in relation to each category of rules of attribution. We turn first to the special rules of attribution which Lord Hoffmann saw as providing the answer in

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A exceptional cases when the other rules did not determine the company's rights and obligations.

192 Thus, in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, the Merchant Shipping Act 1894 (57 & 58 Vict c 60) excluded the liability of a shipowner for loss or damage if it occurred "without his actual fault or privity". That phrase prevented the shipowner incurring such liability vicariously. The House of Lords treated the fault of
B Mr J M Lennard, who was a director of another company which managed the ship, was registered in the ship's register as the manager, and was also a director of the ship-owning company, as the fault of the latter company. Both Viscount Haldane LC and Lord Dunedin, who gave the only substantive speeches in the case saw the question as one of statutory construction which depended on the particular facts of the case. In *Tesco*
C *Supermarkets Ltd v Nattrass* [1972] AC 153, the supermarket company was charged with an offence under the Trade Descriptions Act 1968. It pleaded a defence under section 24 of the Act namely (a) that the commission of the offence was due to the act or default of another person, in this case the manager of the store at which the misleading representations as to price had occurred, and (b) that it had taken all reasonable precautions to avoid the commission of such an offence. The House of Lords upheld that defence.
D Like the Divisional Court, the House of Lords treated the store manager as "another person" for the purpose of section 24 of the Act and focused on the question whether the task of taking reasonable precautions was that of the board of the company or was delegated to its store managers. It construed the statutory defence as allowing an employer who was personally blameless to escape liability and held that in this case the board of directors had not
E delegated their management functions to the shop managers. As a result Tesco established the statutory defence.

193 As in each case the court is engaged in the interpretation of a particular statute and in its application to particular facts, other statutory provisions have given rise to different approaches. Thus in *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037 the Divisional Court
F was concerned with the offence in section 11 of the Video Recordings Act 1984 of supplying a video recording to a person under the age specified in the classification certificate. The court rejected Tesco's statutory defence that it had neither known nor had reasonable grounds to believe that the purchaser was under 18. It distinguished *Tesco Supermarkets Ltd v Nattrass*, holding that the knowledge or information that the section 11(2) defence addressed was that of the employee who supplied the video film to
G the purchaser and not that of the company's senior management.

194 In *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, to which we referred in para 155 above, the Court of Appeal had to consider whether a person or persons who through shareholding and directorship had total control of a company were capable of stealing the property of the company. This involved, among other things, considering section 2(1)(b) of
H the Theft Act 1968 which provides that a person's appropriation of property is not regarded as dishonest "if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it". The Court of Appeal held that the company could not be regarded as "the other" for the purpose of this provision because the mind and will of the defendants fell to be treated as the mind and will of the

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company. The defendants could be charged with theft of the company's property and their appropriate defence (if made out) would be that they appropriated the property in the honest belief that they had the right to deprive the company of it: section 2(1)(a). Again, the court approached the question of attribution as one of statutory construction.

195 In *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 Dyson J attributed to a main contractor the knowledge of its site managers that fraudulent invoices for sub-contract labour were being created, in circumstances in which the main contractor suffered no loss because it could claim input VAT but evaded income tax. Section 60 of the Value Added Tax Act 1994 imposes civil penalties on a person who dishonestly acts or omits to act for the purpose of evading VAT. Dyson J recorded that it was common ground in that case that the knowledge and dishonest acts of the site managers could be attributed to the main contractors only if a special rule of attribution, of which Lord Hoffmann had written in *Meridian*, could be applied. He stated (para 44):

> "The question in each case is whether attribution is required to promote the policy of the substantive rule, or (to put it negatively) whether, if attribution is denied, that policy will be frustrated."

He held (paras 48–49) that the statutory policy of discouraging the dishonest evasion of VAT would be frustrated if the knowledge of the employees of a company who had to play a part in the making and receiving of supplies, as well as those involved in its VAT arrangements, were not attributed to the employing company. Further, as the participants in the fraud had not intended to harm the interests of their employing company, there was no basis for excluding such attribution.

196 The Court of Appeal took a similar approach in *In re Bank of Credit and Commerce International SA (No 15); Morris v Bank of India* [2005] 2 BCLC 328 which concerned a claim for fraudulent trading under section 213 of the Insolvency Act 1986. The court upheld Patten J's finding that the knowledge, which the general manager of Bank of India's London branch had of BCCI's fraud, was to be attributed to his employers for the purpose of section 213. In paras 156–162 above we discussed *Safeway Stores Ltd v Twigger*. What is relevant for present purposes is that the court in that case looked to the wording and policy of the relevant statute in order to determine whether the acts and the intention or negligence underlying those acts were to be attributed to the company.

197 It is not only in the field of statute that the court, when deciding whether to attribute another's act or state of mind to a company, has regard to the purpose of the rule of law which is in play. In the different context of a claim based on knowing receipt of the proceeds of a fraud, the Court of Appeal in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 had to consider whether the knowledge of an agent who was also the director of a company should be attributed to that company. Mr Ferdman, who was a non-executive director of Dollar Land, had made the arrangements by which Dollar Land acquired an interest in assets in which others had invested funds that they had earlier obtained by fraud. He had acted without the authority of a resolution by Dollar Land's board. Because Mr Ferdman managed and controlled the transactions, the court attributed his knowledge to the company, treating him as the directing mind and will of the company in

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relation to those transactions. The court recognised that different persons could be treated as the directing mind and will of a company for different purposes (Rose LJ at p 699H and Hoffmann LJ at p 706E). While a Mr Stern generally managed Dollar Land, Mr Ferdman was for the purpose of the receipt of the funds the company's mind and will, and on that basis his knowledge of the fraud was attributed to the company. The plaintiff's alternative basis of attribution on the ground of agency failed. We see force in the suggestion by the editors of *Bowstead & Reynolds on Agency* (para 8.214) that the rules of agency could have resulted in imputation of knowledge in that case. But in the event the court decided otherwise. Thus the only basis on which Mr El Ajou succeeded was the attribution of Mr Ferdman's knowledge to the company based on the concept of a person being a company's directing mind and will in relation to a particular transaction. Similarly, although in that case it was not necessary to do so in order to establish Mr Tan's accessory liability for dishonest assistance of a breach of trust, the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 393B–C attributed Mr Tan's objective dishonesty to the travel agency company which he controlled.

198 The courts have also had to consider questions of attribution of knowledge or actions in a contractual context such as that of an insurance policy. In that context the terms of the insurance policies are relevant and can be decisive as the court seeks to give effect to the intentions of the parties as expressed in their contract. In *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 Rix J addressed a professional indemnity policy which covered the legal liability of both a company which provided estate agency and valuation services and its directors. The assumed facts included the assertion that one of the directors, who was the managing director, had made a number of fraudulent valuations in the company's name. The plaintiffs obtained judgments against the company, which went into liquidation, and sought to enforce them against the insurance company under the Third Parties (Rights against Insurers) Act 1930. Zurich purported to avoid the policy on the basis of the director's fraud. But the insurance policy included fidelity insurance which indemnified the company against liabilities resulting from the fraudulent acts of a director. Because he construed the policy as insuring the company and its directors as separate insureds, the logic of the policy was that the guilty knowledge and conduct of a director could not be attributed to the company for the purpose of giving effect to the insurance contract even if he were the directing mind and will of the company in relation to the particular transactions. He referred to Lord Hoffmann's analysis of a special rule of attribution which we have quoted in para 190 above, and held that in the context of the particular contract he was not prepared to find that the fraudulent director was the directing mind and will of the company: pp 278–279. In *Morris v Bank of India* [2005] 2 BCLC 328 the Court of Appeal (at paras 122–124) explained the *Arab Bank* case as a case which rested on the construction of the terms of the insurance contract.

199 In *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250 ("*Belmont No 1*"), the Court of Appeal considered a claim by the receiver of an insolvent company ("A") that its shareholders and directors had dishonestly conspired to use A's funds to purchase shares in another company ("B") at an excessive price and thereby give unlawful financial

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assistance to the shareholders of B to purchase A's shares. The Court of Appeal held that the directors' knowledge that they were effecting an illegal transaction should not be imputed to A because the object of the conspiracy was improperly to deprive A of a large part of its assets. Buckley LJ (pp 261–262) explained the non-attribution on the basis that when an agent, who is acting in fraud of his principal, has knowledge which is relevant to the fraud, that knowledge is not imputed to the principal to defeat the company's claim against the conspirators (as to which rule see *Bowstead & Reynolds on Agency*, 20th ed (2014), paras 8-207 (article 95, rule 4) and 8-213). When the case returned to the Court of Appeal after a retrial, (*Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 ("*Belmont No 2*")) the court's findings made clear that the transaction had been approved by resolution at a formal board meeting of A and completed at two further board meetings, including by the sealing by A of the share transfers of B's issued share capital (Buckley LJ at p 398G–H). Although the transaction was clearly subject to what Lord Hoffmann in the *Meridian Global Funds* case [1995] 2 AC 500 described as the primary rules of attribution, the knowledge which some of A's directors (Mr James and Mr Foley) had of the illegal transaction and their misfeasance was not attributed to A so as to bar its claim but was attributed to the defendant parent companies of which they were officers.

200 We think that the court would have reached the same conclusion in the *Belmont* case if it had approached the question of attribution on the basis that the board of directors of A was its "directing mind and will" because the company was pursuing a claim against, among others, its directors for conspiracy. Were it otherwise a company could not vindicate its rights against its directors and those who assisted them or benefited from the conspiracy. This approach is consistent with the older case of *Gluckstein v Barnes* [1900] AC 240, in which the promoters of a company, who also comprised its entire board of directors, were aware of a secret profit which they made on the asset which they had sold to the company. The House of Lords looked at the question of disclosure in the context of the particular claim. The Earl of Halsbury LC thought that it was absurd to suggest that the knowledge of those who were hoodwinking the shareholders should be treated as disclosed to the company (p 247) and Lord Robertson (p 258) agreed, stating colourfully that "the boardroom was occupied by the enemy".

201 Finally, in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr*, to which we have referred, the Court of Final Appeal of Hong Kong was concerned with a claim by way of judicial review by an insolvent company's liquidator to be entitled to object out of time to tax assessments and obtain repayment of the tax paid on the basis that its former management had fraudulently inflated its profits over several years. The company's entitlement to object out of time and also to claim repayment based on error in its tax returns depended on whether the company was attributed with its managers' knowledge of the fraud. The majority of the court held that the company was to be attributed with the knowledge of its management. In the leading judgment, which contained an admirable analysis of the law, Lord Walker of Gestingthorpe NPJ supported an approach to the attribution to a company of a director's knowledge in civil cases which had regard to the factual situation in which they arose and the

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purpose of the legal rules that were in play. See his summary (at para 129). He distinguished between: (i) claims by the company against its directors or employees and their accomplices for loss which the company suffered as a result of their wrongdoing, where it was absurd to allow the directors or employees to rely on their own awareness of their wrongdoing and attribute it to the company as a defence against its claim, and (ii) third party claims against a company for loss caused to the third party by the misconduct of a director or employee, where the dishonesty of the director or employee would not prevent his act and knowledge being attributed to the company.

202 It is clear from those cases that a finding that a person is for a specific purpose the "directing mind and will" of a company, when it is not merely descriptive, is the product of a process of attribution in which the court seeks to identify the purpose of the statutory or common law rule or contractual provision which might require such attribution in order to give effect to that purpose. Similarly, when the question of attribution arises in the context of an agency relationship, the nature of the principal's or other party's claim is highly material as the learned editors of *Bowstead & Reynolds* discuss at para 8-213. Even when the primary rules of attribution apply, where the transaction is approved by the board of directors and completed under company seal as in *Belmont (No 2)*, the court will not attribute to a company its directors' or employees' knowledge of their own wrongdoing to defeat the company's claim against them and their associates. We agree with Lord Walker NPJ in *Moulin's* case when (at para 113) having discussed the Court of Appeal's judgment in this case he stated:

> "the crucial matter of context includes not only the factual and statutory background, but also the nature of the proceedings in which the question [of attribution] arises."

203 In our view, that applies to the knowledge of directors whether one applies the primary rules of attribution of the company's constitution (the cases of *Gluckstein v Barnes* and *Belmont (No 2)*), the rules of attribution of agency (*Belmont (No 1)*), or the special rules of attribution which Lord Hoffmann discussed in the *Meridian Global Funds* case. Where a company's liability is only vicarious, it is attributed with responsibility for the act of the other, usually the employee; but neither the other's act nor his or her state of mind is attributed to the company.

204 It is helpful in the civil sphere, to consider the attribution of knowledge to a company in three different contexts, namely (i) when a third party is pursuing a claim against the company arising from the misconduct of a director, employee or agent, (ii) when the company is pursuing a claim against a director or an employee for breach of duty or breach of contract, and (iii) when the company is pursuing a claim against a third party.

205 In the first case, where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant. In this context, the company is like the absent human owner of a business who leaves it to his managers to run the business, while he spends his days on the grouse moors (to borrow Staughton LJ's colourful metaphor in *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136, 1142). Where the rules of agency do not achieve that result, but the terms of a statute or contract are construed as imposing a direct liability

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which requires such attribution, the court can invoke the concept of the directing mind and will as a special rule of attribution. Thus where the company incurs direct liability as a result of a wrongful act or omission of another (as in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* and *McNicholas Construction Co Ltd v Customs and Excise Comrs*) it is deemed a wrongdoer because of those acts or omissions. If it is only vicariously liable for its employee's tort, it is responsible for the act of the other without itself being deemed a wrongdoer and without the employee's state of mind being attributed to it.

206 In the second case, where the company pursues a claim against a director or employee for breach of duty, it would defeat the company's claim and negate the director's or employee's duty to the company if the act or the state of mind of the latter were to be attributed to the company and the company were thereby to be estopped from founding on the wrong. It would also run counter to sections 171 to 177 of the 2006 Act, which sets out the director's duties, for the act and state of mind of the defendant to be attributed to the company. This is so whether or not the company is insolvent. A company can be attributed with knowledge of a breach of duty when, acting within its powers and in accordance with section 239 of the 2006 Act, its members pass a resolution to ratify the conduct of the director. But, as this court discussed in *Prest v Prest* [2013] 2 AC 415, para 41, shareholders of a solvent company do not have a free hand to treat a company's assets as their own. Further, as we have discussed, actual or impending insolvency will require the directors to consider the interests of the company's creditors when exercising their powers. This might prevent them from seeking such ratification. Similarly, where a company ratifies a breach of duty by an agent or employee, it must be attributed with the relevant knowledge. But otherwise, as the courts have recognised since at least *Gluckstein v Barnes* [1900] AC 240, it is absurd to attribute knowledge to the company and so defeat its claim.

207 In the third case, where the company claims against a third party, whether or not there is attribution of the director's or employee's act or state of mind depends on the nature of the claim. For example, if the company were claiming under an insurance policy, the knowledge of the board or a director or employee or agent could readily be attributed to the company in accordance with the normal rules of agency if there had been a failure to disclose a material fact. But if the claim by the company, for example for conspiracy, dishonest assistance or knowing receipt, arose from the involvement of a third party as an accessory to a breach of fiduciary duty by a director, there is no good policy reason to attribute to the company the act or the state of mind of the director who was in breach of his fiduciary duty. If the company chose not to sue the director who was in breach of his duty, the third party defendant could seek a contribution from him or her under the Civil Liability (Contribution) Act 1978. We have set out above why we consider that the defence of illegality is not available to a company's directors or their associates who are involved in a conspiracy against the company or otherwise act as accessories to the directors' breach of duty. Equally, there is no basis for attributing knowledge of such behaviour to the company to found an estoppel.

208 In the present case Patten LJ rightly stated that attribution of the conduct of an agent so as to create liability on the part of the company

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depends very much on the context in which the issue arises. He said that as between the company and the defrauded third party, the company should be treated as a perpetrator of the fraud; but that in the different context of a claim between the company and the directors, the defaulting directors should not be able to rely on their own breach of duty to defeat the operation of the provisions of the Companies Act 2006 in cases where those provisions were intended to protect the company: paras 34, 35.

209 We agree. Accordingly, if, contrary to our view, the doctrine of illegality were insensitive to context and to competing aspects of public policy, the rules of attribution would achieve the same result and preserve Bilta's claim.

Insolvency Act 1986 section 213

210 The appellants' second challenge is that the court's powers under section 213 of IA 1986 do not extend to people and corporations resident outside any of the jurisdictions of the United Kingdom.

211 Section 213 of IA 1986 provides:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> "(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

212 The appellants accept that the English courts have jurisdiction in personam. Their challenge is to the court's subject matter jurisdiction as discussed by Hoffmann J in *Mackinnon v Donaldson Lufkin & Jenrette Securities Corpn* [1986] Ch 482, 493 and Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450, paras 30–31. It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary: *Ex p Blain; In re Sawers* (1879) 12 Ch D 522, 526, James LJ. That principle has evolved into a question of interpreting the particular statute: *Clark v Oceanic Containers Inc* [1983] 2 AC 130, Lord Scarman, at p 145, Lord Wilberforce, at p 152; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, Lord Mance, at para 10; and *Cox v Ergo Versicherung AG* [2014] AC 1379, Lord Sumption JSC, at paras 27–29. In *Cox* Lord Sumption JSC suggested that an intention to give a statute extraterritorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para 29.

213 In our view section 213 has extraterritorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding up order is worldwide: *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, paras 34, 38. The section provides a remedy against

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any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business.

214 In our view the Court of Appeal reached the correct decision in *In re Paramount Airways Ltd* [1993] Ch 223, in which it held that the court had jurisdiction under section 238 of IA 1986 (which empowers the court to make orders against any person to reverse transactions at an undervalue) to make an order against a foreigner resident abroad. Sir Donald Nicholls V-C expressed the view (p 239D-E) that Parliament did not intend to impose any limitation on the expression "any person" in sections 238 and 239 of IA 1986 and that it must be left to bear its literal, natural meaning. We reach the same conclusion in relation to the use of that expression in section 213 for essentially the same reasons. The section, like sections 238 and 239 and also section 133 (which concerns the public examination of persons responsible for the formation and running of a British company) share the statutory context of the winding up of a British company. The Court of Appeal considered section 133 in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. Peter Gibson J, who produced the leading judgment, expressed the views (a) that Parliament could not have intended that a person who had been responsible for the state of affairs of an insolvent British company should escape liability to be investigated simply because he was not within the jurisdiction (p 354G–H) and (b) that reasons of international comity would not prevent the summoning for public examination of a person who had participated in the running of a British company: p 356E. Hirst LJ said (p 360G–H) that the process of investigating why a company had failed would be frustrated if a non-resident director were immune from public examination. Again, that reasoning is in our view both correct and equally applicable to section 213.

215 The appellants argued that it was wrong that they should be required to defend themselves against a claim when it would only be after the substantive hearing that the court could decide whether to exercise its jurisdiction on the basis that the defendants were sufficiently connected with England. We do not agree. While the court which hears the claim will have to decide whether in all the circumstances the appellants are sufficiently connected with England, we think that the respondents have a good arguable case that they are. The substance of the section 213 allegation is

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that the appellants were party to a conspiracy to defraud Bilta in the context of a wider VAT fraud, that they were parties to the conduct of Bilta's business to that end, and that Jetivia obtained the proceeds of that fraud. If Bilta's liquidators establish those allegations after trial, we think it is likely that the court would decide to exercise its jurisdiction under section 213 of IA 1986 against the appellants, their foreign residence notwithstanding.

216 Bilta's liquidators also asserted that the English courts had jurisdiction by virtue of article 3(1) Council Regulation (EC) No 1346/2000 on insolvency proceedings ("the European Insolvency Regulation"). It provides:

> "The courts of the member state within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

217 In *Schmid v Hertel* (Case C-328/12) [2014] 1 WLR 633 the Court of Justice of the European Union ("CJEU") held (a) that article 3(1) conferred international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them (para 30) and (b) that the court of the relevant member state had jurisdiction to hear and determine an action to set aside a transaction by virtue of insolvency that is brought against a person who is not resident in the territory of a member state: para 39. Thus, Bilta's liquidators submitted, the European Insolvency Regulation, so interpreted, conferred jurisdiction against both appellants. On the other hand, the appellants submitted that the question whether the territorial reach of section 213 of IA 1986 was worldwide was now governed by the European Insolvency Regulation, whose natural meaning was that it related to relationships between member states and not with third party states. Mr Maclean said that the decision in *Schmid* was controversial and suggested that there should be a reference to the CJEU to determine whether the section 213 proceedings were covered by the European Insolvency Regulation.

218 We do not think that it is necessary to rely on the European Insolvency Regulation as the Court of Justice has interpreted it in *Schmid* in order to determine whether there is subject matter jurisdiction against Jetivia. If the proceedings against Jetivia were not covered by the Regulation, there is a basis for the exercise of subject matter jurisdiction in our domestic law, as we have discussed above. There is therefore no need for a reference to the CJEU.

Conclusion

219 We therefore would dismiss the appeal.

Appeal dismissed.

SHIRANIKHA HERBERT, Barrister

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Exhibit 14

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A Court of Appeal

Bloom and others *v* Harms Offshore AHT "Taurus" GmbH & Co KG and another

[2009] EWCA Civ 632

B 2009 May 20; June 26 Ward, Stanley Burnton LJJ, Sir John Chadwick

Injunction — Jurisdiction to grant — Restraint of foreign proceedings — High Court making administration order in respect of English company — Creditors making without notice application to foreign court for attachments of company's assets — Whether foreign proceedings breaching statutory prohibition on legal process C *against company in administration — Whether "legal process" confined to process within United Kingdom — Whether High Court having jurisdiction to restrain foreign attachment proceedings interfering with administration — Circumstances in which jurisdiction to be exercised — Insolvency Act 1986 (c 45), Sch B1, para 43(6) (as inserted by Enterprise Act 2002 (c 40), s 248, Sch 16)*

D Two creditors of an English company which had entered administration pursuant to an order of the High Court commenced proceedings in New York seeking judgment for sums allegedly due from the company and an attachment and garnishment of its property sufficient to answer their claims. That claim was made without notice to the administrators and without the New York court being informed either that the High Court had made an administration order or that the charterparties under which the claims were made had exclusive London arbitration E clauses. The New York court made ex parte orders attaching the property of the company within the Southern District of New York. On the same date a summons was issued naming the company as defendant, and shortly thereafter writs of attachment and garnishment were issued against the property of the company, including property held for its benefit or moving through or within the possession of several named banks. In ignorance of the attachments the administrators sought to make a substantial payment to a post-administration supplier of services to the company. That sum was paid to the supplier's account with one of the banks in F New York which had been served with the attachment orders and as a result a total of approximately US$2·2m was attached. On being served with the New York proceedings and attachment orders the administrators applied to the High Court for an order requiring the creditors to take all necessary steps to procure the release of the two ex parte orders. The judge granted the relief sought, holding that there was jurisdiction to restrain acts which interfered with an administration being conducted under an order of the English court, notwithstanding that the acts complained of G had been committed abroad. In those circumstances the judge held that it was unnecessary for him to determine whether the New York proceedings breached the prohibition on instituting legal process against a company or property of a company in paragraph 43(6) of Schedule B1 to the Insolvency Act 1986[1].

On the creditors' appeal—

Held, dismissing the appeal, that the court's jurisdiction was not restricted by any territoriality of the statutory prohibition on instituting legal process against a H company or property of a company imposed by paragraph 43(6) of Schedule B1 to the Insolvency Act 1986; that, although an administration was different from a winding up in that it did not give rise to trust property in favour of the creditors, the underlying rationale of protecting the assets of the company was the same in

[1] Insolvency Act 1986, Sch B1, para 43(6), as inserted: see post, para 20.

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both cases and, therefore, absent any material distinction between winding up and administration, the court had jurisdiction to protect the assets of a company in administration from foreign attachments and executions, just as it could achieve the equitable distribution of the proceeds of the realisation of the assets of a company being wound up by restraining creditors from moving against assets abroad; that the court would exercise its powers so as to enable the administrators to discharge their statutory functions and to fulfil their statutory duties in any particular case; that, although the comity owed by the courts would normally make it inappropriate to grant injunctive relief affecting procedures in a court of foreign jurisdiction, in an exceptional case the conduct of the creditor against whom an injunction was sought, particularly if oppressive, vexatious or otherwise unfair or improper, and the circumstances of the attachment of the company's property might justify the grant of such an injunction; and that, in the circumstances, the court could and should grant injunctive relief, but the judge's order should be varied so that the interference with the New York proceedings was limited to the release from attachment of moneys paid by the administrators in respect of post-administration liabilities before the date on which they were on notice of the orders made by the New York court (post, paras 22, 24–25, 27–29, 32–33, 34).

In re Oriental Inland Steam Co; Ex p Scinde Railway Co (1874) LR 9 Ch App 557 and *Mitchell v Carter* [1997] 1 BCLC 673, CA applied.

Semble. Like the statutory prohibition on creditors bringing proceedings against a company being wound up by the court, the prohibition on "legal process" in paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 against companies in administration does not have extraterritorial effect (post, paras 16, 21, 34).

Order of Robert Englehart QC sitting as a deputy judge of the Chancery Division [2009] EWHC 1620 (Ch) varied.

The following cases are referred to in the judgment of Stanley Burnton LJ:

Barclays Bank plc v Homan [1993] BCLC 680, CA
Mitchell v Carter [1997] 1 BCLC 673, Blackburne J and CA
Oriental Inland Steam Co, In re; Ex p Scinde Railway Co (1874) LR 9 Ch App 557
Polly Peck International plc, In re (No 2) [1998] 3 All ER 812, CA
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871; [1987] 3 WLR 59; [1987] 3 All ER 510, PC
Vocalion (Foreign) Ltd, In re [1932] 2 Ch 196

The following additional case was cited in argument:

Hughes v Hannover Rückversicherungs-AG [1997] 1 BCLC 497, CA

APPEAL from Robert Englehart QC sitting as a deputy judge of the Chancery Division

On 7 January 2009, on the application of Oilexco North Sea Ltd, a company incorporated in England, Patten J made an administration order in respect of that company appointing Alan Robert Bloom, Colin Peter Dempster, Thomas Merchant Burton and Roy Bailey as joint administrators.

By ordinary application issued on 24 April 2009 the administrators sought, inter alia, orders restraining the creditor companies, Harms Offshore AHT "Taurus" GmbH & Co KG and Harms Offshore AHT "Magnus" GmbH & Co KG (companies incorporated in Germany which were pre-administration creditors of the company), from taking any further steps in proceedings which they had commenced on 16 January 2009 without notice to the administrators in the United States District Court for the Southern District of New York under its admiralty and maritime

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jurisdiction and requiring the creditor companies to take all necessary steps to procure the release of the two ex parte orders of maritime attachment and garnishment made by the district court in such proceedings against the tangible and intangible assets of the company and the release of any attachments effected pursuant to those orders. On 15 May 2009 Mr Robert Englehart QC, sitting as a deputy judge of the Chancery Division in the Companies Court, granted a mandatory injunction requiring the creditor companies to use their best endeavours to procure the release of the two ex parte orders of maritime attachment and garnishment and the release of attachments made pursuant to those orders, and further ordered that the creditor companies be restrained from taking any steps in the substantive proceedings which they had commenced in the district court seeking judgments sums due to them from the company. The judge granted permission to appeal but refused to stay his order.

By an appellant's notice dated 18 May 2009 the creditor companies appealed on the ground, inter alia, that since the Insolvency Act 1986 did not prohibit initiating proceedings abroad against a company in administration and since the administration did not give rise to a statutory trust over the assets of the company for the benefit of the creditors, the judge had erred in ordering that creditor companies give up the benefit of the attachments obtained from the court in New York.

At the end of the hearing the Court of Appeal dismissed the appeal, save as to variation of the judge's order, for reasons to be given later, although for the benefit of the New York court Sir John Chadwick [2009] EWCA Civ 723 gave a brief summary of the court's basis for its decision.

The facts are stated in the judgment of Stanley Burnton LJ.

Elspeth Talbot Rice QC and *Edward Cumming* (instructed by *Ince & Co*), whose submissions are set out in the judgment of Stanley Burnton LJ, post, para 14, for the creditors. [Reference was also made to *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497 and *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196, as to whether the applicable statutory provisions applied extra-territorially, as to either persons or acts.]

William Trower QC and *Tom Smith* (instructed by *Herbert Smith LLP*), whose submissions are set out in the judgment of Stanley Burnton LJ, post, para 15, for the joint administrators and the company.

The court took time for consideration.

26 June 2009. The following judgments were handed down.

STANLEY BURNTON LJ

Introduction

1 On 7 January 2009, on the application of Oilexco North Sea Ltd ("the company") Patten J made an administration order in respect of the company appointing Alan Robert Bloom, Colin Peter Dempster, Thomas Merchant Burton and Roy Bailey, as joint administrators. On 15 May 2009, on the application of the administrators, Mr Robert Englehart QC, sitting as a deputy judge of the Chancery Division in the Companies Court, granted a mandatory injunction requiring Harms Offshore AHT "Taurus" GmbH

& Co KG and Harms Offshore AHT "Magnus" GmbH & Co KG ("the creditor companies"), to use their best endeavours to procure the release of two ex parte orders of maritime attachment and garnishment made by the United States District Court for the Southern District of New York ("the district court") against the tangible and intangible assets of the company and the release of attachments effected pursuant to those orders. The order also restrained the creditor companies from taking any steps in substantive proceedings they had commenced in the district court seeking judgment for sums due to them from the company. The deputy judge granted permission to appeal but refused to stay his order.

2 On 20 May 2009 as a matter of urgency this court heard an application on the part of the creditor companies for a stay of the order made on 15 May 2009 and their appeal against that order. The application and appeal were urgent because the United States Bankruptcy Court in the Southern District of New York ("the bankruptcy court") was due to hear an application by the administrators for the release of attachments secured by the creditor companies later that day. In addition, the administrators contended that the release of the attachments was necessary for them to be in a position to vacate office and thereby to enable completion of a sale of the shares of the company. We dismissed the appeal, and Sir John Chadwick [2009] EWCA Civ 723 gave a brief summary of our reasons for doing so on the basis that it would be of assistance to the bankruptcy court to know why the courts in this country had maintained the injunction, and on the basis that this court would give its reasons more fully in writing subsequently. The dismissal of the appeal rendered the application for a stay pending appeal otiose.

3 This judgment sets out my reasons for dismissing the appeal.

The facts

4 The company is incorporated in England. It carried on the business of offshore oil and gas exploration in the North Sea. It encountered financial difficulties, and as a result, as mentioned above, the administration order was made on 7 January 2009. On the same date, on the application of the administrators, the Companies Court made an order authorising them to enter into and to procure the company to enter into a loan agreement with specified lenders and to draw down funds under that agreement for the purpose of "making such payments in respect of the post-administration liabilities of the company as the joint administrators consider likely to achieve the purpose of the administration". The company was thus able to continue to trade, with a view to the sale of the company or, failing that, of its business and assets.

5 The creditor companies are companies incorporated in Germany. They are one-ship companies, and are pre-administration creditors of the company under time charterparties of their vessels, the *Taurus* and the *Magnus*, dated 7 November 2008. The charterparties are in the standard Supplytime 89 form for offshore service vessels; they are governed by English law and include an arbitration agreement requiring any dispute to be referred to arbitration in London. The charter hire and other payments to be made under the charterparty were denominated in sterling. The amounts outstanding under the charterparties are, according to the creditor

companies, £583,987·70 in respect of the *Taurus* and £595,203·65 in respect of the *Magnus*.

6 By letters dated 7 January 2009 the administrators informed the known creditors of the company, including the appellant creditor companies, that it had entered administration and that they had been appointed administrators. The letter stated that the company was continuing its business under their supervision whilst they investigated its financial affairs and endeavoured to realise a sale of the company or of its business or assets.

7 On 16 January 2009, without notice to the administrators, the creditor companies commenced proceedings in the district court under its admiralty and maritime jurisdiction seeking judgment for the sums due from the company and an attachment and garnishment of its tangible and intangible property sufficient to answer their claims. Para 7 of their verified complaints stated:

> "Under the laws of the United Kingdom, which govern the parties' charter, the prevailing party is entitled to recover its interest and attorneys' fees. Upon information and belief, it will take two years to bring this dispute to conclusion, resulting in a total of the following estimated interest and attorneys' fees in addition to plaintiff's principal claim . . ."

In the *Taurus*, interest of US$85,641 and lawyers' fees of US$100,000 were thus added to the sum attached; in the *Magnus*, US$87,286 interest and US$100,000 were added to the sum attached.

8 The creditor companies' verified complaints made no mention of the fact, known to the creditor companies, that the company was the subject of an administration order. Although para 7 of the complaints stated that the sums claimed were disputed, no mention was made of the London arbitration agreements, of which, if their claims were disputed, the creditor companies were in breach by commencing substantive proceedings otherwise than by arbitration. Of course, the United States of America is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which would require the district court to refer the claims to arbitration at the request of the company. In fact, I have seen nothing to show that the sums claimed by the creditor companies were disputed; but even if they were, in my judgment the creditor companies' complaints misled the district court by omitting mention of the administration and the arbitration agreements.

9 On 21 and 26 January 2009 ex parte orders were made by the district court attaching the property of the company within the Southern District of New York. On the same date a summons was issued naming the company as defendant. Shortly thereafter writs of attachment and garnishment were issued against the property of the company, including property held for its benefit or moving through or within the possession of 19 named banks.

10 The creditor companies did not inform the administrators that they had commenced the proceedings in the district court or that they had obtained and were seeking to enforce attachments against the company's property. In ignorance of the attachments, on 19 March 2009

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the administrators sought to make a payment of US$3,380,963 to a post-administration supplier of services to the company. That sum went to the supplier's account with one of the banks in New York that had been served with the attachment orders. As a result, a total of approximately US$2·2m was attached.

11 The New York proceedings and attachment orders were not served on the administrators until 24 March 2009.

12 The administrators agreed a sale of the shares of the company. It was conditional on a compromise of its liabilities to its creditors, which was to be effected by a company voluntary arrangement ("CVA") pursuant to Part I of the Insolvency Act 1986. The CVA was approved by the creditors of the company. It was a condition precedent of the sale of the shares of the company that the appointment of the administrators cease to have effect. There was an alternative agreement for the sale of the company's assets but it would result in a significantly smaller sum being available for unsecured creditors. Both of the creditor companies submitted forms of proxy and voting dated 9 April 2009 in favour of the CVA.

13 In addition to seeking relief in the Companies Court, on 7 May 2009 the administrators brought proceedings in the bankruptcy court seeking an order vacating the attachments obtained by the creditor companies. The basis of the administrators' proceedings is that the bankruptcy court in New York should recognise the administration order under principles of comity embodied in Chapter 15 of the United States Bankruptcy Code. Chapter 15 is the United States' domestic adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997. Its purpose is to "provide effective mechanisms for dealing with . . . cross-border insolvency": preamble.

The contentions of the parties

14 On behalf of the creditor companies, Mrs Talbot Rice QC submitted that the creditor companies had not acted in breach of any statutory restriction on legal proceedings being commenced against a company in administration. Paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 (as substituted by section 248 of, and Schedule 16 to, the Enterprise Act 2002) does not have extraterritorial effect. Furthermore, the assets of a company in administration, unlike those of a company that is being wound up, are not subject to the trust that justified anti-suit injunctions against creditors of companies in liquidation. The district court in New York was properly seised of an attachment against property within its jurisdiction, and comity requires the courts of this country to abstain from interfering with proceedings before that court. The need for judicial restraint and recognition of the requirements of comity are particularly great where, as here, the foreign jurisdiction has adopted statutory provisions such as those of Chapter 15 of the Bankruptcy Code and the administrators have commenced proceedings in that jurisdiction.

15 On behalf of the administrators, Mr Trower QC submitted that the deputy judge had been entitled to grant the injunction in the circumstances of this case, where the action taken by the creditor companies interferes with the exercise by the administrators of their functions pursuant to orders of the

A Companies Court, and the subject matter of the foreign proceedings has no connection with the foreign jurisdiction.

Discussion

16 It has long been established that the statutory prohibition against creditors bringing proceedings against a company being wound up by the B court is not extraterritorial, i e, it does not extend to proceedings brought in foreign courts. In *In re Oriental Inland Steam Co; Ex p Scinde Railway Co* (1874) LR 9 Ch App 557, the liquidator obtained an order requiring a creditor who had attached assets in India to return them to the company in liquidation. James LJ said, at pp 558–559:

"The winding up is necessarily confined to this country. It is not C immaterial to observe, that there could now be no possibility, having regard to the decision of the Supreme Court of *Calcutta*, in *Bank of Hindustan v Premchand* 5 Bomb HC Rep 83, which we must take to be quite right, of treating this case as if there were an auxiliary winding up in *India*. If this is so with regard to a company domiciled in *England*, but having its business and assets in *India*, there would be no ground for the contention on the part of the appellants that they would obtain an D equitable and rateable distribution of the assets between the creditors. All the assets there would be liable to be torn to pieces by creditors there, notwithstanding the winding up, and there would be an utter incapacity of the courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in E discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company. There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The court abroad may sometimes not be F disposed to assist this court, or take the same view of the law as the courts of this country have taken as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur. In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an G execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one cestui que trust getting possession of the trust property after the property had been affected with notice of the trust. If so, that cestui que trust must bring it in for distribution among the other cestuis que trust. So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. H The assets must be distributed in *England* upon the footing of equality."

17 Mellish LJ said, at pp 559–561:

"I quite agree that the 87th section of the Companies Act 1862 (25 & 26 Vict, c 89), providing that no action shall be brought without

the leave of the court, and the 163rd section, enacting that no execution shall issue, apply only to the courts in this country. Of course, Parliament never legislates respecting strictly foreign courts. Nor is it usually considered to be legislating respecting colonial courts or Indian courts, unless they are expressly mentioned. Still, that appears to me not to prevent the general application to this case of the principles which have been established in cases of bankruptcy. No doubt winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor. Then it is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding up was presented, or possibly prior to the time when the winding up order was made, and a judgment, for instance, had been put on the register, that might, by the law of *Bombay*, have constituted a charge on the property of the company, and then the trust for the benefit of the creditors would have been subject to that charge. But here there is no allegation that the judgment in *Bombay*, any more than a judgment here, simply qua judgment, operates as any charge at all. It is quite clear that it does not, and that until the execution and attachment have issued and been executed, there is no actual charge on the property. That charge is subsequent to the creation of the trust, and is made by the particular appellants here with full notice of the trust. The consequence necessarily follows, that in this court these creditors cannot be allowed by such means to obtain priority; and that they must give up, for the benefit of the creditors, what they have so obtained."

18 As can be seen, although the statutory prohibition was interpreted as confined to the jurisdiction of these courts, the finding of a trust resulted in an effective extraterritorial jurisdiction.

19 As mentioned above, before us the creditor companies sought to distinguish the position of a company being compulsorily wound up from that of a company in administration. In the former case, the assets of the company are the subject of a trust, but not the latter. The administrators took issue with this submission. In addition, the administrators contended that the definition of "property" in section 436 of the Insolvency Act 1986 as including every description of property "wherever situated" means that the prohibition in paragraph 43 of Schedule B1 to the 1986 Act applies to property outside the jurisdiction.

20 Paragraph 43(6) of Schedule B1 is as follows:

> "No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except— (a) with the consent of the administrator, or (b) with the permission of the court."

21 I find it difficult, particularly in the light of the long line of authorities beginning with *In re Oriental Inland Steam Co* LR 9 Ch App 557, to interpret this provision as applying to proceedings brought by a creditor who is not subject to the jurisdiction in a court outside the jurisdiction. The presumption against extraterritoriality would lead me to interpret the reference to legal process as confined to process within the jurisdiction, or (having regard to paragraph 43(5)) within the United Kingdom. My difficulty is reinforced by the facts that in *Mitchell v Carter* [1997] 1 BCLC 673 Blackburne J decided that section 183, which precludes a creditor who levies execution or attaches a debt after commencement of a winding up from retaining the benefit of his execution or attachment, does not apply to executions or attachments in foreign jurisdictions, and that in the Court of Appeal it was not disputed that the section has no extraterritorial effect. Moreover, Parliament has had but not used the opportunity to make express extraterritorial provision. I see no relevant distinction between the wording of paragraph 43 and that of the statutory prohibition in section 130 of the Insolvency Act 1986 in relation to companies in respect of which a winding up order has been made.

22 It is however unnecessary for me to arrive at a final conclusion on this issue. This is because cases such as *In re Oriental Inland Steam Co* and *Mitchell v Carter* show that the jurisdiction of the court is not restricted by the territoriality of the statutory prohibition. I do not think that this jurisdiction is confined to the protection of the assets of a company that is being wound up, and is not available to protect the assets of a company in administration. I do not accept that the protection of the assets of a company in administration is to be regarded by the court as differing in substance from the protection of the assets of a company in compulsory liquidation. In both cases, the assets of the company are dealt with by an officer appointed by the court in accordance with statutory duties. The administrators of a company are required by paragraph 3(1) of Schedule B1 to the 1986 Act to perform their functions with the objective of:

> "(a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors."

Sub-paragraph (2) requires the administrators to perform their functions in the interests of the company's creditors as a whole, subject to sub-paragraph (4), viz:

> "(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if— (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in

sub-paragraph (1)(a) and (b), and (b) he does not unnecessarily harm the interests of the creditors of the company as a whole." A

23 One of the duties of the administrators, and therefore one of their functions for the purpose of paragraph 3, is to "take custody or control of all the property to which he thinks the company is entitled" (see paragraph 67 of Schedule B1 to the 1986 Act), and section 436 makes it clear that that means the property of the company both within and outside the jurisdiction. B

24 It seems to me that the trust the existence of which was established in *In re Oriental Inland Steam Co* was a legal construct created to achieve the equitable distribution of the proceeds of the realisation of the assets of the company wherever situated. As Millett LJ pointed out in *Mitchell v Carter* [1997] 1 BCLC 673, 689, it is a trust which confers no beneficial interest on the creditors, who are the beneficiaries. Their only right is to have the assets of the company dealt with in accordance with the statutory scheme applicable to a company that is the subject of a winding up order. Similarly, the creditors of a company in administration are entitled to have the company and its assets dealt with in accordance with the statutory scheme applicable to such companies. The lack of any material distinction between compulsory winding up and administration is demonstrated by the judgment of Mummery LJ in *In re Polly Peck International plc (No 2)* [1998] 3 All ER 812, 827. If the court has a jurisdiction to protect the assets of a company that is being wound up by the court from foreign attachments and executions, in my judgment it has a similar jurisdiction in the case of a company in administration. C D

25 But although the court has jurisdiction to prevent a creditor from taking advantage of a foreign attachment, it does not follow that the jurisdiction should be exercised in any particular case. The exercise of the jurisdiction will depend on the facts of the case, and must be tempered by considerations of comity. The judgment of Maugham J in *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196 is helpfully summarised in the headnote: E

> "Section 177 of the Companies Act 1929 only applies to proceedings pending in a court of Great Britain and does not apply to proceedings pending in a foreign or colonial court. The court can, however, in the exercise of its equitable jurisdiction in personam restrain a respondent properly served in this country from proceeding with an action brought in a foreign or colonial court to enforce a liability incurred abroad. But as against a respondent domiciled abroad, substantial justice is more likely to be attained by allowing the foreign proceedings to continue, and in such a case the court will not as a rule exercise that jurisdiction." F G

26 The reluctance of the court to interfere with proceedings in a foreign court by the grant of anti-suit injunctions is demonstrated by the important judgment of the Privy Council in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. In that case, the question was where a civil claim should be tried. In such cases questions of forum non conveniens arise, although, as the judgment makes clear, the inconvenience of a forum is of itself not a sufficient justification for the grant of injunctive relief. The present case is different. The question is not where a dispute as to liability or damages should be determined, but whether the creditor companies should be able to continue their proceedings before the district court so as to H

A secure the benefit of their attachments, and thus promote themselves from unsecured to secured creditors. In such cases, as the Privy Council pointed out in the *Aerospatiale* case [1987] 1 AC 871, 892H, the purpose of the anti-suit injunction may be said to be to protect the jurisdiction of the English court. In *Mitchell v Carter* [1997] 1 BCLC 673, 687 Millett LJ said:

> "The position today is that stated by Hoffmann J in *Barclays Bank plc*
B *v Homan* [1993] BCLC 680. There must be a good reason why the decision to stop foreign proceedings should be made here rather than there. The normal assumption is that the foreign judge is the person best qualified to decide if the proceedings in his court should be allowed to continue. Comity demands a policy of non-intervention."

27 The court should exercise its powers so as to enable the
C administrators to exercise their statutory functions and to fulfil their statutory duties, so far as necessary in any particular case. The comity owed by the courts of different jurisdictions to each other will normally make it inappropriate for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction. In this particular case, this court recognises that the bankruptcy and district courts are experienced in commercial and
D insolvency matters. None the less, the conduct of the creditor against whom an injunction is sought, and the circumstances of the attachment of the property of the company, may justify the grant of an injunction despite the strong presumption that this court will not interfere with the proceedings of a foreign court. In particular, if the conduct of the creditor can be castigated as oppressive or vexatious (as to which see the judgment of Glidewell LJ, with whom the other members of the Court of Appeal agreed, in *Barclays*
E *Bank v Homan* [1993] BCLC 680) or otherwise unfair or improper, this court can and should grant relief in order to protect the performance by administrators of their functions and duties, and thus the creditors of the company, pursuant to orders of the court.

28 In the present case, the following factors are relevant. (a) The company is incorporated in England and its place of business was in this
F country. It had no place of business or assets in the United States when the attachment orders were made. Similarly, neither of the creditor companies is incorporated or carries on business in the United States. (b) The company entered into administration and the administrators were appointed and carried out their duties and functions pursuant to orders of the Companies Court in this jurisdiction. Thus the administration is subject to the
G jurisdiction of the Companies Court in this country. (c) When applying for the attachments, the creditor companies failed to inform the district court of the fact that the company was in administration or of the arbitration agreements by which they were bound. If under the law of New York they were under a duty to make full and frank disclosure, they were in breach of that duty, but in any event their verified complaints gave a misleading picture to the district court. The district court thus made the attachment orders in
H ignorance of highly material facts. (d) The attachments did not fasten on any pre-administration property of the company in New York. I can assume that there was none. Successful attachments therefore depended on property of the company coming within the jurisdiction of the district court during the course of the administration. (e) This was not a case of a debtor seeking

to evade payment of its liabilities to the creditor companies, but of officers appointed by the court seeking to secure the best outcome for the creditors of the company. None the less, the creditor companies did not inform the administrators of the attachment orders they had obtained until after they had succeeded in attaching funds sufficient to secure their claims. They had been informed that the administrators proposed to carry on the business of the company. That would involve making payments, often in US dollars, for post-administration supplies and services, as the creditor companies, companies carrying on business in the oil and gas industries, must have been aware. Such payments would be made to suppliers' bank accounts, which might be in New York; in any event, the district court's power to attach funds has been applied to dollar payments cleared through New York. International dollar payments are cleared through the USA, and generally New York. The creditor companies thus established a trap for the administrators. The creditor companies' conduct was unconscionable. (f) The funds subject to the attachment were the proceeds of a loan entered into pursuant to an order of the court and were transmitted to New York in order to pay for post-administration services contracted for pursuant to an order of the court. The attachments thus interfered with the performance by the administrators of their functions and duties as such pursuant to an order of the Companies Court.

29 In my judgment, the conduct of the creditor companies and the circumstances of the attachments brought it into the exceptional category in which the grant of injunctive relief is justified, notwithstanding comity and notwithstanding the outstanding application of the administrators in New York. It is unnecessary to consider whether any of the factors listed above alone would have justified the grant of injunctive relief. It was similarly unnecessary to determine any of the more wide-ranging submissions of the parties.

30 Last, it seemed to me that the bankruptcy court judge in New York would be assisted to be made aware of the views of this court in this matter, an English administration relating to an English company that did not carry on business in the United States and did not have any assets in that jurisdiction when the administration order was made; and indeed the transcript of the proceedings before Judge Drain indicated that he would be assisted by a ruling of this court. The order dismissing the appeal and the short reasons given by Sir John Chadwick were an appropriate means of communicating the views of this court to the district court in New York.

31 More generally, I point out that administrators should be aware that the jurisdiction of the district court to attach payments in dollars cleared through New York may mean that they will be unable safely to make dollar payments in respect of post-administration liabilities without first having obtained recognition of the administration as a "foreign proceeding" under Chapter 15 of the United States Bankruptcy Code.

SIR JOHN CHADWICK

32 As Stanley Burnton LJ has observed, we dismissed this appeal at the conclusion of oral argument. But we varied the order made by the judge so as to make it clear that the interference with the proceedings in New York pursuant to that order was limited to the release from attachment of moneys paid by the administrators in respect of post-administration liabilities and

A where such payments were made through New York before 25 March 2009: that is to say, before the date on which the administrators were on notice of the orders made by the district court.

33 That is, to my mind, an important limitation. It emphasises the special feature of this case: that the effect of the creditor companies' conduct, described by Stanley Burnton LJ, was to set a trap for the administrators
B which, when sprung, obstructed the proper discharge of the functions for which the High Court had appointed them. It is that feature which, to my mind, requires the United Kingdom court to intervene, notwithstanding the strong presumption against interference with proceedings in a foreign court to which Stanley Burnton LJ has referred. It is that feature which justifies the categorisation of the creditor companies' conduct as improper and oppressive in the context of the ongoing administration of the company
C in the United Kingdom.

WARD LJ

34 I agree with both judgments.

Appeal dismissed, save that deputy judge's order varied.
D *Permission to appeal refused.*

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Exhibit 15

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO BVIHC (COM) 0080 OF 2013

IN THE MATTER OF THE INSOLVENCY ACT 2003
AND IN THE MATTER OF C (A BANKRUPT)

Appearances: Miss Sinead Harris and Mr Robert Nader for the applicant Trustees

JUDGMENT

(2013: 24, 31 July)

(Foreign representatives applying for assistance under Part XIX of Insolvency Act, 2003 ('IA 2003') – whether Court entitled to clothe such representatives with the powers and rights with which they would have been clothed had they been appointed under IA 2003 – extent of assistance available to be given by the Court at common law considered – **Picard v BLMIS**[1] disapproved in part)

[1] **Bannister J [Ag]:** This is an application by Hong Kong Court appointed trustees in bankruptcy ('the Trustees') of the estate of a judgment debtor ('the Bankrupt') for orders at common law and under the inherent jurisdiction of the Court for recognition of the Hong Kong bankruptcy proceedings and their standing as such Trustees. The Trustees asked at the hearing (although that was not something sought by their application, which they did not apply to amend) that by way of assistance upon such recognition, they be granted the powers which they would have had if they had been appointed here under Part XII of the Insolvency Act, 2003 ('Part XII,' 'IA 2003'). Part XII deals with personal bankruptcy. Alternatively, the Trustees apply under section 467(3) of the Insolvency Act, 2003 ('IA 2003') for declarations that they are the validly appointed Hong Kong Trustees of the Bankrupt's estate; are entitled to reduce property of the Bankrupt situate in the Virgin

[1] BVIHCV 0140 of 2010

Islands into their possession; and that they are entitled to make applications under section 463(3) of IA 2003. I think that this latter application is intended to refer to section 467(3). Section 463 is not yet in force.

[2] The Trustees seek separate orders that the Registered Agents of various BVI registered companies be required to disclose to the Trustees whether the Bankrupt is or has been the legal or beneficial owner of any of them; restraining such Registered Agents from registering transfers or other dispositions of shares in such companies without order of the Court; and restraining such Registered Agents from disclosing to anyone other than their lawyers that the Trustees have made application for the orders mentioned in this paragraph.

[3] The Trustees have asked for the Court file in these proceedings to be sealed. They offer cogent reasons why that should be so and I have so ordered. Since it is nevertheless important that this judgment should be publicly available, all proper nouns that might enable anyone to deduce the identity of the Bankrupt (apart from the identity of the Court by which the Trustees have been appointed) have been anonymised.

[4] The reason why it is important that this judgment should be made public is because the Trustees have based their primary application at any rate in part upon the submission that my decision in **Picard v Bernard L Madoff Investment Securities LLC**[2] is wrong. If they are right about that, then that fact should be made as widely known as possible as soon as possible.

The Trustees' submissions

[5] Since the Trustees are appointed by the High Court of the Hong Kong Special Administrative Region, they are foreign representatives within the meaning of section 466(1), IA 2003, and are entitled accordingly to apply for assistance under Part XIX of that Act ('Part XIX'). Miss Harris, who appeared together with Mr Robert Nader for the Trustees on these applications, submits that what she calls the common law of bankruptcy subsists in parallel with Part XIX and means that the Court should treat the Trustees exactly as if they had been appointed under and had the powers conferred by Part XII.

[2] BVIHCV 0140 of 2010; 12 November 2010; In what follows I shall refer to Bernard L Madoff Investments Securities as 'BLMIS'

[6] In support of this submission, Miss Harris relies, first, upon what Lord Hoffmann said at paragraph [22] of **Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc and ors**, a decision of the Privy Council:[3]

> 'What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.'

[7] Although she did not cite the entire section, Miss Harris also relied upon passages from Lord Collins speech in the UK Supreme Court at paragraphs [29] to [34] of **Rubin v Eurofinance**:[4]

> 29 'Fourth, at common law the court has power to recognize and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition ... carries with it the active assistance of the court:" **In re African Farms Ltd** [1906] TS 373, 377; "This court . . . will do its utmost to co-operate with the US Bankruptcy Court and avoid any

[3] [2007] 1 AC 508
[4] [2013] 1 AC 236

action which might disturb the orderly administration of [the company] in Texas under ch 11": **Banque Indosuez SA v Ferromet Resources Inc** [1993] BCLC 112, 117.

30 In **Credit Suisse Fides Trust v Cuoghi** [1998] QB 818, 827, Millett LJ said:

"In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

31 The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

32 An early case of recognition was **Solomons v Ross** 1 H B1 13In, where, as I have said, the bankruptcy was in Holland, and the bankrupts were Dutch merchants declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt: see also **Bergerem v Marsh** (1921) 6 B & CR 195 (English member of Belgian firm submitted to Belgian bankruptcy proceedings: movable property in England vested in Belgian trustee).

33 One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus In **Banque**

Indosuez SA v Ferromet Resources Inc [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; *cf* **In re African Farms Ltd** [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in **Turners & Growers Exporters Ltd v The Ship Cornelis Verolme** [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); **Modern Terminals (Berth 5) Ltd v States Steamship Co** [1979] HKLR 612 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in **CCIC Finance Ltd. v Guangdong International Trust & Investment Corpn** [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include **In re Impex Services Worldwide Ltd** [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

34 Cases involving remittal of assets from England to a foreign office-holder include **In re Bank of Credit and Commerce International SA** (No 10) [1997] Ch 213 (Luxembourg liquidation of Luxembourg company); and HIH [2008] 1 WLR 852 (the view of Lord Hoffmann and Lord Walker of Gestingthorpe) (Australian liquidation of Australian insurance company); and **In re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft** [2010] BCC 667 (Swiss liquidation of Swiss company).'

[8] It is important, I think, to have in mind in considering this passage that it is the final part of a section of Lord Collins' speech beginning at paragraph [21], in which he compares and contrasts the various routes open to the English Courts in the matter of cross border insolvency co-operation (the EC Insolvency Regulation, the Cross Border Insolvency Regulations importing the UNCITRAL Model Code as between 19 countries and territories). In doing so he drew especial attention (because it was relevant to the cases before the Supreme Court) to the ability of foreign

representatives to bring, under the Model law, English avoidance and preference claims, which were the claims with which the proceedings were concerned. Any such suggestion is conspicuous by its absence in the passage on common law assistance which I have set out above.

[9] In that section of his speech, Lord Collins first mentions **Re Africa Farms Ltd**.[5] The case is instructive. The company in question went into voluntary liquidation in England owning movable and immovable property in the Transvaal. A bank had put in train an execution sale of certain of its movable property. The English liquidator applied to have it wound up in the Transvaal, but the Full Court held that it did not have the power to do so, as the company was not a company within the meaning of the relevant local statute. Instead, it declared the liquidator entitled to the sole administration of the assets, movable and immovable, of the company in the Transvaal, subject to his providing security. The Full Court further directed that all questions of admission or rejection of the proofs of local creditors and all questions of mortgage and preference should be regulated by the laws of the Transvaal. Although the Full Court allowed the execution sale to proceed, it restrained the bank from appropriating the proceeds, on the principles set out in **Re Oriental Inland Steam Company**,[6] for the well established grounds that the bank had had notice of the English liquidation when it set its execution in motion and ought to be restrained for that reason (see also the cases mentioned in paragraph 33 of Lord Collins' judgment in **Rubin**)..

[10] In a much cited passage Innes CJ said at page 377 of the report:

> 'It only remains to consider whether we are justified in recognizing the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgement of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the

[5] [1906] TS 373
[6] (1874) 9 Ch App 557

> Court may impose for the protection of local creditors, or in recognition of the requirements of our local laws. If we are able in that sense to recognize and assist the liquidator, then I think we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims.'

[11] The reasoning which led the Full Court to make the orders which it did are set out at pages 378 to 382 of the report and may, I believe, be fairly summarized as follows:

> (1) the law of the Transvaal recognized not only the title of a foreign trustee in bankruptcy to local movables, but also to immovables;
> (2) once the company had gone into liquidation, the liquidator had the sole right of administering its assets; and
> (3) it was that right which the Court was recognizing.

[12] What the Full Court did, in other words, was to recognize the title of the liquidator and his superior right to get in the company's property in the Transvaal. It permitted him to administer it there, but according to local law. And it restrained the bank from proceeding with its execution in competition with the liquidator on established principles. What is important to notice, however, is that while the Court ensured that the liquidator would suffer no impediment in getting in the company's property, it conferred no coercive or other power upon him to enable him to do so.

[13] Each of the varied examples given by Lord Collins in the passage which I have set out above from **Rubin v Eurofinance**[7] will similarly be seen to be an example of specific assistance given by local to foreign Courts as a matter of discretion in each case for the purposes of preserving the integrity of their insolvency procedures. In none of them, including **Re**

[7] (supra)

Impex Services Worldwide Ltd,[8] upon which Miss Harris relied strongly, is there any suggestion that at 'common law' a foreign insolvency practitioner, once recognized, is to be treated as entitled to exercise the powers which he would have had had he been appointed pursuant to the insolvency laws of the given jurisdiction. The cases mentioned by Lord Collins all stress the discretion of the assisting Court to decide what, if any, assistance to provide to the foreign Court through its officer.

[14] As for **Impex**,[9] what the Manx Court did was to use its own powers to compel the attendance of witnesses for examination. It did not do so under the Manx Companies Act, which it held[10] was not available to it because the applicant was not the liquidator of a Manx company. It did it under its inherent jurisdiction and by way of assistance – just as, no doubt, it could have granted **Norwich Pharmacal**[11] relief to the applicant. **Impex**[12] is not authority for the conferring of local statutory powers or rights upon a foreign office holder. If anything, it is authority to the contrary. It is authority, however, for the proposition that the local Court will use its own inherent powers to provide assistance to the foreign office holder.

[15] In **Schmitt v Deichman**[13] Proudman J, sitting in the Chancery Division in England, upheld an order of Mr Registrar Jaques recognizing the German administrator of an insolvent company and purporting to confer upon him all the powers of an insolvency practitioner under the English Insolvency Act 1986. The case was decided before the decision of the UK Supreme Court in **Rubin** was published. In my judgment, Proudman J's decision was wrong. The Court has no jurisdiction to confer upon a stranger powers which a statute confers only upon individuals accepting specified appointments under the statute. The source of the powers is the statute, not the Court, even though it may be the Court which makes the appointment. The same applies to permitting a person not within the class permitted by statute to pursue a statutory remedy to do so merely because he has been 'recognised.' There must be express statutory authority (such as the availability of the Model Law or the application of section 426 of the UK Insolvency Act 1986 ('section 426)' to the case)

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[8] [2004] BPIR 564
[9] (supra)
[10] at paragraphs [41] to [43] of the judgment
[11] [1974] AC 133
[12] (supra)
[13] [2013] Ch 61

before that can be done. As the cases referred to by Lord Collins show, what the Court does when recognizing foreign proceedings at common law, is to deploy its own powers in aid of the foreign proceedings. It does not invest the foreign office holder with powers of his own.

[16] Indeed, at paragraph [131] of his speech, Lord Collins turned to the question of potential injustice to the administrators in **Rubin** if their judgment was not enforced in England. He considered the possibility of direct claims (i.e. claims which the administrators could bring under causes of action vested in them independently of any insolvency regime) and he drew attention to the possibility of avoidance claims being available under section 426. At no point did he suggest that the administrators could as a matter of mere recognition proceed to invoke remedies available to an English office holder by reason of his office.

[17] It is true that in the passage from **Cambridge Gas** set out in paragraph [6] of this judgment Lord Hoffmann refers to foreign representatives being given the 'remedies' which they would have had in equivalent proceedings, but he refrained from saying that they should be treated as having the equivalent powers or that, without recourse to the Model Code of section 426, they could enforce statutory remedies available in an English bankruptcy or liquidation and I do not read that passage as intended to carry any such meaning. Certainly, it does not appear that Lord Collins read it in that sense, otherwise he would have been sure to have pointed it out in paragraph 131 of his speech in **Rubin**.[14]

[18] I was referred to **Picard v Primeo Fund**[15] a case in the Grand Court of the Cayman Islands where Mr Justice Andrew Jones held, not without some hesitation, that the Grand Court had jurisdiction to apply the avoidance provisions of Cayman Island company law in aid of the SIPA liquidation of BLMIS - as I read the judgment, by permitting the US Trustee to pursue avoidance causes of action conferred by Cayman companies legislation upon Cayman appointed office holders. He relied upon **Impex**[16] and **Schmitt v Deichmann**.[17]

[19] Mr Justice Andrew Jones was applying local 'assistance' legislation which is different in significant features from Part XIX. I do not think that the decision provides guidance on the interpretation of Part XIX and,

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[14] (supra)
[15] (unreported) Grand Court of the Cayman Islands, 14 January 2013
[16] (supra)
[17] (supra)

Insofar as it broadens the limits of the type of assistance to be granted following recognition at common law beyond cases of the type mentioned by Lord Collins in paragraphs 29 to 34 of his speech in **Rubin**, then I would respectfully decline to follow it here in the Virgin Islands, for the reasons given earlier in this judgment.

[20] In my judgment, therefore, neither **Schmitt v Deichmann** [18] nor **Primeo** [19] helps Miss Harris. The other authorities upon which Miss Harris relies do not support the proposition that foreign insolvency practitioners may be clothed by the Court, by virtue of nothing more than recognition, with the rights and powers of an office holder appointed pursuant to IA 2003, which I reject for the reasons which I have given above. The Trustees revised application to be treated as if they had been appointed under Part XII therefore fails.

[21] The Trustees are, on the other hand, plainly entitled to make such applications as they wish under section 467 of IA 2003 without the leave of the Court.

[22] That said, I need to deal with the criticisms made by Miss Harris of my decision in **Picard v BLMIS**.[20] Miss Harris' argument is that (a) prior to the enactment of IA 2003 and, as she would have it, at all times since, the Court has had jurisdiction to make orders in aid of any foreign insolvency proceedings, wherever pending; (b) that the legislature could not have deprived the Court of the right or power to make orders in aid without expressly saying so; and (c) that section 470 IA 2003 clearly preserves the common law principle of recognition and assistance. Section 470 is in the following terms:

> 'Subject to section 443, nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands.'

In my judgment section 470 has nothing to do with recognition generally. Its effect is restricted to providing for assistance in addition to whatever may be granted under section 467 IA 2003 to a foreign representative. 'Foreign representative' is defined by section 466(1) as a person acting as an office holder in insolvency proceedings in a relevant foreign

[18] (supra)
[19] (supra)
[20] (supra)

country designated as such by the Financial Services Commission. Section 470 adds to the relief which may be granted to a foreign representative but does not expand the class of foreign representatives.

[23] Having listened to Miss Harris' careful submissions, I accept that this section provides for recognition at common law of foreign representatives (as defined) and for the provision of assistance (of the sort discussed by Lord Collins in **Rubin**[21]) to them by the Court, whether or not they apply specifically under section 467. To that extent, what I said in paragraph 8 of my judgment in **Picard**[22] was wrong. I was also wrong, I regret to have to say, in denying Mr Picard the relief (at any rate in some form or another, even if not precisely in the terms in which he sought it) which he had applied for.

[24] As for the wider question, whether the common law approach to recognition and assistance survives generally in this jurisdiction in parallel to Parts XVII and XIX, it does not arise on this application any more than it arose on Mr Picard's, since all three applicants were and are foreign representatives for the purposes of Part XIX. Since the question was fully argued by Miss Harris, however, I should perhaps set out my views upon it. I have no doubt that it does not. The provisions of Part XIX (and, for that matter, of Part XVIII) are quite clearly intended to be restrictive of the class of persons who may be the object of the Court's recognition and the beneficiaries of its assistance. Those restrictions would be rendered futile if it were the case that the Court remained at liberty to grant recognition to any office holder it chose, regardless of the jurisdiction in which he had been appointed – certainly if it could proceed to confer upon any such office holder the powers of a person holding office under IA 2003. In my judgment, what Lord Neuberger said in **In re HIH Insurance Ltd**[23] about the existence of an inherent power in tandem with but extending further than section 426 of the UK Insolvency Act 1986 applies with equal or greater force in this case.

[25] It is said that this conclusion cannot be reached unless it can be shown that the legislature 'repealed' or 'abolished' the common law rule of recognition and assistance and that the language of Part XIX is far too weak to permit that inference to be drawn. I do not think that that is a

[21] (supra)
[22] (supra)
[23] [2008] 1 WLR 852 at paragraph 76

good point. By restricting the class of persons to whom recognition and comity may be extended by the Court, Part XIX is not abolishing or repealing anything. The rule, if it is properly to be described as a rule, still exists. It is merely that its application in this jurisdiction has been defined. Part XIX clearly has the effect of restricting comity to foreign representatives as defined by section 466.

Orders to be made

[26] Movable property formerly belonging to the Bankrupt vested in the Trustees upon their appointment and that fact is recognized within this jurisdiction. I will therefore make an order entitling the Trustees to take all steps necessary in order to reduce the Bankrupt's movable property within the jurisdiction into their possession and requiring any person holding such property within the jurisdiction to deliver it or transfer it to the trustees forthwith upon being required to do so. If any question arises between the Trustees and a person in possession of or holding such property, either party may apply by way of originating application to have the matter resolved.

[27] The Trustees have permission to apply in respect of immovable property, if any, within the jurisdiction.

[28] On the hand down of this judgment I will hear submissions on how the provisions of section 468(1) are to be given effect to in the 'assistance' order and will settle the terms of the order accordingly.

[29] I will also make an order in the terms of the Trustees' disclosure application as set out in paragraph [2] of this judgment.

Commercial Court Judge
31 July 2013

Exhibit 16

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Privy Council

Cambridge Gas Transportation Corpn *v* Official Committee of Unsecured Creditors of Navigator Holdings plc and others

[2006] UKPC 26

2006 March 20, 21; May 16

Lord Bingham of Cornhill, Lord Hoffmann, Lord Hutton, Lord Rodger of Earlsferry and Lord Carswell

Isle of Man — Bankruptcy — Jurisdiction — European investors borrowing money from New York bond market for purchase of ships — Ships owned and managed by Manx group of companies being subsidiaries of holding company — Holding company owned by companies incorporated in other offshore jurisdictions — Investors becoming insolvent and petitioning for Chapter 11 relief under United States Bankruptcy Code — United States Federal Bankruptcy Court confirming reorganisation plan for creditors taking over assets including shares of holding company — Federal Bankruptcy Court requesting Manx High Court for assistance in implementing plan — Whether jurisdiction to enforce Federal Bankruptcy Court order

European investors in a shipping business borrowed US$300m on the New York bond market for the purchase of five gas transport vessels and commenced trading. Subsequently, the investors of the business became insolvent and petitioned for relief in New York under Chapter 11 of the United States Bankruptcy Code, which allowed insolvent companies to negotiate a plan of reorganisation with their creditors. The Federal Bankruptcy Court for the Southern District of New York confirmed a plan providing for the assets to be taken over by the creditors and ordered that it be carried into effect. The ships, registered in Liberia, were owned and managed by a group of Manx companies, each ship owned by a separate subsidiary of a management company and all the shares in the management company held by a holding company, N, which was in turn held through a web of companies incorporated in other offshore jurisdictions, including the appellant, a Cayman-registered company which owned 70% of the issued share capital of N. Pursuant to clause 22 of the plan, the shares in N would be vested in the creditors' representatives, which would enable the creditors to control the shipping companies and implement the plan. The Federal Bankruptcy Court sent a letter of request to the High Court of Justice of the Isle of Man, asking for assistance in giving effect to the plan. The respondents petitioned the Manx High Court for an order vesting the shares in their representatives. The appellant cross-petitioned, asking the Manx High Court not to recognise or enforce the terms of the plan, on the basis that it was a separate legal entity registered in the Cayman Islands which had never submitted to the jurisdiction of the Federal Bankruptcy Court and that no order of that court could affect its rights of property in the Isle of Man. The deemster held that clause 22, as confirmed by the Federal Bankruptcy Court's order, was a judgment in rem purporting to change the title to property outside the jurisdiction and could not be recognised. On appeal by the respondents the Staff of Government Division, reversing the deemster, held that the bankruptcy court's order was not a judgment in rem but a judgment in personam in proceedings in which N, by its voluntary petition, had submitted to its jurisdiction.

On the appellant's appeal to the Judicial Committee—

Held, dismissing the appeal, that bankruptcy proceedings were neither judgments in rem nor judgments in personam and rules of private international law concerning the recognition and enforcement of judgments did not apply; that the purpose of bankruptcy proceedings was not to establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor

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by creditors whose rights were admitted or established; that corporate insolvency was different from personal insolvency in that, even in the case of moveables, there was no question of recognising a vesting of the company's assets in some other person, and they remained the assets of the company; but that the underlying English common law principle that fairness between creditors required bankruptcy proceedings to have universal application was given effect by recognising the person who was empowered under the foreign bankruptcy law to act on behalf of the insolvent company; that the Manx High Court had jurisdiction to assist the first respondent, as appointed representatives under an order made pursuant to Chapter 11 of the US Bankruptcy Code; that, in the circumstances, it would not be unfair for the plan to be given effect; and that, accordingly, the Staff of Government Division had been right to order its implementation (post, paras 13–15, 20–21, 26–27).

Decision of the Staff of Government Division of the High Court of Justice of the Isle of Man affirmed.

The following cases are referred to in the judgment of their Lordships:

African Farms Ltd, In re [1906] TS 373
Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)
Borland's Trustee v Steel Bros & Co Ltd [1901] 1 Ch 279
Davidson's Settlement Trusts, In re (1873) LR 15 Eq 383
Lines Bros Ltd, In re [1983] Ch 1; [1982] 2 WLR 1010; [1982] 2 All ER 183, CA
Oceanic Steam Navigation Co Ltd, In re [1939] Ch 41; [1938] 3 All ER 740
Solomons v Ross (1764) 1 H Bl 131n
Wight v Eckhardt Marine GmbH [2003] UKPC 37; [2004] 1 AC 147; [2003] 3 WLR 414, PC

The following additional cases were cited in argument:

Al Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC
Anderson, In re [1911] 1 KB 896
Bank of Credit and Commerce International SA, In re (No 3) [1993] BCLC 1490, CA
Bank of Credit and Commerce International SA, In re (No 9) [1994] 2 BCLC 636
Bank of Credit and Commerce International SA, In re (No 10) [1995] 1 BCLC 362
Bank of Credit and Commerce International SA, In re (No 10) [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796
Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112
Barclays Bank plc v Homan [1993] BCLC 680, CA
Brady v Brady [1988] BCLC 20, CA
Brassard v Smith [1925] AC 371, PC
Buchanan v Rucker (1808) 9 East 192
Business City Express Ltd, In re [1997] 2 BCLC 510
Chief Constable of Kent v V [1983] QB 34; [1982] 3 WLR 462; [1982] 3 All ER 36, CA
Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA
DAP Holdings NV, In re (unreported) 26 September 2005, Lewison J
Drax Holdings Ltd, In re [2003] EWHC 2743 (Ch); [2004] 1 WLR 1049; [2004] 1 All ER 903
Equitable Life Assurance Society, In re [2002] EWHC 140 (Ch); [2002] 2 BCLC 510
Erie Beach Co Ltd v Attorney General for Ontario [1930] AC 161, PC
Felixstowe Dock and Railway Co v United States Lines Inc [1989] QB 360; [1989] 2 WLR 109; [1988] 2 All ER 77

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Green, In re Petition of (1952) 60 MLR 254
Hoicrest Ltd, In re [2000] 1 WLR 414, CA
Impex Services Worldwide Ltd, In re [2004] BPIR 564
Inland Revenue Comrs v Maple & Co (Paris) Ltd [1908] AC 22, HL(E)
Invercargill City Council v Hamlin [1996] AC 624; [1996] 2 WLR 367; [1996] 1 All ER 756, PC
La Mutuelle Du Mans Assurances (unreported) 12 July 2005, Pumfrey J
Lawson's Trusts, In re [1896] 1 Ch 175
Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387; [1996] 1 All ER 585, CA
New Millennium Experience Co Ltd, In re [2003] EWHC 1823 (Ch); [2004] 1 All ER 687
New York Breweries Co Ltd v Attorney General [1899] AC 62, HL(E)
Regatta Trading Ltd, In re (unreported) 21 July 1998, Common Law Division of the High Court of Justice of the Isle of Man
SW v United Kingdom (1995) 21 EHRR 363
Schemmer v Property Resources Ltd [1975] Ch 273; [1974] 3 WLR 406; [1974] 3 All ER 451
Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670, PC
Stegmann, Ex p [1902] TS 40
Sussex Brick Co, In re [1904] 1 Ch 598, CA
T & N Ltd, In re [2004] EWHC 2361 (Ch)
TTR Ltd, In re (unreported) 19 February 2002, Lawrence Collins J
Turners & Growers Exporters Ltd v The ship Cornelis Verolme [1997] 2 NZLR 110
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250, CA
World Duty Free Co Ltd, In re (unreported) 14 November 2003, Chancery Division of the High Court of Justice of the Isle of Man

APPEAL from the Staff of Government Division of the High Court of Justice of the Isle of Man

The appellant, Cambridge Gas Transportation Corpn, appealed from the decision of the Staff of Government Division of the High Court of Justice of the Isle of Man (Tattersall QC, JA and Teare QC, acting deemster), dated 21 March 2005, reversing the decision, dated 14 October 2004, of Deemster Kerruish QC in proceedings brought by the respondents, the Official Committee of Unsecured Creditors of Navigator Holdings plc and its subsidiaries, that, inter alia, the order of the United States Federal Bankruptcy Court for the Southern District of New York confirming a plan of reorganisation made under Chapter 11 of the United States Bankruptcy Code was in rem and holding instead that it was in personam.

The facts are stated in the judgment of their Lordships.

Robert Howe and *Shaheed Fatima* for the appellant. The Staff of Government Division's decision that the US Federal Bankruptcy Court's order regarding the vesting of the appellant's shares was in personam rather than in rem and that it could be recognised and enforced against the appellant as a matter of comity was erroneous and contravened the basic rule of common law concerning the recognition and enforcement of foreign judgments or orders in personam, namely, that the domestic court will not accept the self-asserted jurisdiction of a foreign court, but can only recognise or enforce an order of a foreign court if the latter had jurisdiction over the party in question in the eyes of the domestic court: see *Buchanan v Rucker* (1808) 9 East 192. Comity between different

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A jurisdictions in cross-border insolvency, although of great importance and a relevant factor in the exercise by the court of discretionary powers, does not enable the court to alter or dispense with mandatory provisions of the law which it administers: see *In re T & N Ltd* [2004] EWHC 2361 (Ch). The approach of English courts to recognising and enforcing foreign insolvency judgments is to take pains over jurisdictional points where third B parties, not party to the foreign proceedings, are involved and to subject the case to rigorous analysis to see whether recognition and enforcement are merited: see *Felixstowe Dock and Railway Co v United States Lines Inc* [1989] QB 360 and *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213.

Even if it were possible to enforce an order in personam based only on the self-asserted jurisdiction of the foreign court, the Staff of Government C Division erred in concluding that the Federal Bankruptcy Court's order was in personam. The unambiguous wording of clause 22 of the plan as confirmed by the Federal Bankruptcy Court's order regarding the vesting of the appellant's shares makes it an order in rem. Since the shares in Navigator Holdings plc were not situated in the USA at the time of the bankruptcy proceeding, the order of the Federal Bankruptcy Court, as a D judgment in rem, is not capable of recognition or enforcement in the Isle of Man: see *New York Breweries Co Ltd v Attorney General* [1899] AC 62, *Inland Revenue Comrs v Maple & Co (Paris) Ltd* [1908] AC 22, *Brassard v Smith* [1925] AC 371, *Erie Beach Co Ltd v Attorney General for Ontario* [1930] AC 161 and *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.

The Staff of Government Division also held that, independently of the E general common law jurisdiction to assist a foreign court, section 101 of the Companies Act 1931, the Manx equivalent of section 359 of the English Companies Act 1985, enabled it to make the order confiscating the appellant's shares. Section 101 gives the court power to rectify the register of shares to reflect the true ownership of the shares, but the section does not confer on the court an original power or discretion to alter the ownership of F the shares: see *In re Hoicrest Ltd* [2000] 1 WLR 414. [Reference was also made to *Chief Constable of Kent v V* [1983] QB 34 and *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670.]

Ewan McQuater QC for the respondents. In addressing issues of private international law the court must look at "the substance of the issue rather than the formal clothes in which it may be dressed": *Wight v Eckhardt* G *Marine GmbH* [2004] 1 AC 147, para 12. The substance of the issue in the present case is whether the Manx High Court had jurisdiction to recognise the US bankruptcy proceedings and to give the assistance requested by the Federal Bankruptcy Court in implementing the plan of reorganisation approved by the court in those proceedings. Insolvencies give rise to different considerations under private international law and are accorded special treatment. A civil judgment, whether foreign or English, generally H concerns only the parties. Insolvency has a broader impact. It is, almost invariably, a collective procedure instigated for the benefit of the creditors as a body. The status of the insolvent is likely to be affected. More importantly, the rights of others may also be affected: see *Ex p Stegmann* [1902] TS 40.

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The commercial necessity for international co-operation between courts in matters of cross-border insolvency has long been recognised and is repeatedly stressed in the authorities: see *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112. Foreign insolvency proceedings may be recognised in England at common law if the debtor company submitted to the jurisdiction of the foreign court: see *Barclays Bank plc v Homan* [1993] BCLC 680 and *Turners & Growers Exporters Ltd v The ship Cornelis Verolme* [1997] 2 NZLR 110. The European Court of Human Rights in *SW v United Kingdom* (1995) 21 EHRR 363 described the development of the common law to meet changing circumstances as a well entrenched and necessary part of legal tradition. [Reference was also made to *Invercargill City Council v Hamlin* [1996] AC 624 and *Schemmer v Property Resources Ltd* [1975] Ch 273.]

Recognition of a foreign insolvency by the court carries with it the active assistance of the court: see *In re African Farms Ltd* [1906] TS 373, *In re Impex Services Worldwide Ltd* [2004] BPIR 564 and *In re Business City Express Ltd* [1997] 2 BCLC 510. Nor is such assistance restricted to procedural matters: see *Al Sabah v Grupo Torras SA* [2005] 2 AC 333. Under section 425 of the Companies Act 1985 the English court may give effect to a scheme of arrangement in relation to either the share capital or the creditors of a company, where that arrangement has been approved by a vote of the relevant shareholders or creditors and is considered by the court to operate fairly: see *In re Drax Holdings Ltd* [2004] 1 WLR 1049, *In re DAP Holdings NV* (unreported) 26 September 2005 and *La Mutuelle Du Mans Assurances* (unreported) 12 July 2005. Schemes of arrangement under section 425 of the 1985 Act do not infringe the dissentient shareholders' rights of property under article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: see *In re Equitable Life Assurance Society* [2002] 2 BCLC 510. Where a company is insolvent, it is the interests of the creditors and not the interests of the shareholders, whose shares have become worthless, which must be regarded as the interests of the company. To allow the interests of the shareholders to prevail over the interests of the creditors runs contrary to well established principles of insolvency law: see *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250, *Brady v Brady* [1988] BCLC 20 and *In re Bank of Credit and Commerce International SA (No 10)* [1995] 1 BCLC 362.

The discretion to assist foreign insolvencies at common law is not too vague to be workable: see *Turners & Growers Exporters Ltd v The ship Cornelis Verolme* [1997] 2 NZLR 110, *In re Impex Services Worldwide Ltd* [2004] BPIR 564, *In re TTR Ltd* (unreported) 19 February 2002, *In re Petition of Green* (1952) 60 MLR 254, *In re Regatta Trading Ltd* (unreported) 21 July 1998, *Felixstowe Dock and Railway Co v United States Lines Inc* [1989] QB 360 and *In re Bank of Credit and Commerce International SA (No 3)* [1993] BCLC 1490.

If the Staff of Government Division was right to recognise the US bankruptcy proceedings, then the court must approach section 101 of the 1931 Act on the basis that it wishes to give the active assistance sought by the Federal Bankruptcy Court if it properly can. Navigator Holdings plc is an Isle of Man company, so section 101 applies to it. The respondent is a

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A "person aggrieved": compare *In re New Millennium Experience Co Ltd* [2004] 1 All ER 687. [Reference was also made to *In re Sussex Brick Co* [1904] 1 Ch 598, *In re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636, *In re World Duty Free Co Ltd* (unreported) 14 November 2003, *In re Anderson* [1911] 1 KB 896, *In re Lawson's Trusts* [1896] 1 Ch 175 and *In re Davidson's Settlement Trusts* (1873) LR 15 Eq
B 383.]

Howe replied.

Cur adv vult

16 May. The judgment of their Lordships was delivered by LORD HOFFMANN

C 1 In 1997 four European businessmen decided to invest in a shipping business. The lead appears to have been taken by a Mr Giovanni Mahler, a Swiss resident who had about 10% of the equity. The investors borrowed some US$300m on the New York bond market and ordered five gas transport vessels with which they commenced trading at the beginning of 2001. Unfortunately the venture was a failure. Freight rates were lower
D than expected and the ships never earned enough to cover even the interest on the loans. At the end of 2003 the investors ran out of credit. The business was heavily insolvent. They petitioned for relief in New York under Chapter 11 of the US Bankruptcy Code, which allows insolvent companies, under supervision of the court and cover of a moratorium, to negotiate a plan of reorganisation with their creditors. In March 2004 the Federal
E Bankruptcy Court for the Southern District of New York confirmed a plan approved by virtually all the outside creditors and ordered that it be carried into effect. Essentially, the plan was for the assets to be taken over by the creditors.

2 This is a simple enough story, though unhappy, and the only complications arise out of the corporate structure adopted by the investors. The business was, as is frequently the case, held through offshore companies
F incorporated in various jurisdictions. The ships, registered in Liberia, were owned and managed by a group of Isle of Man companies, each ship owned by a separate subsidiary of a management company and all the shares in the management company held by a holding company, Navigator Holdings plc. It will be convenient to refer to the group as "Navigator" and the shares in the holding company as the shares in Navigator.

G 3 Navigator was in turn held through a web of companies incorporated in other offshore jurisdictions, of which it is for present purposes necessary to mention only two: Cambridge Gas Transport Corpn ("Cambridge"), a Cayman company which owns, directly or indirectly, at least 70% of the issued share capital of Navigator, and Vela Energy Holdings Ltd ("Vela"), a Bahamian company which (through an intermediate wholly owned Bahamian subsidiary) owns all the issued share capital in Cambridge.
H Mr Mahler is a director of Vela, Cambridge, the Navigator companies and various other associated offshore companies.

4 The use of a scheme of arrangement agreed by a statutory majority of creditors to replace what would otherwise be the liquidation of an insolvent company has existed in England (in somewhat rudimentary form)

since the Joint Stock Companies Arrangement Act 1870 (33 & 34 Vict c 104). The 1870 Act is reproduced in the Isle of Man as section 152 of the Companies Act 1931 and remains the only form of arrangement between a company and its creditors available in that jurisdiction. Chapter 11 is considerably more sophisticated and will ordinarily allow the management of the insolvent company to remain in control (as "debtor in possession") until a plan of reorganisation has been approved by the court. The debtor has a priority right to propose a plan; if this is rejected or the priority period expires, other parties in interest may put forward a different plan. In this case, the debtor put forward a plan under which the assets of the business, that is to say the ships, would be sold, nominally by auction but in fact to Mr Mahler and his associates, who were referred to as "the Vela interests". This plan did not appeal to the bond holders, who put forward their own plan under which the assets of Navigator would be vested in the creditors and the equity interests of the previous investors extinguished. The judge rejected the Vela plan and approved the creditors' plan.

5 The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives. That would enable the creditors to control the shipping companies and implement the plan. So clause 22 provided:

> "Immediately upon entry of this confirmation order, title to the old common stock [of Navigator] shall automatically vest in the interim shareholders [the creditors' committee] without any further act by any person or under any applicable law, regulation, order or rule. The interim shareholders shall then, in their capacities as shareholders of [Navigator], take all necessary steps under the laws of the Isle of Man or otherwise to implement [the plan]."

6 The New York court was of course aware that such a provision could not automatically have effect under the law of the Isle of Man. The order confirming the plan therefore recorded the intention of the court to send a letter of request to the High Court of Justice of the Isle of Man, asking for assistance in giving effect to "the plan and the confirmation order". Such a letter was duly sent.

7 The committee of creditors then petitioned the High Court for an order vesting the shares in their representatives. They were met by a cross-petition by Cambridge, the wholly-owned Cayman subsidiary of Vela in which, it will be remembered, most of the shares in Navigator were vested, asking the court not to recognise or enforce the terms of the plan. The basis of the cross-application was that Cambridge, as a separate legal entity registered in the Cayman Islands, had never submitted to the jurisdiction of the New York court. An order of that court could therefore not affect its rights of property in shares in the Isle of Man.

8 This submission bore little relation to economic reality. The New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors. Vela, the parent company of Cambridge, participated in the Chapter 11 proceedings and arranged the finance which was to have been the cornerstone of the shareholders' plan. It is therefore not surprising that the

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A New York court did not trouble to ask whether the voluntary petition presented by Navigator had the formal consent of its own stockholder company when that company was the creature of the real parties in interest who were actively participating in the proceedings. For Cambridge, which was no doubt administered by lawyers in Cayman on the instructions of Mr Mahler, the claim that it had not submitted to the jurisdiction was B technical in the highest degree. Mr Mahler was, it appears, a director of Cambridge as well as Vela and the Navigator companies, although he himself was not entirely sure about the full extent of his directorships. Given the intricate corporate structure of the Vela interests, this is quite understandable. He was, as he explained in a deposition "not a person who goes into details".

9 The other remarkable feature about the position which Cambridge C has taken and persisted in before the High Court, the Court of Appeal and now the Privy Council, is that the shares in Navigator which it complains have been confiscated by the exorbitant extra-territorial reach of the US Bankruptcy Court are completely and utterly worthless. Navigator's petition disclosed debts of some US$390m and assets of $197m. The Board is therefore left to wonder about the purpose of this litigation. Mr Howe, in D his brave and able submissions for Cambridge, said that drawing attention to these matters was a jury point. The shares might be worthless now, perhaps in the foreseeable future, but some day freight rates might rise sufficiently to float the business and make the shares valuable property. An alterative possibility is that the purpose is to wreck or delay implementation of the confirmed plan in an attempt to drive the creditors back to the negotiating table and secure better terms.

E 10 Before the High Court, Cambridge's objection succeeded. The deemster found as a fact that although Vela had participated in the bankruptcy proceedings in New York, its subsidiary Cambridge had not submitted to the New York jurisdiction. This finding is somewhat surprising but was upheld by the Court of Appeal and the creditors' committee, faced with concurrent findings of fact, have not appealed against it. So the New F York court had no personal jurisdiction over Cambridge. The deemster then held that clause 22 of the plan, as confirmed by the court's order, was a judgment in rem purporting to change the title to property outside the jurisdiction. According to general principles of private international law, judgments in rem can affect only property within the court's territorial jurisdiction. The judgment could therefore not be recognised.

G 11 The Court of Appeal, reversing the deemster, held that upon its true construction, the New York order was not a judgment in rem. It was a judgment in personam in proceedings in which Navigator, by its voluntary petition, had submitted to jurisdiction of the New York court. At common law, the Manx court has a broad discretionary jurisdiction to assist a foreign court dealing with the bankruptcy of a company over which that court had jurisdiction. It could and should assist by vesting the Navigator shares in the H creditors' committee to enable the implementation of the plan.

12 Mr Howe's argument for Cambridge was straightforward. The New York order was either a judgment in rem or in personam. If it was in rem, then as everyone agrees, it could not affect the title to shares in the Isle of Man. On the other hand, if it was in personam, it was only binding upon

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persons over whom the New York court had jurisdiction. The fact that Navigator had submitted to the jurisdiction was irrelevant. The Court of Appeal, having found that the judgment was in personam, then proceeded to enforce it against the wrong persona. Cambridge was the relevant persona because the order purported to deprive Cambridge of its property. On the finding that Cambridge did not submit to the jurisdiction, there was no basis upon which the order of the New York court could bind it. Cambridge was a Cayman company whose sole business was to own shares in the Isle of Man. It had nothing whatever to do with New York.

13 Mr Howe's submissions as to the rules of private international law concerning the recognition and enforcement of judgments in rem and in personam are of course correct. If the New York order and plan had to be classified as falling within one category or the other, the appeal would have to be allowed. But their Lordships consider that bankruptcy proceedings do not fall into either category. Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.

14 The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details. For example, in personal bankruptcy in England, the assets of the bankrupt are vested in a trustee for realisation and distribution to creditors. So the mechanism operates by divesting the bankrupt of his property. In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986: see *Ayerst v C & K (Construction) Ltd* [1976] AC 167. In the case of personal bankruptcy, the bankrupt may afterwards be discharged from liability for his pre-bankruptcy debts. In the case of corporate insolvency, there is no provision for discharge. The company remains liable but when all its assets have been distributed, there is nothing more against which the liability can be enforced: see *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, 155–156. At that point, the company is usually dissolved.

15 But these are matters of detail. The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings.

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A 16 The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. For example, in
B *Solomons v Ross* (1764) 1 H Bl 131n a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm but Bathurst J, sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the
C Dutch bankruptcy.

17 This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not
D all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.

E 18 As Professor Fletcher points out (*Insolvency in Private International Law*, 1st ed (1999), p 93) the common law on cross-border insolvency has for some time been "in a state of arrested development", partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as section 426 of the Insolvency Act 1986, the European Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1) and the Cross-Border Insolvency
F Regulations 2006 (SI 2006/1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.

19 The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest
G automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in *Solomons v Ross*, or in which he submitted to the jurisdiction: *In re Davidson's Settlement Trusts* (1873) LR 15 Eq 383. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a
H foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.

20 Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's

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assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of *In re African Farms Ltd* [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, "recognition which carries with it the active assistance of the court". He went on to say that active assistance could include:

> "A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws."

21 Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.

22 What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.

23 Mr McQuater for the creditors placed some reliance upon the court's power, under section 101 of the Companies Act, to order rectification of the share register. But that power cannot provide an independent justification for transferring shares into the names of the representatives of the creditors. It is exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". Thus the power is exercisable only if the company ought to have entered the representatives of the creditors in the register as shareholders. But for that purpose it is necessary to show that by the law of the Isle of Man the company was obliged to do so. And the source of such an obligation can be found only in an order of the court, pursuant to its common law power of assistance, which requires the company to make such an entry. The argument based on section 101 is therefore circular. The prior question is whether the court has power to declare that the Chapter 11 plan should be carried into effect.

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A 24 In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies Act 1931, could have achieved exactly the same result as the Chapter 11 plan. The Manx statute provides:

> "(1) Where a compromise or arrangement is proposed between a B company and its creditors . . . the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors . . . to be summoned in such manner as the court directs.
>
> (2) If a majority in number representing three-fourths in value of the C creditors . . . agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors . . . and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

25 The jurisdiction is extremely wide. All that is necessary is that the D proposed scheme should be a "compromise or arrangement" and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? Mr Howe accepts that if the plan had provided that all the assets of Navigator, that is to say, the shares in the management company and the shipowning companies, should be transferred to the E representatives of the creditors, he could have had no objection. But he says that because the plan achieved the same economic effect by transferring the shares in Navigator, it was beyond the jurisdiction of the Manx court to give effect to it. The Navigator shares were not the same thing as the assets of Navigator. They were separate items of property belonging to a person who was not party to the bankruptcy proceedings. The plan might just as well F have attempted to confiscate the assets of any other citizen who had nothing to do with the bankruptcy.

26 Their Lordships consider that this argument is based upon a misunderstanding of the nature of shares in a company. In the classic definition of Farwell J (*Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279, 288), "A share is the interest of a shareholder in the company G measured by a sum of money, for the purpose of liability in the first place, and of interest in the second". In the case of fully paid shares, the question of liability does not of course arise. So a share is the measure of the shareholder's interest in the company: a bundle of rights against the company and the other shareholders. As against the outside world, that bundle of rights is an item of property, a chose in action. But as between the shareholder and the company itself, the shareholder's rights may be H varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152. As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152. It is

the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing: see *In re Oceanic Steam Navigation Co Ltd* [1939] Ch 41. The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. Whatever the scheme, it is, by virtue of section 152, binding upon the shareholders when it receives the sanction of the court. The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan which has been confirmed in a foreign jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation.

27 They will humbly advise Her Majesty that the appeal should be dismissed with costs.

Solicitors: Trowers & Hamlins; Freshfields Bruckhaus Deringer.

M F

Exhibit 17

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 157 OF 2017 (NSJ)

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED

AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE IN RESPECT OF WINDING UP PROCEEDINGS PENDING IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

JUDGMENT

Appearance: **For the Liquidators: Ms Clare Stanley QC with Shaun Maloney of Ogier**

Before: **The Hon. Justice Segal**

Heard: **25 August 2017**

Judgment: **19 September 2017**



Headnote

Application for recognition and assistance at common law by foreign liquidators – Hong Kong liquidators of Cayman company seeking an order from the Cayman Court permitting them to apply in Cayman for a Cayman scheme to be approved and sanctioned in parallel with a Hong Kong scheme – approach of the Court to requests for assistance at common law by a liquidator appointed in a place other than the country of incorporation of the company concerned

The application, the relief sought and a summary of the orders to be made

1. I have before me an ex parte summons (the ***Summons***) issued by the Hong Kong liquidators of a Cayman company, China Agrotech Holdings Limited (the ***Company***). In the Summons the Hong Kong liquidators seek orders from this Court giving them certain powers and the authority to act on behalf of the Company for the limited

purpose of presenting a petition for a scheme of arrangement between the Company and its creditors in Cayman as part of a corporate rescue of the Company involving a parallel scheme of arrangement with creditors to be filed in the High Court of the Hong Kong Administrative Region (the ***Hong Kong Court***) and a restructuring of the Company's capital with shareholder approval.

2. The Summons was supported by two affirmations made by Chan So Fun (***Mr Chan***), a solicitor in Hong Kong in the firm of solicitors advising the Hong Kong liquidators (Michael Li & Co), two affidavits made by David Yen Ching Wai (one of the Hong Kong liquidators and a managing director of Ernst & Young Transactions Limited) one affirmation made by Stephen Liu Yiu Keung (the other Hong Kong liquidator and also a managing director of Ernst & Young Transactions Limited) and one affidavit made by David Andrew Freeman (a paralegal with Ogier, the firm of attorneys acting for the Liquidators). David Yen Ching Wai and Stephen Liu Yiu Keung are referred to as the ***Liquidators***. As I have said, this was an ex parte summons and so no notice has yet been given to the Company's directors, shareholders or creditors.

3. The Summons was issued pursuant to a letter of request dated 19 July 2017 from the Hong Kong Court addressed to this Court, which was issued pursuant to an order of Mr Justice Harris (the ***Letter of Request***). The Letter of Request sets out the orders which this Court is requested to make. I shall explain and discuss the precise terms of the proposed orders shortly.

4. For the reasons explained below, I have concluded that I can and should permit the Liquidators to apply in the name and on behalf of the Company for and promote a parallel scheme in Cayman and that I should take steps that will ensure that proceedings commenced against the Company pending the consideration and sanctioning of the scheme can be adjourned or stayed in order to allow the scheme process to be completed. However, I consider that the order to be made should be in a different form from and grant relief in a different manner from that detailed in and set out in the Letter of Request (although the order will be in accordance with and respond to the Letter of Request which invited this Court to give such further or other relief by way of cross-border judicial assistance at common law as this Court considers just and convenient). I also consider that the Liquidators should only be permitted to apply for an order convening the scheme meeting(s) after the Company's directors, shareholders and creditors have been notified of the Summons and given an

opportunity to file objections or submissions and be heard by this Court. If no such objections or submissions are filed, and if no-one notifies the Liquidators of their intention to appear and be heard, the Liquidators may proceed to file the Company's petition for an order convening the scheme meeting(s) without the need for a further hearing.

The background to the Summons

5. The Company has various significant connections with Hong Kong. In particular its shares have been listed on the Main Board of the Hong Kong Stock Exchange (***HKSE***) since 14 January 2002. However since 18 September 2014 the Company's shares have been suspended from trading. Furthermore the corporate business of the Company has been administered from Hong Kong and the Company was registered under part XI of the former Companies Ordinance on 4 November 1999.

6. On 11 November 2014 a creditor of the Company presented a winding up petition on the ground that the Company was insolvent and unable to pay its debts. On 17 August 2015 the Hong Kong Court made a winding up order (the ***Winding up Order***) and appointed the Liquidators.

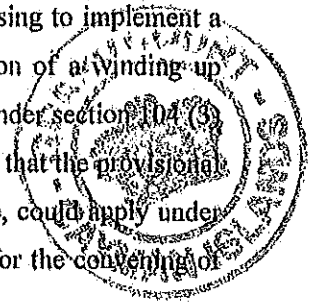
7. Since their appointment the Liquidators have considered what action to take in order to maximise recoveries for and protect the interests of the Company's creditors. They have concluded that the best option available involves giving effect to a resumption proposal and reorganisation of the Company. The Company, with Fine Era Limited, (the ***Vendor***), which is a BVI company, submitted a resumption proposal to the HKSE on 24 August 2016. The purpose of the resumption proposal is to permit the Company to satisfy the HKSE's conditions for allowing the Company's shares to be re-listed, to inject into the Company an active and profitable business and sufficient funds to permit the Company to make a payment to its creditors and for working capital and the payment of the fees involved in the process.

8. The resumption proposal involves an agreement between the Company and the Vendor with various terms and steps. Under the agreement the Company will purchase from the Vendor for a consideration of HK$400,000,000 the entire equity interest in Yu Ming Investment Management Limited (***Yu Ming***). Yu Ming is a licenced corporation carrying on various regulated activities including dealing in

securities, advising on securities and asset management. Following the acquisition by the Company of the equity interests in Yu Ming there will be a capital reorganisation of the share capital of the Company (comprising a capital reduction, share consolidation and increase in the Company's authorised share capital) so as to facilitate the issue of new shares in the Company under a placing and open offer. The placing will raise funds of approximately HK$462,222,000 which will be used for the partial settlement of the consideration payable by the Company for the acquisition of the equity interests in Yu Ming and also to fund a settlement to be offered to the Company's creditors under the proposed schemes of arrangement. Further funds of approximately HK$78,137,000 will also be raised under the proposed open offer. The Company will transfer HK$80,000,000 from the placing to the proposed schemes of arrangement for distribution to the Company's creditors in settlement of their debts. In addition the Vendor will provide a cash advance to the Company and additional funding to finance fees.

9. In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions the Liquidators will apply on behalf of the Company to the Hong Kong Court for the approval and sanctioning of a scheme of arrangement and will also apply for the permanent stay of the Hong Kong winding up upon the successful implementation of the scheme. In addition to the Hong Kong scheme the Liquidators wish to promote a Cayman scheme. After consulting legal advisers in both Hong Kong and Cayman the Liquidators concluded that it was necessary for an inter-conditional scheme to be implemented in the Company's place of incorporation that is the Cayman Islands, in parallel with the proposed Hong Kong scheme.

10. The Liquidators also concluded that it would not be possible or appropriate in the present case for a winding up petition to be presented in Cayman in respect of the Company and for an application to be made in Cayman for the appointment of provisional liquidators who would then promote the Cayman scheme. Such an approach has, of course, been taken in a number of other cases in the past - in which a company subject to a foreign insolvency proceeding and proposing to implement a corporate reorganisation or rescue has, following the presentation of a winding up petition, applied for the appointment of a provisional liquidator under section 104 (3) of the Companies Law (2016 Revision) (the ***Companies Law***)) so that the provisional liquidator, working in conjunction with the foreign representative, could apply under section 86(1) of the Companies Law on behalf of the Company for the convening of



meetings of creditors to approve and the sanction by the Court of a Cayman scheme (with the benefit of the statutory stay and moratorium). The Liquidators took advice from Richard de Lacy QC (who sadly died recently and to whom I should like to pay tribute as a fine Cayman and English lawyer and a true gentleman). Based on this advice they concluded that there were various uncertainties that made it undesirable to seek to present a winding up petition in Cayman, particularly if an alternative option was available. Mr de Lacy had expressed a concern that before the Company's directors could present a winding up petition they would need to obtain a special resolution from the Company's shareholders, which would not only be time consuming and costly but would create difficulties for a listed company the trading of whose shares had been suspended (although I note that it does appear that the Company's articles of association give the directors the power to petition without shareholder approval). Mr de Lacy also noted that it was unclear whether the directors would be treated by this Court as having the power and authority to present a winding up petition following the appointment of the Liquidators. He had therefore recommended that the Liquidators apply to the Hong Kong Court for the issue of a letter of request to this Court in which the Hong Kong Court would ask this Court to make orders in a suitable form that would allow the Liquidators to promote the proposed scheme in Cayman.

The Letter of Request

11. The Liquidators, as I have noted, did apply to the Hong Kong Court for the issue of a letter of request and Mr Justice Harris ordered that a letter of request be issued. The Letter of Request was issued on 19 July 2017. The following points emerge from the Letter of Request:

(a). the Letter of Request recited the appointment of the Liquidators and that:

"the Liquidators have demonstrated to the satisfaction of this Court that it is necessary and desirable for the purposes of implementing the rescue and restructuring of the Company for the benefit of the Company's creditors and shareholders and that it is in the interest of justice to assist the Liquidators in exercising all the powers, duties and discretions afforded to them by the [winding up order] (and applicable law); and that it is just and convenient that [the Letter of Request] be issued."

(b). The Letter of Request requested this Court *"pursuant to its inherent jurisdiction and all other powers vested in it, to assist and act in aid of the*

Hong Kong court" in the winding up proceedings in respect of the Company by making the orders requested.

(c). The orders requested were as follows:

"1. *Making an order if [this Court] thinks fit that the Liquidators ... be recognised by [this Court] and be treated in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by [this Court], including recognition of the powers and authority of the Liquidators to act on behalf of the Company, amongst other things:*

(1) to secure the alteration [of] or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

(2). to pay a class or classes of creditors in full;

(3). to make a compromise or arrangement with-

(a). creditors or persons claiming to be creditors;
(b). persons having or alleging themselves to her of any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the company may be rendered liable.

(4). to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and –

(a). a contributory;
(b). an alleged contributory; or
(c). any other debtor or person apprehending liability to the Company.

(5). to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

(6). to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(7). to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

(8). to appoint an agent to do any business that the Liquidator is unable to do in person; and

(9). to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. If thought fit, making such further or other Orders as may be required in accordance with such recognition and, in particular, an Order staying the

same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) [Ordinance] (CAP 32)) that section 97 of the Cayman Islands Companies Law (2016 Revision) shall apply to the Company so that no action or proceeding shall be proceeded with or commenced against the Company within the jurisdiction of [this Court] except by leave of [this Court] and subject to such terms as [this Court] may impose;

3. *Giving such further or other relief or assistance by way of cross – border judicial assistance at common law as [this Court]may think just and convenient; and*

4. *The Liquidators [to] have liberty to apply for further relief to [this Court].*"

The Summons and the draft order

12. The Summons seeks orders in similar terms as follows:

"1. *That the [order of the Hong Kong court dated 17 August 2015 appointing the Liquidators][the Appointment Order]and [the Liquidators]be recognised by this Court such that the Appointment Order be treated in all respects in the same manner as if the Appointment Order had been made and [the Liquidators] had been appointed as the joint and several provisional liquidators of the Company by this Court, including recognition of the powers and authority of [the Liquidators] to act on behalf of the Company, including, inter alia;*

a. *to alter or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;*

b. *to pay a class or classes of creditors in full;*

c. *to make a compromise or arrangement with-*

i. *creditors or persons claiming to be creditors;*
ii. *persons having or alleging themselves to her of any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the Company, or for which the Company may be rendered liable.*

d. *to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and—*

1. *a contributory;*
2. *an alleged contributory; or*
3. *any other debtor or person apprehending liability to the Company,*

e. *to bring or defend any action or other legal proceedings in the name and on behalf of the Company;*

f. to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

g. to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

h. to appoint an agent to do any business that the Liquidator is unable to do in person; and

i. to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. [That in accordance with such recognition as set out in paragraph 1 above and for the avoidance of doubt, that] section 97 of the Companies Law (2016 Revision) shall apply to the Company so that no action or proceedings shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this Court may impose.

3. That the [Liquidators] shall have liberty to apply to this Court in respect of any matter concerning the Company and arising during the period of the appointment of the [Liquidators] as Joint Provisional Liquidators of the Company and by doing all such things as may be necessary to assist the [Liquidators] (or one or more of them) in connection with their appointment as the joint and several provisional liquidators of the Company."

13. The draft order filed by the Liquidators sets out the orders sought in the Summons in the same form, save that the words in square brackets at the beginning of paragraph 2 were omitted.

The Liquidators' submissions

14. The submissions of Ms Stanley QC for the Liquidators can be summarised as follows:

(a). the Court has an inherent jurisdiction (at common law) to recognise the powers given (and to grant assistance) to a foreign liquidator appointed by an order of a competent court and to send and receive letters of request relating to the recognition of such court appointed liquidators (citing in support, in relation to letters of request, *In the Matter of Basis Yield Alpha Fund (Master)* [2008] CILR 50 at [51] – [56]).

(b). the common law jurisdiction to recognise (and assist) foreign insolvency officeholders appointed in the country of incorporation of the company is well

established in Cayman – see, for example, in relation to the recognition of a receiver appointed by a foreign court in the company's place of incorporation *Kinderkin v Player* [1984] CILR 63 (CA) at pp. 82-83 and also *Basis Yield* (supra) at [46] (Ms Stanley notes that the Cayman legislature has, in Part XVII of the Companies Law, also codified and extended the Court's powers in relation to foreign representatives appointed in the country of incorporation).

(c). but the non-statutory jurisdiction is not limited to foreign insolvency officeholders, including liquidators, appointed by a court in the country of incorporation of the relevant company. The Court has jurisdiction to recognise and grant assistance to liquidators appointed by other courts in certain circumstances.

(d). such jurisdiction can and should be exercised:

(i). at least where the evidence establishes that there will not be, or it that it is unlikely that there will be, a winding up in the country of incorporation;

(ii). probably also in any case in which the relief sought by the foreign liquidator would be available to a Cayman official liquidator if appointed and there is no reason why, having regard to the interests of the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and

(iii). where the company concerned has submitted to the jurisdiction of the relevant foreign court.

(e). as regards (d)(i), in the present case the evidence demonstrates that it is unlikely that any application will be made for a Cayman winding up. Accordingly, the basis for exercising the jurisdiction to recognise and assist on the first ground is established. The Court should exercise the jurisdiction because the Company has the right under the Companies Law to apply to the Court and commence the scheme approval process and since the Liquidators

are acting on behalf of the Company, their action is in accordance with the statutory power and Cayman law; it is manifestly in the interests of all the Company's stakeholders to permit the Liquidators to proceed with the Cayman scheme and granting the relief sought involves the Court co-operating, in accordance with the principle of comity, with the Hong Kong Court and the liquidators it has appointed (as the only proceeding commenced and to be commenced in relation to the Company and a Court with which the Company has substantial and significant connections) in circumstances where there are no policy or other reasons which require a local winding up or which would require and justify refusing the relief sought by the Liquidators.

(f). as regards (d)(ii), a local liquidator would be able to petition the Court to convene meetings of creditors to vote on the scheme but a local winding up is unnecessary as it would involve unnecessary expense and no additional benefits to creditors and members (unless, of course, a Cayman winding up is necessary in order for there to be a Cayman scheme).

(g). a Cayman winding up is unlikely because none of those with standing to present a winding up petition are able or willing to do so. As David Yen Ching Wai stated in his second affidavit, the Company's directors (those directors who have not resigned) have been unwilling to contact and cooperate with the Liquidators and appear unwilling to exercise any residual power which the directors might retain to act on behalf of the Company and present a petition. Indeed, it was arguable that the directors could not exercise any such power (at least without the consent of the Liquidators) following the making of the Winding up Order. Furthermore, it was unlikely that the shareholders would wish or be prepared to present a petition. In addition, the Company's creditors (many of whom had already participated and filed proofs in the Hong Kong liquidation) also have not indicated any intention to present a petition for or wish to have a Cayman winding up. The Winding up Order was made over two years ago and no creditor had sought a Cayman winding up since then.

(h). a Cayman winding up is unnecessary because it has already been determined that the resumption proposal is in the best interests of the Company's creditors and shareholders and a Cayman winding up is not needed to

implement that proposal or to protect the interests of creditors or other stakeholders (the resumption proposal will not require a distribution by the Liquidators to creditors and will involve a stay of the Hong Kong liquidation so that there will be no risk of any differences between the rules regulating distributions or avoidance actions in Hong Kong and Cayman giving rise to differences of outcomes for creditors or members). The Liquidators with the support of the Hong Kong Court have concluded that they should give effect to the resumption proposal and exit from the Hong Kong liquidation without the need for a Cayman winding up by obtaining the approval of creditors to and the sanction of the Hong Kong and Cayman courts for the schemes (and to a capital reduction and reorganisation).

(i). as regards (d)(iii), since the Company submitted to the jurisdiction of the Hong Kong Court by registering as an overseas company in Hong Kong, this Court should recognise and give effect to the Winding up Order, at least the powers of the Liquidators thereunder or resulting therefrom to act on behalf of the Company (including the power to act on behalf of the Company for the purpose of presenting a petition under section 86(1) of the Companies Law for an order convening a meeting of creditors and for the sanctioning of a scheme of arrangement in respect of the Company).

(j). the Company registered under Part XI of the former Companies Ordinance (Cap. 32) on 4 November 1999 (Part XI has now been superseded by Part 16 of the Companies Ordinance, Chapter 622 to which the Company is now subject). Part XI (and Part 16) relate to overseas companies that is companies incorporated outside Hong Kong, which have established a place of business in Hong Kong. According to Mr Chan (see paragraph 9 of his second affirmation):

> *"by registering under Part XI of the former Companies Ordinance (Cap. 32), the Company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the Company is "within the jurisdiction" and can therefore be served with a winding up petition in accordance with Order 10, rr.1 - 5 of the Rules, ... and sections 326(1) and (2) and section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014),..."*

15. Ms Stanley relied on a number of textbooks and cases in support of her submission that the Court had jurisdiction to and could recognise the appointment and powers of a liquidator appointed by a court in a jurisdiction other than the place of incorporation. In particular she noted and relied on a judgment of Kawaley J in the Supreme Court of Bermuda (in 2008) in a case which was based on similar facts and circumstances to the present case in which the learned judge had permitted a Hong Kong liquidator appointed in respect of a Bermudian company to summon a meeting of creditors to consider a scheme of arrangement in Bermuda. She also noted and relied in particular on an unreported judgment of this Court (in 2010), delivered by the Chief Justice, involving a provisional liquidator appointed in Hong Kong in respect of Cayman company in which the Chief Justice made orders recognising the provisional liquidator's powers to alter and deal with the capital structure of the company and staying proceedings against the company.

16. Ms Stanley's submissions on the grounds I have identified in paragraph 13(d)(i) and (ii) above can be summarised as follows :

(a). Ms Stanley referred to the discussion in *Dicey, Morris & Collins on the Conflict of Laws, (15th Ed)* and submitted that the starting point in the analysis was Rule 179 (at 30R-100) which is in the following terms:

> *"...the authority of a liquidator appointed under the law of the place of incorporation is recognised in England."*

(b). but, Ms Stanley pointed out, in the commentary on Rule 179 Dicey, Morris & Collins amplify their analysis and suggest that the non-statutory jurisdiction to recognise and assist may extend beyond liquidators appointed in the place of incorporation. The commentary suggests that recognition may be permissible where the appointment is made in (under the law of) the country where the company concerned carries on business or, where there is no likelihood of a liquidation in the country of incorporation, in another country. The relevant parts of the commentary are as follows:

> *"30-102*
>
> *The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.*

30-103

Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law. It merely states the position which has been established to date. First, and generally, in determining whether to exercise its jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.

30-104

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that "it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves." However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of liquidation in the country of incorporation." [Underlining added]

(c). Ms Stanley noted that in *Rubin v Eurofinance* [2013] 1 A.C. 236 (UK Supreme Court) (***Rubin***) Lord Collins had referred to Rule 179 and said (at [13]) that:

"*the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation: Dicey , 15th ed, para 30R-100. That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ("the EC Insolvency Regulation") and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties).*" [underlining added]

However, she submitted, this statement was not inconsistent with the commentary set out above since a general rule need not be, and should not be treated as, the exclusive rule (I also note Lord Collins comment at [31] that "*The common law assistance cases ... [had] involved cases in which the foreign court was a court of competent jurisdiction in the sense that the .. company was incorporated there.*")

(d). Ms Stanley also noted that in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (House of Lords) Lord Hoffmann (at [31]) had indicated (obiter) that a test other than the place of incorporation test might be more appropriate for determining whether the foreign court was competent for recognition purposes:

> "*I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1 . That may be more appropriate.*"

While Lord Collins in *Rubin* had referred to this passage (at [122]) and refused (at [129]) to change the settled law on the recognition and enforcement of foreign judgments by formulating a judge-made, common law, rule which would recognise judgments in foreign insolvency proceedings where the foreign court conducting the insolvency proceeding was to be regarded as being competent by reason of the connections between the court and company concerned (such as the country where the insolvent entity has its centre of interests or the country with which the judgment debtor has some other sufficient or substantial connection), his judgment and analysis did not affect the this part of Lord Hoffmann's judgment or the cogency of the comments he had made as they relate to the scope of the common law jurisdiction to recognise foreign liquidators.

(e). Ms Stanley noted that another leading English law textbook dealing with cross-border insolvency also supported the view that recognition should be granted to a liquidator appointed by a court outside the place of incorporation in a case where there was no likelihood of a liquidation being commenced in

the country of incorporation. In paragraphs 6.81 - 6.83 of chapter 6 of Sheldon (and others), *Cross-Border Insolvency* (fourth edition, 2015, Bloomsbury) (written by Tom Smith QC) the point is made as follows.

> *"if the English rules on recognition were restricted to the place of incorporation and an insolvency proceeding has not or even cannot there occur, then no foreign insolvency whatsoever could be recognised. Plainly this would be most unsatisfactory. Accordingly, it is suggested that recognition is possible 'where there is no likelihood of a liquidation in the country of incorporation.'*

(f). Ms Stanley, as I have mentioned, relied on the judgment of Kawaley J in Bermuda in *In re Dickson Group Holdings Limited* [2008] Bda LR 34. The decision in *Dickson Group* and Ms Stanley's submissions based on the decision can be summarised as follows:

(i). in this case, Dickson Group Holdings Limited was a company incorporated in Bermuda in respect of whom a winding up order had been made in Hong Kong. Although the company had been incorporated in Bermuda no business activities took place there but instead the main focus of the company's business was Hong Kong and the People's Republic of China. The liquidators wished to promote a scheme of arrangement which would restructure the company's affairs and leave it in a solvent position. They had decided that there was no need for a winding up in Bermuda but there was a need for a Bermudian scheme as well as a scheme in Hong Kong. Accordingly a summons was issued by the company acting by the Hong Kong liquidators under section 99 of the Bermuda Companies Act 1981 for leave to summons a meeting of creditors to consider the scheme.

(ii). the liquidators did not separately and explicitly seek an order recognising their appointment and powers under the Hong Kong winding up order but Kawaley J considered that recognition was required. The learned judge considered recognition to be necessary even though the company's directors had "*remained in place for Bermuda law purposes and ... had passed a resolution supporting the .. application.*" While the directors might, from a Bermudian perspective, retain powers to bind the company, the scheme and the

application were in substance controlled by the liquidators and therefore it would be artificial to proceed on the basis that the company was effectively acting, in making the application, just by its directors (an argument which Kawaley J labelled "*a Temple point*"!) and grant the company leave to summon a meeting of creditors without deciding that it was permissible and appropriate to recognise the liquidators' appointment and powers to act on behalf of the company.

(iii). counsel for the liquidators argued that there was an exception to the requirement that the foreign liquidator be appointed in the place of incorporation, in a case in which there was no likelihood of a winding up taking place there and that this was such a case. After noting that:

> "*It seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into "full-blown" liquidation in what amount to primary (as opposed to ancillary) proceedings abroad.*"

Kawaley J referred to the commentary on rule 179 in Dicey, Morris and Collins which I have set out above (although in 2008 Lord Collins was yet to be recorded as a co-author and the textbook was referred to as Dicey and Morris, and was in its twelfth edition, with rule 179 being rule 160), to a passage in the second edition (2005) of Philip Wood's *Principles of International Insolvency* (in which Mr Wood had said that there was a disadvantage to recognising only a liquidation in the country of incorporation as many companies were incorporated in one jurisdiction but carried on their principal place of business elsewhere so that it would seem odd to refuse to recognise a liquidation where the main assets are located) and to a passage in Professor Ian Fletcher's *Insolvency in Private International Law* (2007) in which Professor Fletcher stated that where there were no winding up proceedings in the place of incorporation insolvency proceedings taking place in

another jurisdiction might be considered to be the most appropriate way to wind up the company.

(iv). after referring to the "*high judicial authority*" and the analysis of the court's "*common law discretion*" in the judgment of Lord Hoffmann in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508 (***Cambridge Gas***) Kawaley J concluded (at [19]) that:

> *"All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile; and (b) the main practical consideration is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share rateably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case."*

(v). Kawaley J noted that since it was no longer intended to wind up the company (the winding up was to be stayed and the company rescued) it was unnecessary to consider in depth the circumstances in which a Bermudian court would decline to recognise a foreign winding up proceeding in respect of a Bermudian company (and insist on a local Bermudian liquidation). He stated however (at [24]) that there should not be an expectation that the court in Bermuda would rubber stamp and always give recognition to such foreign proceedings. In any liquidation of substance it will be impossible for the place of incorporation to be ignored because for example, absent a local winding up creditors not subject to limitation constraints could apply for a local winding up after and

despite the foreign winding up, the directors remain in office and there may be local reputational, regulatory and policy reasons requiring a local proceeding.

(vi). the learned judge in exercising his discretion concluded as follows:

> "*34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.*
>
> *35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.*
>
> *36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:*
>
> > "*In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.*"
>
> *37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda- incorporated company.*"

(g). Ms Stanley noted and accepted that Kawaley J's approach had been based on and followed the analysis of Lord Hoffmann in *Cambridge Gas* and that his

judgment had been delivered before the decision of the Supreme Court in *Rubin* and the important decision of the Privy Council (sitting on appeal from Bermuda) in *Singularis v PricewaterhouseCoopers* [2015] AC 1675 (***Singularis***). Both decisions had (as is well known amongst insolvency layers and practitioners) included comments critical of Lord Hoffmann's approach and reasoning (in *Singularis* Lord Sumption had at [18] noted that *Cambridge Gas* had "*[marked] the furthest that the common law courts [had] gone in developing the common law powers of the court to assist foreign [liquidators and had] proved to be a controversial decision.*"). However, Ms Stanley submitted that none of the criticisms and dicta declaring that *Cambridge Gas* was (at least in part) wrongly decided meant that Kawaley J's decision was wrong and should not be followed. The challenge to *Cambridge Gas* affected the decision in so far as it held that a foreign insolvency judgment could be recognised and enforced at common law even when the normal common law rules did not permit this and that the court could by way of common law assistance order that foreign liquidators could rely on and exercise rights under local statutes that did not otherwise apply (by acting as if a local statutory insolvency or restructuring procedure had been commenced and the related statutory powers had been available and applied). But Kawaley J had relied on neither of these aspects, nor on any of the other aspects of *Cambridge Gas* judgment that had been criticised in *Rubin* and *Singularis*.

(h). Ms Stanley also relied, as I have mentioned, on the 2010 decision of the Chief Justice in *In the Matter of FU JI Food and Catering Services Holdings Limited* (FSD Cause No. 222 of 2010). She pointed out that this is another pre-*Rubin* and *Singularis* case. The judgment is not reported but the Chief Justice gave a helpful summary of the facts and his decision in an article he published in the Beijing Law Review (*A Cayman Islands perspective on trans-border insolvencies and Bankruptcies: the case for judicial co-operation* Beijing Law Review, 2011, 2, 145-154). The following is the relevant section in the Chief Justice's article:

"*The Matter of FU JI Food and Catering Services Holdings Limited (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.*

Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—prin- cipally in food production

restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.

As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active in- terest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.

Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from Cambridge Gas was noted and applied:

> *"The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum (para 22, page 518)."*

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand

Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings."

(i). Ms Stanley also relied on the recent decision of Aedit Abdullah JC sitting in the High Court of Singapore in *Re Opti-Medix Ltd (in liquidation)* [2016] SGHC 108 in which the Singapore Court recognised a Japanese liquidation of BVI companies. This is a post-*Rubin* case.

(i). the case involved two BVI companies in respect of which bankruptcy orders had been made by the Tokyo District Court. The companies had assets (in the form of funds credited to bank accounts) in Singapore and the Japanese trustee wanted to exercise his powers under the Japanese bankruptcy orders to deal with, collect in and remit to Japan the funds in the bank accounts. For this purpose he sought an order recognising his appointment and for the appointment of a foreign bankruptcy trustee by the Singapore court. The trustee also gave an undertaking to pay all preferential debts and other debts in Singapore before remitting any funds out of Singapore.

(ii). the Japanese trustee argued that since there were no competing claims by liquidators from different jurisdictions, the Singapore court should recognise his appointment (no prejudice would be suffered as there were only three Singapore creditors, the notes issued by the company had only been sold only in Japan, any debts in Singapore were incurred only for administrative services and notice of the liquidation had also been advertised in Singapore, and no one had contacted the trustee's solicitors). Accordingly, the trustee submitted that his appointment should be recognised even though he was not a liquidator appointed in the place of incorporation of the companies because there was no likelihood of

insolvency proceedings in the BVI. He relied in particular on Rule 179 and the commentary thereto in *Dicey, Morris and Collins* (at that date Rule 166 of the fourteenth edition of 2006) and Tom Smith QC's chapter in *Cross Border Insolvency* (in particular paragraph 6.81 cited above).

(iii). the learned judge granted the relief sought. He noted that the Singapore court had in the past recognised foreign liquidators (citing *Re Lee Wah Bank Ltd* (1926) 2 Malal's Cases 81, which appears to be a case involving the recognition of a liquidator appointed in a jurisdiction other than the country of incorporation); referred to and agreed with Lord Hoffmann's statements in paragraph 31 of *HIH* (cited above) and noted Lord Collins' conclusion (at paragraphs [129] and [130] in his judgment in *Rubin* that it was not open to the courts to introduce a new basis for recognition of foreign judgments by reference to the connection between the judgment creditor and the jurisdiction in which the foreign insolvency proceedings had been commenced in respect of it) and cited and agreed with the following passage from paragraph 6.80 of *Cross Border Insolvency*:

> "*.. there is a measure of authority that the law of the place of incorporation does not occupy an exclusive position: other foreign insolvency proceedings may also be grated recognition in the English Court. However, the issues which arise in light of the comments of Lord Collins in Rubin are first, whether the existing authorities do provide sufficient support for a test of recognition based on factors other than the place of incorporation; and secondly, whether there is any ability for the common law to develop in this area without legislative intervention.*
>
> *As to the first issue, it is suggested that Lord Collins in Rubin may well have overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised. As to the second issue, it is difficult to see why the common law could not develop a broader test based on the concept of 'centre of main interests' as envisaged by Lord Hoffmann in HIH.*"

(iv). so Aedit Abdullah JC concluded that he was able to recognise the Japanese trustee even though not appointed in the BVI and was

prepared to use, as the test for determining whether the Japanese court was competent for these purposes, the centre of main interests test (which he held was satisfied since Japan was essentially the sole place in which actual business was carried on). He noted (at [18]) that:

> "*A consequence of a greater sensitivity to Universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding-up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there.*"

(v). but he also considered that it was also possible to justify the recognition of the Japanese trustee on other "*practical grounds*." He said (at [26]) that:

> "*Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking.. and there was no competing jurisdiction interested in the winding-up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both Re Lee Wah Bank and Re Russo-Asiatic Bank could perhaps be explained on this practical basis.*"

(j). Ms Stanley also noted that Mr Justice Harris in the Hong Kong Court in *Joint Administrators of African Minerals Limited v Madison Pacific Trust Limited* (HCMP 865/2015) had been prepared to assume without deciding that the Hong Kong Court could in principle recognise liquidators or (administrators) appointed in a jurisdiction other than the place of incorporation (although he noted that the point was open to argument citing Millet J in *Re International Tin Council* [1987] Ch 419 at 447-447 and Lord Collins in *Rubin*). She also referred to the various cases discussed in paragraphs 6.68 to 6.80 of chapter 6 of *Cross-Border Insolvency*, 4th ed., 2015 under the sub-heading "*place of*

incorporation not exclusive" in which courts had recognised the effect of a liquidation taking place in a jurisdiction other than that of the place of incorporation. She referred in particular to the following cases:

(i). *Queensland Mercantile and Agency v Australasian Investment Co Ltd* [1888] 15 R 935, a decision of the Court of Session (Inner House) involving liquidations both in the place of incorporation and another jurisdiction. The case related to a Queensland incorporated company which was being wound up in Queensland, but there was also a subsequent (ancillary) winding up order made in England. In the course of the English proceedings the English court made an order staying proceedings in Scotland against the Company. The effect of this order was considered by the Court of Session in Scotland, who gave effect to the English order and thus recognised a liquidation other than that under the law of the place of incorporation.

(ii). *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)* [1997] HKLRD 304, a decision of the Hong Kong Court. BCCI (Overseas) Ltd was incorporated in Cayman and had opened a branch in Macau. The officers of the Macau branch placed funds from the branch on deposit with a Hong Kong bank. Subsequently the company was put into liquidation pursuant to an order of this Court and then the branch was ordered to be liquidated out of court pursuant to an order of the Governor of Macau. Under the law of Macau the assets recovered by the Macau liquidator would be ring-fenced. Both the Cayman liquidator and the Macau liquidator claimed the funds held on deposit in Hong Kong. The Hong Kong Court allowed the Macau liquidator, as the representative of creditors entitled to prove in the Macau liquidation, to be a party to the proceedings in Hong Kong and to that extent the Macau liquidation was recognised but the rights to the funds on deposit in Hong Kong were governed by Hong Kong law as the *lex situs*. The Hong Kong Court ordered the funds to be paid to the Cayman liquidator.

(iii). *Re Lee Wah Bank Ltd* (1926) 2 Malal's Cases 81, a decision (as was noted in *Re Opti-Medix Ltd (in liquidation)*) of the High Court of

Singapore. Here a Hong Kong bank had a branch in Saigon. The branch had an account in Singapore at a time when winding up proceedings were commenced in Hong Kong and Saigon. The Hong Kong liquidator and the Saigon liquidator both claimed the money. The Singapore court held that either liquidator could give a good receipt for the money and that the court had a discretion to direct payment to either liquidator.

(iv). I note that it is stated at paragraph 6.74 of *Cross-Border Insolvency* with reference to *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)* and *Re Lee Wah Bank Ltd* that: "*Although the results in both these cases are by no means surprising, the important point to note is that the liquidator of the relevant branch was recognised: the courts did not take the approach that, because there was a liquidation in the place of incorporation, that in itself automatically put an end to any dispute.*"

(v). *Re Stewart & Matthews Ltd* (1916) 10 WWR 154, a Canadian case. In this case a company incorporated in Manitoba carried on all of its business in Minnesota. The company petitioned the bankruptcy court in Minnesota and a trustee in bankruptcy was appointed. Subsequently a winding up order was made in Manitoba. On an application supported by the majority of the company's creditors, the Canadian court stayed the Manitoban winding up in favour of the US bankruptcy. In paragraph 6.78 of *Cross-Border Insolvency* it is suggested that: "*... it can only be that the court of the domicile of the company was prepared to grant recognition to the foreign (American) liquidation; otherwise, Canadian assets would not have been transferred to America.*"

(k). finally Ms Stanley drew to my attention a Scottish case in which Lord Tyre in the Court of Session (Outer House) refused to grant relief in support of a foreign liquidation taking place outside the country of incorporation of the company concerned. The case is *Re Hooley* [2016] B.C.C. 826. Ms Stanley pointed out that since Lord Tyre's judgement contained certain dicta that

and because his decision, might be considered to be inconsistent with her submissions she considered it necessary to refer the Court to the case:

(i). As Ms Stanley explained the case involved three Scottish companies. One of the companies (T Ltd) was placed into insolvent winding-up by the Indian court. In 2012 an administration order was made by the Scottish Court in relation to T Ltd. The administrators agreed and entered into contracts for the sale of T Ltd's underlying assets to Hooley Ltd (the petitioner), and then Hooley Limited, having paid the purchase consideration, sought a declaration from the Scottish Court as to its rights under the agreement and that that the agreements were valid and enforceable and that the administrators had been entitled to enter into the agreements (without the need for the Scottish court's approval). The respondent to the petition was a creditor of T Ltd. It objected to the order sought and argued that "*the court should refrain from hindering the Indian winding up by making any order which appeared to confirm the effectiveness of the exercise by the administrator of any power regarding assets in India or governed by Indian law.*"

(ii). The administrator's response was summarised by Lord Tyre as follows:

> *"it was not suggested on behalf of Hooley that this court should not apply the principle of modified universalism as defined by Lord Sumption in Singularis (above). The principle was, however subject to domestic law and public policy, and the court could only act within the limits of its own statutory and common law powers. Most importantly, its purpose was to assist a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. The principle could not be applied to winding-up proceedings in a country other than the place of incorporation. That indeed would hinder universalism. The Scottish courts could recognise and assist ancillary windings up (i.e. winding-up processes taking place other than in a court in the place of incorporation), but they did not and could not defer to such ancillary windings up."*

(iii). Lord Tyre accepted the administrators submissions and granted the declarations sought (confirming that the administrators had been authorised and entitled to sell and refusing to require the Scottish administrators to refrain from exercising their powers so as to avoid

any interference with the Indian insolvency proceeding). Lord Tyre said as follows:

> *"35. The principle of modified universalism has not, to date, been the subject of examination by a Scottish court. For present purposes it is sufficient for me to say that nothing was placed before me that might indicate that it should not be recognised. There is nothing new in a Scottish court lending assistance to foreign winding-up proceedings: see e.g. Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd (1888) 15 R. 935 . The same case demonstrates that Scots law has long recognised that there may be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction. In my opinion, however, Hooley is well founded in its submission that the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding-up proceedings are taking place in the jurisdiction in which the company is incorporated."* [underlining added]

(iv). Ms Stanley submitted that *Hooley* was distinguishable from the present case, in particular because Lord Tyre was required to deal with a very different type of fact pattern. *Hooley* involved an asserted inconsistency or conflict (asserted by a creditor rather than the foreign liquidator or foreign court) between a domestic (Scottish) insolvency proceeding (taking place in the country of incorporation of the companies concerned) and the foreign liquidation and an application for relief that challenged and sought to limit the powers of the Scottish officeholder. In stark contrast, in the instant case there is no conflict and no question of subordinating the Cayman Court (or its officeholder) to the Hong Kong Court; rather, the Court is being asked to recognise the Hong Kong orders with a view to promoting a single co-ordinated process via parallel schemes of arrangement.

17. Ms Stanley's arguments as to the ground I have identified in paragraph 13(d)(iii), based on the Company's submission to the jurisdiction of the Hong Kong Court, can be summarised as follows:

(a). in the circumstances of this case, the Company has submitted to the jurisdiction of the Hong Kong Court, and it could not be heard to say that it was not bound by the winding-up order and the order appointing the Liquidators;

(including the Liquidators' powers to act on behalf of the Company for the purpose of applying for orders under section 86(1) of the Companies Law).

(b). the analysis set out in paragraph 6.68 of *Cross-Border Insolvency* correctly summarised the applicable law. Paragraph 6.68 states as follows:

> *"However, the Privy Council in Cambridge Gas had plainly proceeded on the basis that submission would be sufficient, and it is suggested that there is no reason for regarding this part of the reasoning has having been overruled by Rubin. Accordingly, where a corporation invokes the insolvency jurisdiction of a foreign court, or otherwise validly submits thereto, the proceedings may be accorded recognition by the English court."*

(c). as is stated in paragraph 6.84 of *Cross-Border Insolvency* it is clearly established as a matter of personal bankruptcy law that foreign proceedings may be recognised if the debtor submitted to the jurisdiction of the foreign court. Ms Stanley relied on *In re Davidson's Settlement Trusts* (1873) LR 15 Eq 383. This case involved the bankruptcy in Queensland of Walter Davidson based on his own petition and the subsequent application to the English court by the official assignee appointed in Queensland for an order that he be entitled to withdraw and remit to Australia funds held in court in England for Mr Davidson (representing funds settled on Mr Davidson by his deceased father). After Mr Davidson had presented his own bankruptcy petition to the Queensland court, he had died intestate leaving a widow and his widow was appointed to represent Mr Davidson's estate and she opposed the official assignee's application. Ms Stanley referred me to the following passage from the judgment of Lord Justice James (at page 385):

> *"Whether the domicil of the insolvent was English or colonial, for the purpose of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in Queensland cannot be disputed by the representative of the insolvent who became an insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts and any surplus here is only in the imagination ..."*

(d). Lord Hoffmann in *Cambridge Gas* had (at [19]) referred to *In re Davidson's Settlement Trusts* and confirmed the principle on which the decision was based as follows:

"The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English movables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in Solomons v Ross , or in which he submitted to the jurisdiction: In re Davidson's Settlement Trusts .. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.[underlining added].

(e). the effect of a submission should, in principle, be the same in the case of a corporate insolvency as in the case of a personal bankruptcy (although, as is acknowledged in paragraph 6.84 of *Cross-Border Insolvency* "*.. submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon*"). The only material difference between bankruptcy and corporate insolvency is that there is no need for a vesting order in the latter because the foreign assets of the company remain in the company, whereas in the case of a trustee in bankruptcy those assets need formally to be vested in him. Ms Stanley submitted that this difference does not, and should not, lead to different rules for recognition.

(f). submission by the company to the jurisdiction of the foreign court prevented anyone claiming through the company from challenging or denying the foreign liquidators' powers to act on behalf of the company, which powers were granted by or resulted from (in a case in which the powers were granted by a foreign statute following the making of) the foreign court's order.

(g). Ms Stanley noted that in *Cambridge Gas* the issue of submission had arisen but the discussion in that case related to submission not by the company but by a shareholder, who was treated as a third party. In *Cambridge Gas* the issue was whether the New York Bankruptcy Court's confirmation order in the chapter 11 proceedings relating to Navigator Holdings plc (***Navigator***), a Manx corporation, pursuant to which the shares in Navigator held by Cambridge Gas Transport Corporation (***Cambridge Gas***), a Cayman company, were to be transferred to Navigator's chapter 11 creditors' committee was to be recognised. In these circumstances, there was, for the purpose of deciding whether the common law rules for recognising and enforcing foreign judgments applied, an issue as to how to characterise the

Bankruptcy Court's confirmation order (as well, of course, as to whether these common law rules applied differently to judgments obtained in the course of bankruptcy and insolvency proceedings). Was it an *in personam* order against Cambridge Gas (as shareholder) so that Cambridge Gas must have submitted to the chapter 11 proceedings for it to be bound or was it to be characterised in some other way which avoided the need to find a submission by Cambridge Gas? If the confirmation order was to be treated as an *in personam* order against Cambridge Gas under the ordinary common law rules regulating the recognition of foreign judgments Cambridge Gas would have had had to submit. It had not directly done so and had not participated directly in the chapter 11 proceedings (but its parent company had done so, perhaps on its instructions) and therefore the deemster in the High Court of the Isle of Man concluded that Cambridge Gas had not submitted. His decision on this point was not appealed. But it seems that Lord Hoffmann thought this result surprising (see [10] of his judgment presumably because he thought, on the facts, that Cambridge Gas' involvement in the chapter 11 proceedings albeit indirect was on the evidence sufficient to give rise to a submission). In any event, submitted Ms Stanley, *Cambridge Gas* did not involve a decision on or analysis of the effect of a submission by the company on the recognition of the powers of a foreign liquidator to act on behalf of the company (and of other corporate organs, such as the board of directors, to act on the company's behalf). Furthermore, Ms Stanley submitted that there was nothing in the Supreme Court's judgment in *Rubin* that was inconsistent with or undermined the validity of the proposition that where the company submitted to the foreign court the powers of the foreign liquidator to act for the company would be recognised.

(h). further, even though in the present case the Hong Kong winding up had not been commenced by a petition presented by the Company, the Company's registration under Part XI of the former Companies Ordinance (Cap. 32) was sufficient to constitute a submission to any order made by the Hong Kong Court, including the Winding up Order. Ms Stanely relied on the statement made by Mr Chan in his second affirmation, which I have quoted above, as to the effect of the registration as a matter of Hong Kong law. Ms Stanley did not appear (nor on the evidence did it appear possible for the Liquidators) to rely on participation by the Company's directors or shareholders in the Hong

Kong liquidation which should be treated and sufficient to amount to a submission to those proceedings.

Discussion and decision – the issues to be decided

18. It seems to me that the following four main issues arise:

(a). does the Court have jurisdiction or the power to grant the relief sought by the Liquidators in the present circumstances (the ***Jurisdiction or Power Issue***)?

(b). if it does have jurisdiction or the power, should the Court make an order and exercise the jurisdiction or power in the present circumstances (the ***Exercise of Discretion Issue***)?

(c). assuming the Court is otherwise able and willing to grant the relief sought, should the Court do so without notice being, and before notice is, given of the Summons to the Company's directors, shareholders and creditors (the ***Notice Issue***)?

(d). what form of relief should the Court grant and order should the Court make (the ***Nature of the Relief Issue***)?

The Jurisdiction or Power Issue

19. The first question is whether the Court is able to grant the relief sought in the present circumstances. There are three sub-issues;

(a). what is the juridical nature and scope of the Court's non-statutory jurisdiction to recognise and assist foreign court-appointed liquidators?

(b). what is the relief being sought by the Liquidators?

(c). is that relief within the scope of the Court's jurisdiction or powers?

20. The juridical nature and scope of the Court's non-statutory jurisdiction to recognise and assist foreign court-appointed liquidators has, as is well known, been the subject of much judicial comment and academic and practitioner commentary and has generated a voluminous body of secondary literature, in particular since the decisions in *Rubin* and *Singularis*. Some, but not all, of the decisions and only a small proportion (thankfully) of the literature have been cited to me on this application and I will confine my comments (with limited exceptions) to the materials which have been cited to me.

21. It seems to me that the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognise and assist is to be found in the majority judgments in *Singularis*, in particular the judgment of Lord Sumption. For this reason, this seems to me the proper place to start any discussion of this jurisdiction.

22. Before considering the decision and approach taken in *Singularis* I should make two preliminary points. First, as I have noted, in Cayman we have a statutory jurisdiction to recognise and assist foreign representatives under Part XVII of the Companies Law. This statutory jurisdiction is only available where the foreign representative is appointed in the place of incorporation (see the definition of "debtor" in section 240 which states that "debtor" for the purposes of the definition of a foreign representative – a liquidator appointed in respect of a debtor – means a foreign corporation or other foreign legal entity subject to a bankruptcy proceeding in the country in which is incorporated or established – "established" in this context appears only to be the equivalent of the place of incorporations in cases of, and is to be applied to, other foreign entities and not foreign corporations). But the statutory jurisdiction has not pre-empted or removed the non-statutory, common law based, jurisdiction. This was the view of Jones J in *Picard and Bernard L Madoff Investment Securities LLC (in liquidation) v Primeo Fund (in liquidation)* [2013] (1) CILR 164 *per* Jones J at paragraph 13 where the learned judge said as follows:

> "*...Part XVII [of the Companies Law] supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision.*"

This seems to me to be correct. Secondly, *Singularis* is, as I have noted, a decision of the Privy Council (on appeal from Bermuda). Ms Stanley did not address the question as to the extent to which this Court should follow *Singularis* but for the purpose of

this application I intend to treat the decision and analysis as authoritative albeit not technically binding on me.

23. The analysis in *Singularis* (as well as in *Rubin*) used a particular terminology to describe the jurisdiction that the court was exercising – there are repeated references to common law *powers* to be applied having regard to common law *principles*. The following extracts from the core parts of Lord Sumption's judgment illustrate the use of this terminology and his analysis of the basis, nature and scope of the jurisdiction:

> "*10. The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations.....*
>
> *11. The question of what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sort. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First the proceedings are a 'is mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established' is, to use the expression of Lord Hoffmann in Cambridge Gas.... Inherent in this function of a winding up is the statutory trust of the company's assets ... and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction..... Fourth it brings into play procedural powers generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities.*
>
> *12. .... even without a winding up, the court could, on ordinary principles of private international law have recognised as a matter of comity the vesting of the company's assets in an agent or officeholder appointed or recognised under the law of incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English movable assets of a foreign bankrupt which had transferred to an officeholder in an insolvency proceeding in the law of his domicile. Moreover, while the same rule did not apply to immovable property the court would ordinarily appoint the foreign officeholder a receiver of the rents and profits: see Dicey, Morris & Collins, the Conflict of Laws, 15th ed., (2012), volume 2, rules 216 and 217. ...,*
>
> *19. .. In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise...*

23. *... The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can....."*

25. *In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in In re African Farms Ltd [1906] TS 373 and in HIH [2008] 1 WLR 852 and Rubin [2013] 1 AC 236 , that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in Norwich Pharmacal [1974] AC 133 and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] 1 All ER 161; [2014] QB 112 (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance."* [underlining added]

24. In *Singularis* Lord Collins also referred to the court's common law *power*:

"51. *The UK Supreme Court accepted, and re-confirmed, in Rubin v Eurofinance SA [2013] 1 AC 236 that at common law the court has power to recognise and grant assistance to foreign insolvency proceedings: para 29...*

53. *The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court*



> *54. Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in Rubin v Eurofinance SA [2013] 1 AC 236 , para 33. They include (subject to what is said below) In re African Farms Ltd [1906] TS 373 , where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme" [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy; ship released from arrest); and Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112 , where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency)...*
>
> *58. A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation."* [underlining added]

25. Lord Collins also used the power terminology in *Rubin* and summarised the position in this way:

> *"29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element."* [underlining added]

26. It seems to me that, based on these statements concerning the nature and scope of the non-statutory jurisdiction to assist, the following points can me made:

(a). the *court* is to be treated as having a *power* to recognise and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by a court). This is a power of the court. If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised.

(b). the court's power as so described is in substance a non-statutory jurisdiction which is based on and justified by the public interests identified by Lord

Sumption. In deciding whether and how to exercise the power the court has regard to and applies the approach which has been labelled the *principle* of modified universalism. This term is a convenient shorthand for the approach that the court takes when exercising the power which recognises both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise. (I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterise the status and effect of this guiding and flexible principle by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology).

(c). suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). The court is using and relying on its domestic law to fashion and find a form of relief for the foreign liquidator that achieves the purpose for which the power can be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances - for example by making an order which could only be made if a domestic scheme of arrangement had been applied for and approved where no such scheme can be or has been applied for. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist - for example, in the view of both the majority and the minority in *Singularis*, the court cannot order that an auditor subject to the *in personam* jurisdiction of the court provide information to the foreign liquidator when the auditor is not subject to a domestic law duty or obligation in the circumstances to provide it and when there is no right under domestic law for a party in the position of the foreign liquidator to such information. It is an interesting question, which I do not need to resolve on this application, whether the Privy Council created or

recognised - a special common law right or remedy enforceable by the Cayman liquidators which responded to and arose out of the liquidators' need to have the information sought or whether the Board was merely recognising a right, which was analogous to the *Norwich Pharmacal* right or remedy, available to any litigant in a similar position (of course the Board refused to grant the relief sought because the Cayman liquidators were said – or perhaps more accurately on the case as argued, assumed - not to have the power under Cayman law to obtain the relevant information from the auditors, although one wonders why, if the common law of Bermuda recognised their entitlement to the information, or the Bermudian court's power to make an order requiring the information to be provided, such an entitlement or power was not available under Cayman law and in this Court).

(d). the court must in each case start by considering the nature and form of relief sought by the foreign liquidator. This can take a number of different forms and the legal analysis varies depending on the nature of the relief sought. Sometimes, the foreign liquidator is asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There may well be no need to rely on or exercise the common law power in this case. Sometimes, the foreign liquidator is asking the requested court just to exercise its case management powers in proceedings before it by adjourning or staying those proceedings or the execution of a domestic judgment arising therefrom. The exercise of such case management powers can be said to involve an exercise of the common law power. Sometimes the foreign liquidator will seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needs to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there will be no need to rely on the common law power. Where the cause of action is vested in the foreign liquidator or he is seeking additional relief in reliance on his powers as liquidator then the common law power to recognise and grant assistance to the foreign liquidator comes into play.

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(e). where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. To that extent he will be entitled to recognition of his powers. As I have pointed out, the principles of domestic private international law produce that result. Therefore technically the foreign liquidator does not need to rely on, and this result does not depend on the exercise of, the common law power (at least when the foreign liquidator is only taking action in the name of and on behalf of the company and those seeking to challenge the foreign liquidator's action are claiming through the company). However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company.

(f). the limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption and those I have set out above.

27. In the present case the Liquidators wish to be able to promote a Cayman scheme and in particular to apply to the Court for an order under section 86(1) of the Companies Law convening a meeting of creditors. Section 86(1) states that:

"*Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them the Court may, on the application of the company or of any creditor or member of the company or where the company is being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members as the case may be to be summonsed in such manner as the Court directs.*" [underlining added].

28. Accordingly, the Liquidators can apply if they are able or permitted to act for and on behalf of the Company. Two main questions therefore arise. First, are the Liquidators able – are they treated under Cayman private international law as being entitled – to act on behalf of the Company (and therefore able to cause the Company to make an application under section 86(1) of the Companies Law)? If not, can and should the Court exercise its power to recognise and assist so as to permit them to do so, and if so how?

The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation

29. As regards the first question, the answer is no:

(a). because the Liquidators are not appointed in the Company's country of incorporation they are not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the Company. As Professor Briggs notes in *Private International Law in the English Courts* (OUP, 2014) at paragraphs 10.15, 10.16 and 10.22:

> "*A corporation is an artificial creation, a legal person. The question whether, and with what powers, a body corporate has been created can only be determined by the law under which its creation took place, which for the common law rules of private international law means the lex incorporationis. Likewise, the question who is empowered to act on behalf of the corporation, and in what circumstances, is a matter for the lex incorporationis to specify.... Likewise the question of who is entitled to sue in the company's name ... is almost inevitably a matter for the lex incorporationis ..*"

(b). under Cayman law, having regard to the Company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the Company are the Company's directors and shareholders. The Winding up Order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the Company. The Winding up Order is not, as an order of a foreign court, of itself binding or enforceable in Cayman (see *Felixstowe Dock Co v U.S. Lines Inc.* [1989] 1 Q.B. 360 at 375). Of course, before taking any action the directors would need to consider the effect (both legal and practical) of the Winding up Order and would be unlikely to act, and are likely to be advised not to act, without the consent of the Liquidators, certainly where they are subject to the *in personam* jurisdiction of the Hong Kong Court and save in a case where there some proper justification for not acting as directed by the Liquidators.

(c). it was no doubt the Hong Kong liquidators' lack of authority, as a matter of Bermudian private international law, which resulted in the directors in the *In re Dickson Group Holdings Limited* case remaining in place for Bermuda law purposes and passing a resolution supporting the Hong Kong liquidators' application for leave to summon a meeting of creditors. This meant that under the law of incorporation, a corporate organ recognised as having authority to

act for the company and to authorise the company to apply for an order to convene a meeting of creditors, had approved and authorised the issue of the summons. At the very least, this was a prudent belt and braces approach (the application in the *Dickson Group Holdings Limited* case had been issued by and in the name of the company). This step has not been taken in the present case because, as the second affidavit of David Yen Ching Wai makes clear, despite the Liquidators' best efforts the directors are not cooperating and have failed to respond to the Liquidators' efforts to contact them (it appears that one director has been disqualified from acting while others have resigned – including the two Hong Kong based directors - or indicated that they intend to resign from the board).

The Exercise of Discretion Issue

30. As regards the second question:

(a). it seems to me that the power to recognise and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognise and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.

(b). the significance and impact of the appointment being made in the country of incorporation was also discussed in *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 (***Stichting Shell***), another important and recent decision of the Privy Council (sitting on appeal from the Eastern Caribbean Court of Appeal in a case involving the BVI). In that case the advice of the Board was given in a judgment of Lord Sumption and Lord Toulson. They commented (at [14]) as follows:

> *"In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute... In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court but all assets worldwide.... It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation ..."* [underlining added]

(c). this confirms that at least one of the important reasons why an appointment in the place of incorporation is significant is because it brings with it the effects under private international law that I have already mentioned. Liquidators appointed by a court in the place of incorporation can take advantage of these rules of private international law (which are applied in many jurisdictions), and therefore in practice expect to be able to conduct the liquidation and be effective, and act for the company, in multiple jurisdictions.

(d). I also note that there are some highly respected commentators who suggest that the powers of a liquidator appointed in a country other than the place of incorporation should be limited to dealing with the assets of and acting on behalf of the company in that territory and not beyond it. For example, Professor Ian Fletcher says the following in the latest and recent edition of *The Law of Insolvency* (fifth edition, 2017, Sweet & Maxwell) at paragraph 30-057:

> *"...A liquidator appointed under the law of the company's place of incorporation will be recognised at English law as having authority to wind up the company and to represented in legal proceedings brought either against or on behalf of the company provided that such representative authority is conferred upon him by the law governing his appointment. Conversely, there is no reported incidence of recognition having been accorded in England to a liquidator appointed under the law of some other jurisdiction than that in which the company underwent incorporation. With respect to liquidations of this kind, the inference which most readily suggests itself is that, the effects of such a liquidation being regarded as of necessity, confined to the territorial limits of the jurisdiction in which the winding up is taking place, the liquidators capacity to act on the company's behalf and to deal with its assets must be deemed to be similarly restricted so as to be limited to property situated within the jurisdiction of the foreign court.*

(e). but it seems to me that the inapplicability of the rules of private international law that treat a foreign liquidator appointed in the country of incorporation as having proper authority to act for and to bind the company or as effecting in

substance a universal succession to the company's assets does not preclude the Court exercising its non-statutory power to assist a foreign liquidator appointed outside the place of incorporation where the conditions for the exercise of that power are satisfied. The power is capable of having a wider application that these rules of private international law so that the power can be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status.

(f). it seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

(i). it seems to me that the relief that the Liquidators need and should be granted is an order authorising them to make an application under section 86(1) of the Companies Law and to consent to the proposed scheme on the Company's behalf.

(ii). the Liquidators wish (as Ms Stanley confirmed during the hearing) simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process. This can be achieved by the Court making an order in the terms I have just mentioned and by making a direction to the effect that any proceedings commenced or any winding up petition presented against the Company be assigned to me (so that I can ensure that appropriate case management orders are made to stay or adjourn such proceedings pending the completion of the scheme process save in exceptional circumstances which would justify a different approach).

(iii). in the present case the Court is in substance dealing with a governance question, namely whether to permit the Liquidators to act on behalf of the Company in presenting an application under section 86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the Company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the Company (in the context of a corporate rescue or reorganisation, albeit not one that involves all creditors being paid in full). No issues

arise involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the Liquidators were granted the relief they seek. It appears that currently the Company's board and its directors are unable or unwilling to act and (while the directors could I assume act, and support or authorise the making by the Company of an application under section 86(1), with the consent of the Liquidators they) have shown no sign that they will take any steps to support or oppose the Liquidators' plans or this application. It also appears that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the Liquidators' application (although as I explain below I think that it is important, to ensure that there really is no objection and to give all those affected an opportunity to be heard, to give notice to the directors and shareholders of the Liquidators' plan to promote a parallel scheme in Cayman, the Summons and the order that I make on this application).

(iv). it also appears to be the case that there is no likelihood of an application being made for a winding up order in Cayman. The Winding up Order was made on 9 February 2015. As David Yen Ching Wai explains in his Second Affidavit, creditors have participated in the Hong Kong liquidation and 39 proofs of debt have been lodged. If creditors considered it to be in their interests to have a Cayman winding up they be expected to have made that clear and either applied in Hong Kong for permission or taken steps in Cayman to present a petition in Cayman. They have not done so in over two and a half years and it appears from the evidence filed in support of the Summons that creditors are aware of and not objecting to the proposed schemes of arrangement (although, once again as I explain below, I think it important to ensure that creditors are given proper notice of the Liquidators' plan to promote a parallel scheme in Cayman, the Summons and the order that I make on this application).

(v). it is clear on the evidence that the Company has substantial contacts with Hong Kong. As I have already noted, the Company's shares have been listed and are to be relisted on the Main Board of the

HKSE; the corporate business of the Company has been administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); the Company was registered under part XI of the former Hong Kong Companies Ordinance on 4 November 1999; virtually all the Company's shareholders have addresses in Hong Kong (the Company's largest registered shareholder, HKSCC Nominees Limited, which owns and operates the Hong Kong Central Clearing and Settlement System (***CCASS***), held as at 17 August 99.02% of the Company's shares and all CCASS participants were registered with Hong Kong addresses) and 2.7% of the value of all proofs of debt lodged in the Hong Kong liquidation have been filed by persons located in Hong Kong and 74.9% of proofs have been lodged by persons located in the PRC.

(vi). there appears on the evidence to be no need for or reason why creditors or members would benefit by a Cayman winding up or from a provisional liquidator being appointed in Cayman. The Liquidators consider that a Cayman liquidation or provisional liquidation would just incur additional cost and result in unnecessary delays and there is no risk of prejudice to stakeholders in not having such a proceeding. This, on the evidence, seems right to me.

(vii). this is also not a case in which there are any local reputational, regulatory and policy reasons requiring a local proceeding. I agree with, and wholeheartedly endorse, the approach explained and the caveats identified by Kawaley J at paragraph 24 of his judgment in *Dickson Group*. In appropriate cases the requested court may have to refuse to grant assistance and the relief sought by a foreign liquidator where a local liquidation or provisional liquidation is needed (and I also note that the Chief Justice made the same point in his summary of his judgment in *FU JI Food* and expressed the same reservations, commenting that there may be cases in which there are *"compelling reasons"* for a Cayman winding up).

(g). therefore in the present case the Hong Kong liquidation is the only proceeding which has or is likely to be commenced in respect of the Company and is

taking place in a jurisdiction with which the Company has substantial connections. I note that the Company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNCITRAL Model Law, is probably in Hong Kong and that seems to me be a consideration of considerable weight to be taken into account when deciding whether the foreign, non-place of incorporation, liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative. There is therefore a foreign liquidation taking place in a jurisdiction which should be treated as competent, no other insolvency proceeding in prospect and a proper need (endorsed and supported by a well-respected foreign court) for the foreign liquidator to be able to exercise his powers to represent the Company in the local court and jurisdiction in order to be able effectively to conduct and achieve the purposes of the liquidation in the interests of creditors and other stakeholders. It seems to me that in these circumstances the purpose for which the power to recognise and assist may be exercised is fully engaged so as to justify the exercise of the power (and the authorities relied on by Ms Stanley support its exercise in the present case).

(h). none of the limitations which Lord Sumption identified apply in the present case to prevent the exercise of the power to recognise and assist the Liquidators. They have a power as a matter of Hong Kong law to act for and on behalf of the Company and to promote schemes of arrangement. Furthermore, while the Liquidators wish to use and rely on the statutory jurisdiction to apply for a Cayman scheme (under section 86(1)) that jurisdiction (and the applicable statutory provision) is available in the circumstances. Section 86(1) permits an application to be made by the Company and the Liquidators can be authorised by the Court to make such an application on the Company's behalf. This does not involve the heresy or impermissible exercise of the common law power identified by Lord Collins in *Singularis* (see [78]-[83]) in which the Court applies legislation which otherwise does not apply "as if" it applied. Provided that the Liquidators can properly make an application in the Company's name and are authorised to do so on the Company's behalf, the statutory jurisdiction to apply for an order convening a meeting of creditors may be invoked in accordance with its terms. It seems to me that the Court may without the need to rely on a statutory power not otherwise available and in a manner that is in accordance

with domestic law make an order against and in respect of a Cayman company authorising a foreign liquidator to make such an application and giving him powers to act on behalf of the Company for that purpose.

(i). in my view *In re Dickson Group Holdings Limited* was correctly decided and I see myself as following in general terms the approach taken in that case by Kawaley J, although I have sought to update and modify the analysis of the common law power and how it is to be applied to reflect the judgments in *Rubin* and *Singularis*. I also consider that I can rely on and am following the approach of the Chief Justice in *FU JI Food* subject to a similar updating of and adjustment to the analysis of the common law power (and consequently to the form and nature of the relief to be granted to the foreign liquidator). I also agree with the result in *Re Opti-Medix Ltd (in liquidation)* although I have sought to provide a different and more detailed analysis of the common law power. I agree with Ms Stanley that the result and reasoning of Lord Tyre in *Hooley* is not inconsistent with the approach I have adopted or the Liquidators' application. It is hardly surprising that a Scottish court would refuse to interfere with a sale agreed and entered into by Scottish administrators (whom it had appointed) on a post-transaction application made by a creditor rather than the foreign liquidator and without a request of the Indian court. The present case is very different and presents wholly different issues. I also regard the commentary in both Dicey, Morris & Collins and *Cross-Border Insolvency* to be helpful and broadly correct and take comfort from the various cases cited in those texts and by Ms Stanley in which courts, in admittedly different contexts, have been prepared to recognise and assist foreign liquidators appointed outside the country of incorporation.

The submission to jurisdiction point

31. Ms Stanley, as I have noted, also argues that submission by the company to the jurisdiction of the foreign court in which the winding up order is made and the foreign liquidator is appointed is a separate ground which justifies the requested court recognising (and indeed requires the requested court to recognise) the powers of the foreign liquidator to act on behalf of the company and that the Company has submitted to the jurisdiction of the Hong Kong Court in the present case.

32. It seems to me that two main issues arise:

(a). is submission a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company?

(b). if so, what constitutes submission for these purposes – in particular is registration as an oversea company sufficient or is it necessary that the company applies for the commencement of (or actively participates in) the foreign liquidation?

33. As regards the first issue, I would make the following comments, subject to the caveat that my views are preliminary since, as the textbooks cited to me make clear, the issue has not been the subject of a full consideration by any previous decision and this has been an *ex parte* application in which the counter-arguments have not been aired and tested:

(a). in my view submission can in principle be sufficient for certain purposes;

(b). at paragraph 6.84 of *Cross-Border Insolvency* Mr Smith notes, prior to reaching the conclusion relied on by Ms Stanley and quoted above, that there is no clear authority on the effect on a foreign liquidator's application for recognition or assistance of a submission by the company to the jurisdiction of the foreign court:

> *"In the case of bankruptcy, it is clearly established that foreign proceedings may be recognised in England if the debtor submitted to the jurisdiction of the foreign court. However, submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon."*

(c). but it does appear that (in addition to Lord Hoffmann in *Cambridge Gas* in the passage referring to *In re Davidson's Settlement Trusts* relied on by Ms Stanley and quoted above) both Lord Collins and Lord Mance in *Rubin* accepted, or perhaps assumed, that submission by a corporate debtor (as well as an individual bankrupt) would be sufficient.

(i). in *Rubin*, when discussing *Cambridge Gas*, Lord Collins said (at [46]) as follows:

> "*The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (Dicey , 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation: Dicey,15th ed, vol 2, para 30R-100). Under United States law the US Bankruptcy Court has jurisdiction over a "debtor", and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.*" [underlining added].

(ii). the second underlined passage is quoted and relied on by Ms Stanley. I think that the first quoted passage is also worth noting. (I also think that Ms Stanley is right to say that there is nothing in the subsequent criticisms of Lord Hoffmann's analysis or the result in *Cambridge Gas* which prevents a court concluding that a submission by a company would be a sufficient ground for recognising the foreign liquidator's powers to act for the company. The significance of submission has been highlighted and strengthened by the Board's judgment in *Stichting Shell*. Furthermore, there is an argument that the result in *Cambridge Gas* can be justified on the basis of there having been a submission – the submission by Navigator having been sufficient to constitute a submission by its shareholders, at least to the extent of preventing them challenging the orders of the foreign court: see Briggs, *Judicial assistance still in need of judicial assistance* [2015] LMCLQ 179.)

(iii). Lord Mance said the following in his dissenting judgment in *Rubin* (at [189]):

> "*Lord Clarke ...takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having "jurisdiction to entertain" bankruptcy proceedings or, if one were (wrongly in my view) to*

treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings:... The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in Dicey (in para 31-064 in the 14th and 15th editions) as a "vexed and controversial" question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction. On Lord Clarke JSC's analysis, in such a case (of which Rubin v Eurofinance is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law. [underlining added]

(iv). the personal bankruptcy rule in Dicey, Morris & Collins to which Lord Mance was referring to (Rule 31R-059) states that:

"(2)..... *the English courts will recognise that the courts of any other foreign country have jurisdiction over a debtor if–*

(a) he was domiciled in that country at the time of the presentation of the petition or

(b) he submitted to the jurisdiction of its courts whether by himself presenting the petition or by appearing in the proceedings."

Paragraph 31-064 states as follows:

"*Clause (2) of the Rule .... must be regarded as somewhat speculative because the question is a vexed and controversial one which English courts have had few opportunities of considering. It was at one time supposed that English courts would recognise the bankruptcy jurisdiction of a foreign court only if the debtor was domiciled in the foreign country. But it has since become clear that they will also do so if the debtor submitted to the jurisdiction of the foreign court whether by presenting the petition himself or by appealing against the adjudication or by appearing in the proceedings at some stage either personally or by his counsel or solicitor.*"

(v). Dicey, Morris & Collins refers to and relies on *In re Davidson's Settlement Trusts* to support the proposition that the presentation by the personal debtor of his own petition will be sufficient. They also refer to *Re Anderson* [1911] 1 KB 896 at 902. In this case a debtor, whose domicile was English and who was entitled to a reversionary interest in personalty (a fund) in England, was adjudicated bankrupt in New Zealand on a creditor's petition. Subsequently, he was adjudicated bankrupt in England. The reversionary interest, which by

an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England and he at once gave notice of his title to the trustees of the fund and argued that he was entitled to it as against the New Zealand trustee. Phillimore J held that New Zealand trustee was entitled, as against the trustee in bankruptcy in England, to the reversionary interest. The record in the New Zealand proceedings showed that though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy and had recognised the adjudication by applying some time afterwards for his discharge and obtaining it. Phillimore J said:

> "*Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in In re Davidson's Settlement Trusts and In re Lawson's Trusts. Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate*" [underlining added]

(vi). it seems to me that Ms Stanley is right to say that, at least as regards the issue of whether anyone other than the foreign liquidator should be recognised and treated as having the right and power to act on behalf of the company, there is no principled basis for distinguishing between the effect of submission by an individual and a corporate debtor. As Phillimore J says it is the fact that the debtor has become and made itself a party to the foreign proceedings that is key and affects anyone claiming under or through the debtor. The fact that under personal bankruptcy law there is a vesting and transfer of title in the debtor's property to the trustee is of no consequence in this context. The vesting or transfer of property outside the foreign jurisdiction is not recognised as a matter of the private international law of the requested court. In a corporate context, if the company has submitted to the foreign court and the insolvency proceedings by applying for the appointment of the liquidator or participating in the foreign insolvency proceedings its board or shareholders cannot be heard to deny the effects of the appointment (in a case where the

company presents its own petition or application in the foreign court) requested by the company and (in any case in which the company through its proper officers has participated in the foreign liquidation or otherwise acted so as to give rise to a submission) the consequences, as regards corporate authority and the power to act on behalf of the company, that follow from the appointment and the foreign court's order.

34. As regards the second question, I would make the following comments (which once again must also be subject to a caveat to the effect that I express here only preliminary views since not only were the arguments not tested on an *inter partes* hearing but the evidence of Hong Kong law was not detailed and limited and Ms Stanley did not explore the issue or relevant authorities in any depth):

(a). as I have noted, the Liquidators rely on the Company's registration under Part XI of the former Companies Ordinance as establishing its submission to the jurisdiction of the Hong Kong Court generally and in particular with respect to the Hong Kong winding up proceedings. As I have already noted Mr Chan in paragraph 9 of his second affirmation says as follows:

> *"by registering under Part XI of the former Companies Ordinance (Cap. 32), the Company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the Company is "within the jurisdiction" and can therefore be served with a winding up petition in accordance with Order 10, rr.1 - 5 of the Rules, ... and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014),..."*

(b). Part XI applies to an oversea company which has established a place of business in Hong Kong (see section 332). In common with similar English statutory and procedural rules, Part XI and the Rules (as defined in Mr Chan's second affirmation) permit service to be effected in Hong Kong on the oversea company either by service addressed to any person in Hong Kong whose name has been delivered to the Registrar as being authorised to accept service or where the oversea company makes default in filing these details by service at any place of business established by the oversea company in Hong Kong or if the company no longer has a place of business in Hong Kong by sending the document to the company's principal place of business in its

place of incorporation or to any place in Hong Kong at which the company had a place of business within the previous three years (see section 338).

(c). the question arises as to the legal effect of these provisions and as to whether they result in mere registration constituting a submission for the purposes of recognition of the foreign liquidator's powers.

(d). as regards what is required for there to be a submission I note that in their judgment in *Stichting Shell* Lord Sumption and Lord Toulson (at [31]) comment that:

> "*A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof*"

The company must by some voluntarily act accept that it is subject to and bound by the jurisdiction of the foreign court pursuant to which the order in question is made. Registration *prima facie* appears to be a voluntary act by which the oversea company concerned allows itself to become subject to the foreign court's jurisdiction and to accept that such jurisdiction may be taken and assumed by service of process on the company's appointed authorised representative. If the applicable rules regulating the effect of registration provide for and permit service of a winding up petition as well as originating process relating to ordinary civil litigation then it should follow that there is also a voluntary acceptance of the foreign court's winding up jurisdiction.

(e). however the difficulty I have is that it appears to be arguable that registration by an oversea company of particulars (of a person authorised to accept service), when required only where the oversea company has established a base of business in the foreign jurisdiction, is to be treated as permitting the foreign court to take and assume jurisdiction by reason of the company's presence in the foreign jurisdiction rather than its submission. Furthermore, the analysis of the legal effect of the registration gives rise to questions of construction of the relevant foreign legislation and requires proper evidence of foreign law (which is not available on this application) and appears at least

by reference to the English authorities of which I am aware (but which were not cited to me or the subject of submissions by Ms Stanley) to raise difficult issues which may be contested and would require further submissions before I would be prepared to form a view.

(f). In paragraph 9.13 of Professor Richard Fentiman's *International Commercial Litigation* (second edition, 2015, OUP) he says as follows:

> *"It has been said that a foreign company having a branch in England submits to the jurisdiction merely by complying with its Companies Act obligation to file an address for service (citing Employers Liability Assurance Corp v Sedgwick, Collins &Co [1927] AC 95, 104, 107, 114 (HL)). In such cases,, however, the basis for jurisdiction is the defendants presence in England. By providing an address for service the company is merely ensuring that service may be effected easily. This is confirmed by the rule that such a company may be served at its place of business even if it has provided no address."*

(g). so Professor Fentiman considers that registration of particulars by an oversea company does not permit the court of the place where the registration is made to take jurisdiction because the oversea company has submitted generally to the jurisdiction of the foreign court. It is presence through the place of business that is the operative factor. Having a presence or place of business in the country of the foreign court is, of course, in the current context insufficient and is different from submitting to the jurisdiction of the foreign court, which is what is required (I also note that Dicey, Morris & Collins state that the statutory and procedural rules relating to oversea companies are "*exclusively concerned with service*" and therefore are perhaps of limited significance and effect - see paragraph 11-117).

(h). it does appear, however, that the judgments in *Employers Liability Assurance Corp v Sedgwick, Collins &Co* were based on the proposition that the foreign company concerned had submitted to the jurisdiction of the English courts. In that case, as Sir John May noted in the Court of Appeal in *Rome v Punjab National Bank (No 2)* [1989] 1 WLR 1211 at 1218:

> *"The judgment debtor was a Russian company which had carried on business in London before the 1914–1918 war and had registered a Mr. Collins as its agent to accept service. After 1917 the company's business and assets were transferred to the Soviet government under the revolutionary legislation. In 1923 a writ was served on Mr. Collins, and, in default of appearance, judgment was signed against the defendants despite Mr. Collins' protest that the company had ceased to exist. In both tribunals the validity of the service was challenged, but having found that the*

company continued to exist both the Court of Appeal and the House of Lords held that the Russian company, by filing Mr. Collins' name and address, had submitted voluntarily to the jurisdiction of the English courts and that so long as his name remained on the register, service on him was good service." [underlining added]

(i). In *Rome v Punjab National Bank (No 2)* the Court of Appeal held that that on a true construction of the relevant provisions of the Companies Act 1985 (section 695(1)) a writ was sufficiently served on an oversea company if addressed to a person whose name and address had been delivered to the registrar of companies and left at or sent by post to that address, notwithstanding that the company had ceased to carry on business in Great Britain, that the persons so named were no longer resident there, and that those facts had been notified to the registrar under the 1985 Act. The decision is not referred to by Professor Fentiman and does, as it seems to me, suggest that the basis for jurisdiction in cases involving oversea companies is not presence (or at least presence alone) in the foreign jurisdiction.

(j). furthermore, I note that the Hong Kong Ordinance in terms provides for service on the oversea company even if it no longer has a place of business in Hong Kong. This suggests that the existence of a place of business is not the key factor or the only relevant basis on which the Hong Kong Court is to be treated as taking jurisdiction.

(k). it seems to me that the basis on which jurisdiction over the oversea company is taken is properly to be treated as statutory and therefore whether registration gives rise to and is to be characterised for present purposes as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission.

(l). my provisional view is that they are but, as I have said, there are doubts and issues which require evidence of foreign law and fuller consideration and I therefore do not wish on this application to express a firm view. I would also wish to consider carefully whether if registration can be treated as a submission it constitutes a submission for the purpose a liquidation taking place in that jurisdiction. I note that Lord Mance in the passage from *Rubin*

quoted above referred to the need for there to be a submission to "*the foreign bankruptcy jurisdiction*" and it seems to me to be arguable that what is required is that the company apply for the commencement of the foreign liquidation or that its directors or shareholders (or other proper representatives) authorise participation in the foreign liquidation. As I have noted neither of these conditions is satisfied in the present case.

(m). accordingly, where the position is not settled and there has only been a limited opportunity for the citation of authority or argument, I do not consider that I am in a position to form a concluded view on this issue. I am reassured by the fact that in this case, in view of the conclusion I have reached regarding the availability of and the justifications for the exercise of the common law power, I am able to grant the relief sought by the Liquidators without the need to determine that the Company has submitted to the insolvency jurisdiction of the Hong Kong Court.

The Notice Issue

35. As I have noted above, there is a further issue which needs to be considered. This is whether I should grant the relief sought by the Liquidators before notice has been given to the Company's directors shareholders and creditors. The Summons has been applied for on an *ex parte* basis and while notice of the resumption proposal and the Liquidators' plans to promote parallel schemes of arrangement in Hong Kong and Cayman has been given and details notified to shareholders and creditors the directors, shareholders and creditors have not seen the Summons or the evidence in support and have not been given an opportunity to notify the Liquidators of any objections or views or to make submissions or appear on the Summons,

36. In a case such as the present one, where I am proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up will be made; that the Company's directors and shareholders have not sought and do not intend to exercise any residual powers and rights which they may have to act on behalf of the Company and that the relief sought by the Liquidators is demonstrably in the interests of all stakeholders, it seems to me to be important that the directors shareholders and creditors are notified of the Summons specifically and given an

opportunity to notify the Liquidators and the Court of any objections, to make submissions and to apply to the Court should they wish to do so.

37. It would be open to me to direct the Liquidators to give notice of the Summons before making the order sought and to require a further hearing if any objections are received or to give the directors, shareholders or creditors an opportunity to appear and make submissions. However, this seems to me to be unnecessary. Instead I propose to make an order in the form discussed below which will authorise the Liquidators to apply under section 86 (1) of the Companies Law and to petition the Court for an order convening the meetings required in connection with the proposed scheme but which will also require the Liquidators to notify, by a suitable means and within an appropriate timescale, the directors, shareholders and creditors of the Summons and to make available copies of the Summons and evidence in support to any such person who wishes to receive a copy before the Liquidators make any such application. This will ensure that the directors, shareholders and creditors are given adequate notice of the Summons and an opportunity to object or to make an application to this Court before the Liquidators proceed to petition the Court for an order convening the scheme meetings. If there are any objections or submissions or if any such person wishes to be heard a further hearing of the Summons will be listed in order to consider such objections or submissions and hear any person who wishes to appear and the Court can then decide how to proceed. If however no such objections, submissions or notices of an intention to appear are received before the time to be specified in the order then the Liquidators will be authorised and permitted to proceed thereafter to apply to the Court for an order convening the scheme meetings. This will balance the need to ensure that anyone wishing to raise an objection has the opportunity to do so before the Liquidators proceed with the scheme without unduly delaying the scheme process by requiring a further hearing which may be unnecessary.

The Nature of Relief Issue

38. The Letter of Request and the draft order provided by the Liquidators, as I have explained, sought an order which would recognise the Liquidators and treat them "*in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by this Court* .." The order would then recognise the powers

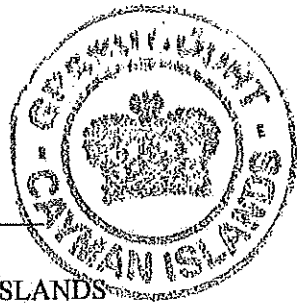
and authority of the Liquidators to act on behalf of the Company generally and also for the various purposes set out in the Letter of Request and draft order.

39. The Letter of Request and the draft order also sought an that section 97 of the Companies Law shall apply to the Company (and which would have the same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) so that no action or proceeding shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this court may impact.

40. It seems to me that the Court is unable, in the exercise of the common law power, to make either of these orders. Granting relief which is only available to provisional liquidators appointed by this Court in circumstances when no such provisional liquidators have been appointed, and granting relief "as if" provisional liquidators had been appointed seems to me to be precisely what Lord Collins in *Rubin* and *Singularis* had said was impermissible. The same applies to an order that would declare that section 97 applies to the Company in circumstances where that section does and cannot so apply in the absence of a provisional liquidator being appointed by this Court. It seems that the Letter of Request and the draft order were drafted so as to reflect the form of order made by the Chief Justice in the *FUJI Food* case.

41. However it seems to me that the objective of the Liquidators can properly be achieved by an order in a different form. I have already outlined above the form of order that I have in mind. The Liquidators wish and need to be able to apply to this Court for an order convening the scheme meetings, to make such other applications as are required in connection with and to promote the proposed Cayman scheme and to consent to such scheme on behalf of the Company. This objective can be achieved by an order which authorises the Liquidators to take this action. Furthermore, relief having the same effect as section 97 of the Companies Law can be achieved by a direction that requires all proceedings commenced or to be commenced (including proceedings for injunctive relief or to execute a judgment) against the Company be allocated to and heard by me. This order will ensure that any action taken by creditors or shareholders will become before me and will allow me to make suitable case management orders for adjournments or stays to allow the scheme to proceed (unless there are exceptional circumstances that justify the commencement or continuation of proceedings).

42. Ms Stanley indicated at the hearing that this approach would be acceptable to the Liquidators. Accordingly I shall make an order in these terms the precise form of which is to be proposed by Ms Stanley and approved by me.



THE HONOURABLE JUSTICE SEGAL
JUDGE OF THE GRAND COURT, CAYMAN ISLANDS

Exhibit 18

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House of Lords

*In re HIH Casualty and General Insurance Ltd

In re FAI General Insurance Co Ltd

In re World Marine and General Insurance Pty Ltd

In re FAI Insurances Ltd

McGrath and others v Riddell and another

[2008] UKHL 21

2007 Dec 11, 12;
2008 April 9

Lord Hoffmann, Lord Phillips of Worth Matravers, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury

Insolvency — Winding up — Foreign company — Companies incorporated in Australia also registered in and conducting business in England — Principal liquidation in Australia — Ancillary liquidation in England — Scheme for pari passu distribution of assets under Australian law different from English law — Whether English court should exercise discretion to direct remission of English assets to Australian liquidators — Whether discretion arising under common law or solely under statute — Insolvency Act 1986 (c 45), s 426(4)(5)

Four insurance companies which were incorporated in Australia and managed in Australia were authorised under the Insurance Companies Act 1982 to carry on insurance business in the United Kingdom, although the majority of their assets and liabilities remained in Australia. In 2001 the four companies became insolvent and the Supreme Court of New South Wales made winding up orders in respect of them and appointed liquidators in Australia. Pursuant to letters of request issued by the Australian court, joint provisional liquidators were appointed in England by the High Court. In 2005 the Australian court issued a letter of request to the High Court, pursuant to section 426(4) of the Insolvency Act 1986[1], asking that the English provisional liquidators be directed, after payment of their expenses, to remit the assets to the Australian liquidators for distribution. The judge declined to make the direction on the ground that the scheme for pari passu distribution in the Australian liquidation was not substantially the same as under English law, in that the Australian scheme gave preference to insurance creditors to the prejudice of other creditors. The Court of Appeal upheld his decision.

On appeal by the Australian liquidators and two representative Australian insurance creditors—

Held, (1) that Australia had been designated a "relevant country" for the purposes of section 426(4) of the 1986 Act and English courts were, therefore, required to assist the Australian courts in exercising jurisdiction in relation to insolvency and had a discretion to order remission of assets located in England to Australia; and that in the exercise of that discretion an English court could order remission of assets located in England to a liquidator in a country whose insolvency scheme was not in accordance with English law (post, paras 29, 37, 44, 59, 61, 62, 63, 66, 68, 69, 76, 82, 83).

Per Lord Scott of Foscote and Lord Neuberger of Abbotsbury. A discretion to order remission of assets to a liquidator in a country whose insolvency scheme is not

[1] Insolvency Act, s 426(4)(5): see post, para 55.

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A in accordance with English law only arises under section 426 (post, paras 59–62, 66, 69, 74–77).

Per Lord Hoffmann and Lord Walker of Gestingthorpe. A discretion to order remission of assets to a country whose insolvency scheme is not in accordance with English law also arises under the inherent powers of the court under common law, pursuant to the principle that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal B liquidation to ensure that all of a company's assets are distributed to its creditors under a single system of distribution (post, paras 10, 11, 18–21, 24, 26, 27, 30, 63).

In re Bank of Credit and Commerce International SA (No 10) [1997] Ch 213 and *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, CA considered.

(2) Allowing the appeal, that the mere fact that under the insolvency laws applicable in Australia there would be a significant class of preferential creditors whose debts would not have priority under English law was insufficient reason to refuse to remit the English assets; that there was nothing unacceptably discriminatory C or unfair about the Australian insolvency scheme in relation to preferential creditors which would justify an English court refusing to exercise its discretion to remit; and that, accordingly, it was appropriate, in all the circumstances of the case, to order remission of the English assets to Australia for distribution by the Australian liquidators in accordance with Australian law (post, paras 31–34, 36, 37, 42–45, 59, 61, 62, 63, 65, 79–83).

Decision of the Court of Appeal [2006] EWCA Civ 732; [2007] Bus LR 250; D [2007] 1 All ER 177 reversed.

The following cases are referred to in the opinions of their Lordships:

AssetInsure Pty Ltd v New Cap Reinsurance Corpn Ltd (2006) 225 CLR 331; 226 ALR 1

Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)

E *Bank of Credit and Commerce International SA, In re (No 10)* [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829, PC

Dallhold Estates (UK) Pty Ltd, In re [1992] BCLC 621

England v Smith [2001] Ch 419; [2000] 2 WLR 1141, CA

F *English, Scottish, and Australian Chartered Bank, In re* [1893] 3 Ch 385, Vaughan Williams J and CA

Drax Holdings Ltd, In re [2003] EWHC 2743 (Ch); [2004] 1 WLR 1049; [2004] 1 All ER 903

Forster v Wilson (1843) 12 M & W 191

HIH Casualty and General Insurance Ltd, In re (2005) 215 ALR 562

Hughes v Hannover Rückversicherungs-AG [1997] 1 BCLC 497, CA

G *International Tin Council, In re* [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890

Matheson Brothers Ltd, In re (1884) 27 Ch D 225

Mitchell v Carter [1997] 1 BCLC 673, CA

New Cap Reinsurance Corpn Ltd v Faraday Underwriting Ltd (2003) 117 FLR 52

Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA

H *Stein v Blake* [1996] AC 243; [1995] 2 WLR 710; [1995] 2 All ER 961, HL(E)

Suidair International Airways Ltd, In re [1951] Ch 165; [1950] 2 All ER 920

The following additional cases were cited in argument:

Debtor (Order in Aid No 1 of 1979), In re A; Ex p Viscount of the Royal Court of Jersey [1981] Ch 384; [1980] 3 WLR 758; [1980] 3 All ER 665

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African Farms Ltd, In re [1906] TS 373
Al Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC
Alfred Shaw & Co Ltd, In re; Ex p MacKenzie (1897) 8 QLJ 93
Artola Hermanos, In re (1890) 24 QBD 640, CA
Australian Federal Life and General Assurance Co Ltd, In re [1931] VR 317
Ayres v Evans (1981) 56 FLR 235
Banco de Portugal v Wadell (1880) 5 App Cas 161, HL(E)
Bank of Credit and Commerce International SA, In re (No 8) [1998] AC 214; [1997] 3 WLR 909; [1997] 4 All ER 568, HL(E)
Bank of Credit and Commerce International SA, In re (No 9) [1994] 1 WLR 708; [1994] 3 All ER 764
Bankers Trust International Ltd v Todd Shipyards Corpn [1981] AC 221; [1980] 3 WLR 400; [1980] 3 All ER 197, PC
Banque des Marchands de Moscou (Koupetschesky) v Kindersley, In re [1951] Ch 112; [1952] 1 All ER 1269, CA
Cavell Insurance Co Ltd, In re (2006) 269 DLR (4th) 679
Cleaver v Delta American Reinsurance Co [2001] UKPC 6; [2002] 2 AC 328; [2001] 2 WLR 1202, PC
Colorado, The [1923] P 102, CA
Commercial Bank of South Australia, In re (1886) 33 Ch D 174
Compania Merabello San Nicholas SA, In re [1973] 1 Ch 75; [1972] 3 WLR 471; [1972] 3 All ER 448
Federal Bank of Australia Ltd, In re (1893) LJ Ch 561; 68 LT 728, CA
Focus Insurance Co Ltd, In re [1997] 1 BCLC 219
Galbraith v Grimshaw [1910] AC 508, HL(E)
Goetze v Aders Preyor & Co (1874) 2 R 150
Jackson, In re [1973] NI 67
Kloebe, In re; Kannreuther v Geiselbrecht (1884) 28 Ch D 175
Levy's Trusts, In re (1885) 30 Ch D 119
Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512
National Benefit Assurance Co, In re [1927] 3 DLR 289
National Employers' Mutual General Insurance Association Ltd, In re (1995) 15 ASCSR 624
Osborn, In re; Ex p Tree [1931-32] B & CR 189
Sefel Geophysical Ltd, In re (1988) 70 CBR 97; 54 DLR (4th) 117
Solomon v Ross (1764) 1 H Bl 131
Standard Insurance Co Ltd, In re [1968] Qd R 118
Thurburn v Steward (1871) LR 3 PC 478, PC
Treco, In re (2001) 240 F 3d 148
Union Theatres Ltd, In re (1933) 35 WALR 89
Wilson, Ex p, Douglas, In re (1872) LR 7 Ch App 490

APPEAL from the Court of Appeal

This was an appeal by (1) Anthony McGrath and Christopher Honey, being the joint liquidators appointed by the Supreme Court of New South Wales of HIH Casualty and General Insurance Ltd ("HIH"), FAI General Insurance Co Ltd ("FAIG"), World Marine and General Insurance Pty Ltd ("WMG") and FAI Insurance Ltd ("FAII"), and (2) Amaca Pty Ltd and Amaba Pty Ltd, as representatives of insurance creditors of those companies, with leave of the House (Lord Hoffmann, Lord Walker of Gestingthorpe and Lord Mance) granted on 18 October 2007 against a decision of the Court of Appeal (Sir Andrew Morritt C, Tuckey and Carnwath LJJ) given on 9 June 2006 dismissing their appeal against a decision by David Richards J, sitting in the Chancery Division of the High Court of Justice, given on 7 October

2005, refusing the Australian liquidators' application, under section 426 of the Insolvency Act 1986, for directions to the provisional English liquidators of the companies, Thomas Alexander Riddell and John Mitchell Wardrop, to transfer the assets collected by them in the liquidation to the Australian liquidators.

The facts are stated in the opinions of Lord Hoffmann and Lord Scott of Foscote.

Jonathan Sumption QC, *Simon Mortimore* QC and *Tom Smith* for the Australian liquidators.

Geoffrey Vos QC and *Peter Arden* QC for the insurance creditors.

William Trower QC and *Jeremy Goldring* for the English provisional liquidators.

Their Lordships took time for consideration.

9 April 2008. **LORD HOFFMANN**

1 My Lords, this appeal arises out of the insolvent liquidation of the HIH group of Australian insurance companies. On 15 March 2001 four of them presented winding up petitions to the Supreme Court of New South Wales. Some of their assets—mostly reinsurance claims on policies taken out in London—were situated in England. To realise and protect these assets, provisional liquidators were appointed in England. In Australia, the court has made winding up orders and appointed liquidators. The Australian judge has sent a letter of request to the High Court in London, asking that the provisional liquidators be directed, after payment of their expenses, to remit the assets to the Australian liquidators for distribution. The question in this appeal is whether the English court can and should accede to that request. The alternative is a separate liquidation and distribution of the English assets in accordance with the Insolvency Act 1986.

2 The English and Australian laws of corporate insolvency have a common origin and their basic principles are much the same. The general rule is that after payment of the costs of liquidation and the statutory preferred creditors, the assets are distributed pari passu among the ordinary creditors: see section 107 of the 1986 Act and section 555 of the Corporations Act 2001 (Cth). But Australia has a different regime for insurance companies. I need not trouble your Lordships with the details. It is sufficient to say that, in broad outline, it requires assets in Australia to be applied first to the discharge of debts payable in Australia (section 116(3) of the Insurance Act 1973 (Cth)) and the proceeds of reinsurance policies to be applied in discharge of the liabilities which were reinsured (section 562A of the Corporations Act 2001 (Cth)). It is agreed that if the English assets are sent to Australia, the outcome for creditors will be different from what it would have been if they had been distributed under the 1986 Act. Some creditors will do better and others worse. Approximate figures are given in the judgment of Sir Andrew Morritt C in the Court of Appeal [2007] Bus LR 250, para 17. Generally speaking, insurance creditors will be winners and other creditors will be losers.

3 The Australian court made its request pursuant to section 426(4) of the Insolvency Act 1986: "The courts having jurisdiction in relation to

insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in . . . any relevant country . . ."

4 The Secretary of State has power under subsection (11) to designate a country as "relevant" and has so designated Australia. Subsection (5) describes the assistance which a UK court may give. A request from the court of a relevant country is

> "authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

5 This provision was introduced into insolvency law in consequence of a recommendation in fairly general terms by the Cork Committee in 1982: see Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558), ch 49. The committee drew attention to the inadequacy of the statutory provisions for international co-operation in personal bankruptcy and their complete absence in the law of corporate insolvency.

6 Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.

7 This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also *Fletcher, Insolvency in Private International Law*, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.

8 In the late 19th century there developed a judicial practice, based upon the principle of universalism, by which the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile. There is no doubt that an English court has jurisdiction to wind up such a company if it has assets here or some other sufficient connection with this country: *In re Drax Holdings Ltd* [2004] 1 WLR 1049. And in theory, such an order operates universally, applies to all the foreign company's assets and brings into play the full panoply of powers and duties under the Insolvency Act 1986 like any other winding up order: see Millett J in *In re International Tin Council* [1987] Ch 419, 447: "The statutory trusts extend to [foreign] assets, and so does the statutory obligation to collect and realise them and to deal with their proceeds in accordance with the statutory scheme."

A 9 But the judicial practice which developed in such a case was to limit the powers and duties of the liquidator to collecting the English assets and settling a list of the creditors who sent in proofs. The court, so to speak, "disapplied" the statutory trusts and duties in relation to the foreign assets of foreign companies. This practice was based partly upon the pragmatic consideration that any foreign country which applied our own rules of private international law would not recognise the title of an English ancillary B liquidator to the company's assets. But it was also based upon the principle of universalism. In *In re Matheson Brothers Ltd* (1884) 27 Ch D 225 Kay J appointed a provisional liquidator, as in this case, to protect the English assets of a New Zealand company which was being wound up in New Zealand. He said, at pp 230 and 231:

C "what is the effect of the winding up order which it is said has been made in New Zealand? This court upon principles of international comity, would no doubt have great regard to that winding up order and would be influenced thereby"—but there was nevertheless jurisdiction to make a winding up order, and therefore to appoint a provisional liquidator, to protect the English assets.

"I consider that I am justified in taking steps to secure the English assets D until I see that proceedings are taken in the New Zealand liquidation to make the English assets available for the English creditors pari passu with the creditors in New Zealand."

10 It seems clear from the last sentence that Kay J envisaged the English assets being distributed in the New Zealand liquidation, provided that English creditors shared pari passu with New Zealand creditors. It was on E the authority of this and similar statements in other cases that Sir Richard Scott V-C held in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 247 that an English court had power in an ancillary liquidation (provisional or final) to authorise the English liquidators to transmit the English assets to the principal liquidators. The basis for the practice could only be what Kay J called principles of international comity, the desirability of a single bankruptcy administration F which dealt with all the company's assets.

11 It is this jurisdiction, reinforced by the provisions of section 426, which the Australian liquidators (supported by two Australian insurance creditors who stand to gain from the application of Australian law) invite the court to exercise. But David Richards J [2006] 2 All ER 671, in a judgment which carefully examined all the arguments and authorities, held G that the jurisdiction did not extend to authorising the assets to be remitted to principal liquidators for distribution which was not pari passu but gave preference to some creditors to the prejudice of others. The Court of Appeal (Sir Andrew Morritt C, Tuckey and Carnwath LJJ) [2007] Bus LR 250 held that there was such a jurisdiction, which might be exercised if distribution in the country of the principal liquidation produced advantages for the non-preferred creditors which counteracted the prejudice they suffered. But H the present case offered no such advantages. The appeal was therefore dismissed.

12 My Lords, I would entirely accept that there are no administrative savings to be gained from remitting the assets to Australia. In order to avoid delay in distributing the available assets, the English provisional liquidators

and the Australian liquidators have co-operated in securing the approval of two alternative schemes of arrangement, one based on the outcome which would occur if all the assets were distributed according to Australian law and the other on the outcome of separate liquidations in England and Australia. Depending upon your Lordships' decision, one or the other will be carried into effect. All that remains is to press button A or button B. So the question is whether an order for remittal should be made, not to achieve any economies in the winding up, but simply because it is the right thing to do. Is it what principle and justice require?

13 The judge denied the existence of a power to order remittal to Australia on two grounds. The first was the absence of a power in the English court to disapply any part of the statutory scheme for the collection and distribution of the assets of an insolvent company. That included the provision in section 107 for pari passu distribution. The second was the weight of authority, in the specific context of an ancillary winding up, which laid emphasis upon the fact that the co-operation of the English court was given on the assumption that there would be a pari passu distribution in the principal liquidation.

14 In my opinion there is force in both of these reasons but the judge carried them too far. There is no doubt that, at least until the passing of section 426, an English court and an English liquidator had no option but to apply English law to whatever they actually did in the course of an ancillary winding up. As Wynn-Parry J said of an ancillary winding up in *In re Suidair International Airways Ltd* [1951] Ch 165, 173: "this court sits to administer the assets of the South African company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law. . ."

15 Similarly Sir Richard Scott V-C decided in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 that in settling a list of creditors, the English court was bound to apply English law. It could not disregard rule 4.90 of the Insolvency Rules 1986 (SI 1986/1925), which requires that the amount owing by the company to the creditor or vice versa shall be determined after setting off mutual debts against each other.

16 However, Sir Richard Scott V-C went further and directed the English ancillary liquidators not to remit the assets in their hands to the principal liquidators in Luxembourg (which did not recognise rights of set off) without making provision to ensure that the overall distributions to English creditors were in accordance with English law.

17 On the facts of the case I think, if I may respectfully say so, that the decision was correct. The mutual debts which were set off against each other appear to have been entirely governed by English law, which regards set off as a matter of substantial justice between the parties: see *Forster v Wilson* (1843) 12 M & W 191, 204. The court of the principal winding up in Luxembourg had made it clear that it was going to apply its lex fori and disallow the set off, notwithstanding the close connection of the transactions with England. In the circumstances, I think that justice required that a remittal of the assets should have been qualified by a provision which ensured that the English set off was given effect. Luxembourg has not been designated a "relevant country" under section 426 and there was accordingly no jurisdiction to apply Luxembourg law, but, as at present advised, I think that even if there had been, I would not have thought it

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A appropriate to do so. The mutual debts were too closely connected with England.

18 Where I respectfully part company with my noble and learned friend, Lord Scott, is in relation to the reason which he gave, and maintains in his speech in this appeal (which I have had the privilege of reading in draft) for deciding that he should not remit the assets to Luxembourg without protecting the position of creditors who had proved in England. In B my opinion he was right to do so as a matter of discretion. But he says that he had no jurisdiction to do otherwise because creditors in an English liquidation (principal or ancillary) cannot be deprived of their statutory rights under English law.

19 In my opinion, however, the judicial practice to which I have referred and which my noble and learned friend approved in *In re Bank of* C *Credit and Commerce International SA (No 10)* [1997] Ch 213 is inconsistent with the broad proposition that creditors cannot be deprived of their statutory rights under the English scheme of liquidation. The whole doctrine of ancillary winding up is based upon the premise that in such cases the English court may "disapply" parts of the statutory scheme by authorising the English liquidator to allow actions which he is obliged by statute to perform according to English law to be performed instead by the D foreign liquidator according to the foreign law (including its rules of the conflict of laws.) These may or may not be the same as English law. Thus the ancillary liquidator is invariably authorised to leave the collection and distribution of foreign assets to the principal liquidator, notwithstanding that the statute requires him to perform these functions. Furthermore, the process of collection of assets will include, for example, the use of powers to E set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme.

20 Once one accepts, as my noble and learned friend rightly accepted in *In re Bank of Credit and Commerce International SA (No 10)*, that the logic of the ancillary liquidation doctrine requires that the court should have power to relieve an English ancillary liquidator from the duty of distributing the assets himself but can direct him to remit them for distribution by the F principal liquidator, I think it must follow that those assets need not be distributed according to English law. The principal liquidator would have no power to distribute them according to English law any more than the English liquidator, if he were doing the distribution, would have power to distribute them according to the foreign law.

21 It would in my opinion make no sense to confine the power to direct G remittal to cases in which the foreign law of distribution coincided with English law. In such cases remittal would serve no purpose, except some occasional administrative convenience. And in practice such a condition would never be satisfied. Almost all countries have their own lists of preferential creditors. These lists reflect legislative decisions for the protection of local interests, which is why the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the H retention of funds to pay English preferential creditors. But the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal. I think that the judge was inclined to regard these differences as de minimis variations which did not prevent the foreign rules from being in substantial

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compliance with the pari passu principle. But they are nevertheless foreign rules. The fact that the differences were minor might be relevant to the question of whether a court should exercise its discretion to order remittal. But any differences in the English and foreign systems of distribution must destroy the argument that an English court has absolutely no jurisdiction to order remittal because it cannot give effect to anything other than the English statutory scheme.

22 The other ground relied upon by the judge was based upon a number of statements by eminent judges (including Sir Richard Scott V-C in *In re Bank of Credit and Commerce International SA (No 10)*) to the effect that the object of an ancillary liquidation was to ensure that all the company's assets worldwide were made available for distribution pari passu to all its creditors. One example is the passage I have quoted from the judgment of Kay J in *In re Matheson Brothers Ltd* 27 Ch D 225, 231 (see para 9 above) in which he said that he would continue the provisional liquidation "until I see that proceedings are taken in the New Zealand liquidation to make the English assets available for the English creditors pari passu with the creditors in New Zealand." That, said David Richards J, showed that pari passu distribution in the principal liquidation was a sine qua non for the assistance of the ancillary liquidator.

23 In my opinion, however, such observations have to be read in their context. Kay J was plainly anxious to secure that English creditors were treated equally with New Zealand creditors. He never directed his mind to the question of whether it would matter if New Zealand law gave preferences on grounds unrelated to the residence or nationality of the creditor. And your Lordships have not been referred to any case in which this question has been considered. In my opinion the authorities relied upon by the judge do not justify limiting the court's jurisdiction.

24 It follows that in my opinion the court had jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution. These differences are relevant only to discretion.

25 Even on the question of whether the court should make the kind of provision for protecting rights of set off which Sir Richard Scott V-C made in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, much will depend upon the degree of connection which the mutual debts have with England. If the country of principal liquidation does not recognise bankruptcy set off and the mutual debts arise out of transactions in that country, it is hard to see why an English court should insist on rights of set off being preserved in respect of claims by the foreign creditors against assets which happen to be in England. The English court would be entitled to exercise its discretion by remitting the assets to the principal jurisdiction and leaving it to apply its own law. (Compare *In re Paramount Airways Ltd* [1993] Ch 223, discussing the discretion not to apply the English law on voidable dispositions.)

26 It was submitted by the appellants that the argument for the existence of such a jurisdiction under section 426 was even stronger, because it expressly gives the court power to apply the foreign insolvency law to the matter specified in the request. As Sir Andrew Morritt C said [2007] Bus LR 250, para 49, section 426 is "itself part of the statutory scheme", no less

than section 107. The court therefore has power to apply the Australian law of distribution. It may be that it does, but in my opinion that is not what a court directing remittal of the assets is doing. It is exercising its power under English law to direct the liquidator to remit the assets and leave their distribution to the courts and liquidators in Australia. It is they who apply Australian law, not the English ancillary liquidator. As Morritt LJ said in *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, 517, a court asked for assistance under section 426 may exercise "its own general jurisdiction and powers" as well as the insolvency laws of England and the corresponding laws of the requesting state. The power to direct the remittal of assets collected in an ancillary liquidation falls within the former category.

27 This point highlights, I think, the difference between my noble and learned friend Lord Scott and myself. In relying upon section 426, Lord Scott holds that a court which directs remittal of the English assets to the Australian principal liquidator is applying the insolvency law of Australia. My own view is that the order cannot be characterised in this way and that the court is exercising a power, established well before the 1986 Act, under the insolvency law of England.

28 The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction. Section 426, on the other hand, extends the jurisdiction of the English court and the choice of law which it can make in the exercise of its own jurisdiction, whether original or extended. For example, section 426 can confer jurisdiction to make an administration order in respect of a foreign company when that jurisdiction is ordinarily confined to UK companies: *In re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621. Or it may enable the court to apply a foreign law when, as in *In re Suidair International Airways Ltd* [1951] Ch 165, it would otherwise be obliged to apply only English law, as in *England v Smith* [2001] Ch 419 (Australian law applied to examination of accountant connected with insolvent Australian company). But the present case involves neither an extension of the English jurisdiction or an application by the English court of a foreign law.

29 I therefore agree with the Court of Appeal that the court has jurisdiction, even if not for precisely the same reasons. But the Court of Appeal nevertheless decided that the jurisdiction should not be exercised because the outcome for some creditors would be worse than if the English assets were distributed according to English law. There was, said Carnwath LJ [2007] Bus LR 250, para 72, no "rule of private international law, or any other countervailing benefit" which would require the court to disregard the principles applicable under English insolvency law.

30 I must respectfully disagree. The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle

requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal.

31 In the present case I do not see that it would offend against any principle of justice for the assets to be remitted to Australia. In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3(1). That may be more appropriate. But in this case it does not matter because on any view, these are Australian companies. They are incorporated in Australia, their central management has been in Australia and the overwhelming majority of their assets and liabilities are situated in Australia.

32 It is true that Australian law would treat insurance creditors better and non-insurance creditors worse than English law did at the relevant time. But that seems to me no reason for saying that the Australian law offends against English principles of justice. As it happens, since the appointment of the provisional liquidators, English law has itself adopted a regime for the winding up of insurance companies which gives preference to insurance creditors: see regulation 21(2) of the Insurers (Reorganisation and Winding Up) Regulations 2004 (SI 2004/353), giving effect to the European Parliament and Council Directive 2001/17/EC on the reorganisation and winding up of insurance companies. So English courts are hardly in a position to say that an exception to the pari passu rule for insurance creditors offends against basic principles of justice.

33 Furthermore, it seems to me that the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law. Policy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all to expect that in the event of insolvency their rights will be determined by Australian law. Indeed, the preference given to insurance creditors may have been seen as an advantage of a policy with an Australian company.

34 As for UK public policy, I cannot see how it would be prejudiced by the application of Australian law to the distribution of the English assets. There is no question of prejudice to English creditors as such, since it is accepted that although section 116(3) of the Insurance Act 1973 (Cth) gives creditors whose debts are payable in Australia a first call upon Australian assets, this provision will not in practice prejudice the interests of creditors in the English assets. Furthermore, if there were to be a separate liquidation of the English assets in England, all creditors would be entitled to prove. Those

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A Australian (or other foreign) creditors who see an advantage in proving in England after bringing into hotchpot their dividends in Australia would no doubt do so. But UK public policy does not require them to be afforded this facility.

35 The fact that there are assets in England is principally the result of the companies having placed their reinsurance business in the London
B market. For the purposes of deciding how the assets should be distributed, that seems to me an entirely adventitious circumstance. Indeed, it may not be to the advantage of London as a reinsurance market if the distribution of the assets of insolvent foreign reinsurance companies is affected by whether they have placed their reinsurance business in London rather than somewhere else.

36 In my opinion, therefore, this is a case in which it is appropriate to
C give the principle of universalism full rein. There are no grounds of justice or policy which require this country to insist upon distributing an Australian company's assets according to its own system of priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators. I would therefore allow the appeal and make the order requested by the Australian court.

D

LORD PHILLIPS OF WORTH MATRAVERS

37 My Lords, I have had the benefit of reading in draft your Lordships' speeches. They contain areas of common ground that result in the conclusion that this appeal should be allowed. I share those areas of common ground and agree with the result to which they lead. They are:
E (i) section 426(4) and (5) of the Insolvency Act 1986 gives the court jurisdiction to accede to the request of the Australian court and (ii) on the facts of this case the court ought to accede to that request.

38 I had initially reservations about the second proposition. The business of insurance has certain special characteristics. These include the fact that, for a premium paid at the start of the contractual relationship the insurer undertakes obligations that may extend over a considerable
F future period. It is commonplace for countries to regulate insurance business under conditions that require insurers to demonstrate that they have adequate resources to meet such obligations before being authorised to enter into contracts of insurance. That is certainly the case in the United Kingdom. It appears also to be the case in Australia.

39 Where the law of a country requires an insurer to maintain assets,
G which may include rights under contracts of reinsurance, that are designed to protect policy holders who have taken out insurance within that country, one would normally expect the insolvency law of that country to afford priority to those policy holders in relation to such assets. In such circumstances, one would not expect rules of private international law or international comity to require the transfer of those assets to liquidators in another country who would not recognise such priority.

H 40 There are now in place in this jurisdiction Regulations which make special provision for distribution to creditors of insolvent insurance companies. These are the Insurers (Reorganisation and Winding-up) Regulations 2004 (SI 2004/353) which implement European Parliament and Council Directive 2001/17/EC of 19 March 2001.

41 These Regulations do not apply to the insolvencies with which this appeal is concerned because they were not in force when the provisional liquidators were appointed. Those insolvencies are, however, subject to Australian legislation whose overall effect will be, if the English assets are remitted to the Australian liquidators, that insurance and reinsurance creditors as a whole will benefit at the expense of other creditors in the case of the three insurance companies where remission had an effect. On the other hand insurance and reinsurance creditors whose liabilities are not in Australia will (except in the case of FAII) be worse off. This is not, however, the result of any special priority given to them under English law.

42 When considering the exercise of discretion under section 426(4) and (5) of the 1986 Act the following matters seem to me to be material. (i) The companies in liquidation are Australian insurance companies. (ii) Australian law makes specific provision for the distribution of assets in the case of the insolvency of such companies. (iii) These do not conflict with any provisions of English law in force at the material time designed to protect the holders of policies written in England. (iv) The policy underlying these provisions appears to accord with the policy of Regulations that have since been introduced in this jurisdiction.

43 These matters have persuaded me that it is in accordance with international comity and with the principle of universalism, as explained by my noble and learned friend, Lord Hoffmann, that the English court should accede to the request of the Australian liquidators.

44 These are my reasons for agreeing that this appeal should be allowed. I do not propose to stray from the firm area of common ground onto the controversial area of whether, in the absence of statutory jurisdiction, the same result could have been reached under a discretion available under the common law.

LORD SCOTT OF FOSCOTE

Introduction

45 My Lords, this appeal concerns the question whether the English assets of four insolvent Australian insurance companies, each of which is in compulsory liquidation in Australia and, in England, is under the control of provisional liquidators appointed by the High Court pursuant to a request made by the Australian liquidators, should in principle be remitted to the Australian liquidators for distribution in accordance with the Australian statutory scheme applicable to the liquidation of insolvent insurance companies, or should be retained in England and distributed in accordance with the English statutory scheme. Both David Richards J at first instance and the Court of Appeal (Sir Andrew Morritt C and Tuckey and Carnwarth LJJ) held that an order for the remission of the English assets to the Australian liquidators could not, or should not, be made. The Australian liquidators and two of the Australian insurance creditors have appealed to this House. The respondents are the provisional liquidators appointed by the High Court. The appeal depends on the answer to the question I have referred to, and the answer to that question depends, in my opinion on how section 426(4) and (5) of the Insolvency Act 1986 should be applied in a case such as this. The facts that have given rise to a need for an answer to the question are fully set out in the 7 October 2005 judgment of David

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Richards J [2006] 2 All ER 671, paras 9–21, and the judgment of Sir Andrew Morritt C [2007] Bus LR 250, paras 2–9. It is not necessary for me to do more than outline the nature of the problem that has arisen and sufficient of the details to explain why I, and I believe all your Lordships, have come to a different conclusion from that reached by the courts below.

The facts

46 The four insolvent companies were incorporated in Australia. They are conveniently referred to in the judgments below as HIH, FAIG, WMG and FAII and I shall so refer to them. They are members of the HIH Group which, until its collapse in March 2001, was the second largest insurance group in Australia. Its corporate members, 274 in number, included eight companies that were licensed insurance companies in Australia. The four companies with which this appeal is concerned were among them but were authorised also, under the Insurance Companies Act 1982, to carry on insurance business in the United Kingdom, and did so, as well as carrying on business in Australia and elsewhere. The majority of the assets and liabilities of the four companies are located in Australia but each has significant assets and liabilities in England. The relative size of the assets and liabilities in each of these countries can be judged from the table set out in para 12 of David Richards J's judgment and, for convenience, repeated here. The figures are approximate, based on estimates as at 31 March 2005 and expressed in millions of Australian dollars.

Assets	HIH	FAIG	FAII	WMG
Australia	864	799	33	15
UK	206	23	10	8
Total	1,111	892	43	23
Liabilities				
Australia	3,488	2,274	1,903	35
UK	882	5	85	12
Elsewhere	129	50	154	0
Total	4,500	2,329	2,142	47

The figures demonstrate the great preponderance of Australian assets and Australian liabilities over those in the United Kingdom.

47 Winding up orders in respect of the four companies were made in Australia on 27 August 2001 (they had previously been in provisional liquidation). Petitions for winding up orders against the four companies in England had been presented on 24 July 2001 by a corporate member of the HIH Group that was a creditor of each of the companies. Those petitions remain pending but each of the companies is insolvent and, pursuant to letters of request issued by the Australian court on 10 September 2001, the High Court in England made orders appointing the respondents joint provisional liquidators (and at the same time revoking a similar appointment that had been made before the presentation of the petitions). The orders appointing the provisional liquidators do not contain any provision permitting the remission of English assets to Australia.

48 On 4 July 2005 the New South Wales Supreme Court issued a letter of request asking the High Court in England to assist the Australian

liquidators by hearing and determining an application issued on the same day. The application asked the High Court to direct the provisional liquidators in England to pay over to the Australian liquidators "all sums collected, or to be collected, by them in their capacity as English provisional liquidators, after paying or providing for all proper costs, charges and expenses of the English provisional liquidators". This application, together with an application to the High Court by the provisional liquidators for directions, was heard by David Richards J and led to his judgment to which I have referred. He rejected the Australian liquidators' request for the direction above referred to.

49 It had been common ground that the way in which a winding up of the four companies would be most satisfactorily achieved would be via a scheme of arrangement approved under section 411 of the Corporations Act 2001 in Australia and section 425 of the Companies Act 1985 in England. The schemes would need to reflect the priorities that would be applicable to the distribution of assets among creditors if the liquidations were to run their ordinary course (see para 4 of David Richards J's judgment). It was here that the problem which led to David Richards J's refusal to make the order for remission to Australia of the English assets arose. Australian law has certain statutory provisions relating to insurance companies which depart from the insolvency principle of a pari passu distribution of assets among unsecured creditors. It is necessary to describe the effect of those provisions.

50 Section 116(3) of the Australian Insurance Act 1973 provides that, in the winding up of a company authorised under the Act to carry on insurance business, "the assets in Australia of the [company] shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia". The Australian courts have held that "assets in Australia" in section 116(3) means assets in Australia at the time of the winding up: *New Cap Reinsurance Corpn Ltd v Faraday Underwriting Ltd* (2003) 117 FLR 52 and *In re HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562. It is common ground, therefore, that section 116(3) would not apply to assets transferred or remitted to Australia after the commencement of the winding up. Moreover, in the *New Cap Reinsurance* case 117 FLR 52 it was held that the principle of hotchpot applied in relation to section 116(3) so that creditors with "liabilities in Australia" who received distributions from the proceeds of "assets in Australia" would not be entitled to participate in a distribution of the proceeds of other assets until the same level of dividend had been paid on debts which were not liabilities in Australia. David Richards J held that section 116 did not constitute a bar to an order directing remission to Australia of the English assets of the four companies and there has been no cross-appeal on that point.

51 Section 562A of the Australian Corporations Act 2001 does, however, present a more substantial problem. The section is fully set out in para 44 of the judgment of David Richards J. It provides, in summary, that the reinsurance recoveries of an insurance company must be distributed, in priority to other creditors, to those creditors who have insurance claims against the company. It has been held by the High Court of Australia that the term "contract of insurance" in section 562A(1) includes a contract of reinsurance and that "contract of reinsurance" includes a contract of retrocession: *AssetInsure Pty Ltd v New Cap Reinsurance Corpn Ltd* (2006) 225 CLR 331. Accordingly, it is common ground that section 562A confers

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on all creditors of an insurance company with insurance and reinsurance claims priority over all other creditors in respect of reinsurance, including retrocession, recoveries. Moreover, section 562A(4) gives the court power, in relation to amounts received under a contract of reinsurance or retrocession, to confer further priority on a particular insurance or reinsurance creditor, in "a manner that the court considers just and equitable in the circumstances". Section 562A has no territorial limits. Its application is mandatory so far as Australian liquidators are concerned. And, in *In re HIH Casualty and General Insurance Ltd* 215 ALR 562, 591 the Supreme Court of New South Wales held that the principles of hotchpot do not apply so as to require dividends received by a creditor under section 562A(3) or (4) to be brought into account by the creditor when proving against other assets of the insolvent insurance company.

52 By contrast, David Richards J held, and it was common ground before the Court of Appeal and not disputed before your Lordships, that, in a winding up in England governed by English distribution rules, creditors who had received dividends under section 562A in Australia would have to bring them into account, by way of hotchpot, when claiming dividends in the English winding up.

53 The approximate effect on creditors of the remission to Australia of the English assets, according to a table produced by the Australian liquidators and the English provisional liquidators (but not agreed by the third and fourth appellants) is set out below.

Type of creditor	Company	Anticipated dividend (cents/A$) if there is no remission of English assets	Anticipated dividend (cents/A$) if there is remission of English assets
Insurance/reinsurance creditors with liabilities in Australia	HIH	25.8	28.5
	WMG	49.0	55.1
	FAII	1.3	13.3
Insurance/reinsurance creditors with liabilities that are not liabilities in Australia	HIH	25.4	19.3
	WMG	49.0	39.49
	FAII	1.3	12.8
Other creditors with liabilities in Australia	HIH	25.4	19.3
	WMG	49.0	44.9
	FAII	1.3	0.9
Other creditors with liabilities that are not liabilities in Australia	HIH	25.4	19.3
	FAII	1.3	0.4

According to the agreed statement of facts and issues (para 41) the Australian liquidators believe that the dividends receivable by the creditors of FAIG would be unaffected by the remission.

54 Following the judgment of David Richards J the proposed schemes of arrangement were redrafted. They have, as I understand it, been drafted on alternative footings, dependant on whether your Lordships dismiss this

appeal and hold that David Richards J and the Court of Appeal were right to refuse to direct the remission of the English assets to Australia, or allow this appeal and hold that in principle the English assets ought to be remitted to Australia. These schemes of arrangement providing for alternative modes of distribution, I understand, have been approved both in Australia and in England. How they will be implemented depends upon your Lordships' decision, first, whether the High Court has power to direct the remission of the English assets to Australia and, second, whether in the circumstances of this case that power should, in principle, be exercised. There are two possible sources of such a power. One, espoused by my noble and learned friend Lord Hoffmann, whose opinion I have had the advantage of reading in draft, is an inherent power in the court established not by statute but by previous judicial decisions. The other is section 426 of the Insolvency Act 1986, introduced into our law, as Lord Hoffmann has explained (para 5 of his opinion), in consequence of a recommendation by the Cork Committee in 1982.

Section 426

55 The section is headed "Co-operation between courts exercising jurisdiction in relation to insolvency" and subsections (4) and (5) provide as follows:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> "(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

By the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123) Australia was designated a "relevant country" for the purposes of section 426.

56 David Richards J, in para 112 of his judgment, expressed the conclusion that:

> "in an English liquidation of a foreign company, the court has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for pari passu distribution in that liquidation is not substantially the same as under English law."

He said that he regarded that conclusion as an application of my reasoning in *In re Bank of Credit and Commerce International (No 10)* [1997] Ch 213. I think, with respect, that that was a mistaken basis for his conclusion. My reasoning in *In re Bank of Credit and Commerce International (No 10)* related only to the inherent power of the court. It had nothing to do with section 426. *In re Bank of Credit and Commerce International (No 10)* was concerned with the question of remission of assets from England to

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Luxembourg, the country where Bank of Credit and Commerce International had been incorporated and the seat of the principal liquidation. Luxembourg had not been designated a "relevant country" for the purposes of section 426. A letter of request under section 426, asking for the remission to Luxembourg of the assets held by the English liquidators, had not been, and could not have been, issued by the Luxembourg court to the High Court. The issue was whether the High Court had an inherent jurisdiction to authorise the English liquidators, conducting an ancillary liquidation in England, to remit assets to the liquidators conducting the principal liquidation and, if so, the scope of that inherent jurisdiction. It was common ground in *In re Bank of Credit and Commerce International (No 10)* that the High Court had no statutory jurisdiction to remit the assets or to direct the liquidators to do so.

57 Although David Richards J expressed his conclusion as a lack of "power" to give the direction sought by the Australian liquidators, I think, reading his judgment as a whole, that he was not really taking a jurisdictional point but was concluding that it would not be right to direct a remission of assets in circumstances where the remission would reduce the dividends that would have been recovered under the English scheme of insolvency distribution by those creditors who were not insurance creditors. That certainly was the approach of Sir Andrew Morritt C when the case reached the Court of Appeal. He said [2007] Bus LR 250, para 35 that "the concept of 'assistance' should not be restrictively construed so as to limit the jurisdiction of the court" and that the assistance that the New South Wales court had requested by its letter of request of 4 July 2005 did not fall "outside the ambit of that concept." He concluded, at para 50:

> "if the companies were in liquidation in England the court in England would have jurisdiction to entertain a request under section 426 for directions to the liquidators in England to transfer the assets collected by them to the liquidators in the principal liquidation even though the result of such a transfer would be to interfere with the statutory scheme imposed on those assets by [the] Insolvency Act 1986"

With all of that I respectfully agree. The Chancellor went on to consider whether the High Court could "properly" give the requested direction. That, he thought, was the critical question: para 36. Again, I respectfully agree.

58 The reason why the Chancellor concluded that the court's power under section 426 to direct the provisional liquidators to remit the English assets to Australia ought not to be exercised appears from para 52 of his judgment. He held that, on the authority of *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497 and *England v Smith* [2001] Ch 419, the court should comply with the letter of request issued by the Australian court "if it may properly do so", and went on to say:

> "That will involve a consideration of all the circumstances including whether the transfer sought will prejudice the creditors or any class of them and whether there would be other advantages sufficient to counteract such prejudice. In relation to the facts of this case it is quite clear that the transfer sought would prejudice all creditors of each of the companies except FAIG and except Australian insurance and reinsurance creditors of HIH, WMG and FAII and non-Australian insurance and

reinsurance creditors of FAII. The advantage to the latter classes of creditor cannot counteract the prejudice suffered by all the other classes. Nor can those advantages and any benefit obtained from avoiding duplication enable the court to conclude that a transfer would be for the benefit of the estate as a whole."

The last sentence in this citation was a response to a submission made by the Australian liquidators that the remission of the English assets should be directed if it would be for the benefit of the estate or the creditors as a whole: see para 51 of the Chancellor's judgment.

59 The Chancellor's reasoning does not, however, seem to me to explain why the identification of disadvantage to creditors other than the insurance and reinsurance creditors referred to should require the conclusion that the English assets should not be remitted to Australia. The exercise of the section 426 power so as to direct the remission of the assets to Australia would not constitute the disapplication of the English insolvency scheme. Section 426 is part of the English insolvency scheme. To hold that the power under the section to direct the remission of assets from the country where an ancillary liquidation is being conducted (England) to the country where the principal liquidation is being conducted (Australia) cannot be exercised if the effect would be to reduce the amount of dividends receivable in England by any class of creditors, or, I suppose, by any individual creditor, would be to deprive the section, at least in relation to remission of assets from an ancillary to a principal liquidation, of much of its intended potential to enable a single universal scheme for insolvency distribution to be achieved. If an ancillary liquidation is being conducted in England under an insolvency scheme that does not include section 426, eg where the country of the principal liquidation is not a United Kingdom country and has not been designated a "relevant country or territory"; the position seems to me quite different. The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme. I expressed that opinion in *In re Bank of Credit and Commerce International (No 10)* [1997] Ch 213 and remain of that opinion. Luxembourg was not a "relevant country or territory". Australia, however, is and, accordingly, section 426 is part of the statutory scheme applicable under the 1986 Act to these four Australian companies. I do not think it would be proper for the courts of this country, in reliance on an inherent jurisdiction, in effect to extend the benefits of section 426 to a country that had not been designated a "relevant country or territory" by the Secretary of State, and thereby to deprive some class of creditors of statutory rights to which they would be entitled under the English statutory insolvency scheme. There is no case law that supports the proposition that the inherent jurisdiction can be used so as to bring about such deprivation.

60 Indeed, the case law is to an entirely contrary effect. Vaughan Williams J said in *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, 394:

"One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicile of the company in

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liquidation; let the court of the country of domicile act as the principal court to govern the liquidation; and let the other courts act as ancillary, as far as they can, to the principal liquidation. *But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the court where the main liquidation is going on—will not ever make the court give up the forensic rules which govern the conduct of its own liquidation*" (my emphasis).

In *In re Suidair International Airways Ltd* [1951] Ch 165, 173 Wynn-Parry J, having cited the passage from the judgment of Vaughan-Williams J in *In re English, Scottish and Australian Chartered Bank* cited above, said:

> "It appears to me that the simple principle is that this court sits to administer the assets of the South African company which are within its [i e the English court's] jurisdiction, and for that purpose administers, and administers only, the relevant English law; that is, primarily, the law as stated in the Companies Act 1948 looked at in the light, where necessary, of the authorities. If that principle be adhered to, no confusion will result. If it is departed from, then for myself I cannot see how any other result would follow than the utmost possible confusion."

I cited these authorities, and others, in *In re Bank of Credit and Commerce International (No 10)* [1997] 1 Ch 213, 246, in coming to the conclusion that:

> "the ancillary character of an English winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court."

61 It is, of course, desirable as a general proposition that there should be one universally applicable scheme of distribution of the assets of an insolvent company. And it is also obvious that, in general, where a company is being wound up not only in its place of incorporation but also in other countries where it carried on some of its business, the winding up process in the latter countries should be regarded as ancillary to the principal winding up being conducted in the country of its incorporation. In such a case there is, therefore, a potential conflict between, on the one hand, the desirability of that general proposition and, on the other hand, the undesirability of the confusion to which Wynn-Parry J referred in the *Suidair* case [1951] Ch 165 coupled with the obligation of English courts to accord to claimant creditors in an English winding up the statutory rights to which they are entitled under English insolvency statutes. This conflict has been resolved by Parliament in enacting section 426. Section 426 has become part of the statutory scheme. But the resolution achieved by section 426 does not apply to all countries. It does not apply where the principal winding up is being conducted in a country which is neither part of the United Kingdom nor has been designated by the Secretary of State as a "relevant country or territory". The proposition that the assistance and directions sought by the Australian court and the Australian liquidators in the present case could be given under an inherent power of the court without reliance on section 426(4) and (5) is, in my respectful opinion, unacceptable. It would mean that the assistance and directions could be

given in relation to a winding up being conducted in a foreign country that had not been designated a "relevant country or territory" by the Secretary of State. It would constitute the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State. Moreover, the issue is one that does not arise in the present case. If the assistance and directions sought cannot, on a proper exercise of the court's discretion, be given pursuant to section 426(4) and (5), they could hardly be given as a proper exercise of the court's inherent power. Exactly the same considerations would come into play. And, as I understand it, your Lordships all agree that the directions sought should be given.

62 If the country of the principal winding up is a "relevant country or territory" for section 426 purposes and the liquidators in that country have requested English liquidators to remit to them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of pari passu distribution to ordinary unsecured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede. I agree, as I think is common ground, that the English liquidators should first discharge the debts of those creditors who, under the English insolvency scheme, are entitled to preferential payment. There may be other circumstances in which a refusal to remit assets pursuant to such a request might be justified. It has been suggested that a refusal would be justified if it would give rise to "manifest injustice to a creditor". So indeed it might. But reliance simply on the fact that under the insolvency scheme applicable to the principal winding up there would be a significant class or classes of preferential creditors whose debts would not have priority under the English insolvency scheme is not, in my opinion, sufficient to justify a refusal. It would, in my opinion, as I hope I have made apparent, have been sufficient if the country of the principal winding up had not been a "relevant country or territory" for section 426 purposes. These four companies are Australian companies whose principal place of business, as well as their place of incorporation, was Australia. The Australian statutory scheme allows insurance and reinsurance creditors of insolvent insurance companies to be paid in priority to ordinary creditors. There is nothing unacceptably discriminatory or otherwise contrary to public policy in these statutory provisions. The general acceptability by English law standards of the Australian insolvency scheme is confirmed by the designation of Australia as a "relevant country or territory" for section 426 purposes. I can see no sufficient reason why the Australian liquidators' request for the remission of the English assets should not be acceded to. I would allow this appeal but repeat that I would do so on the footing that the power to accede to the Australian liquidators' request derives from section 426 and not from any inherent jurisdiction of the court.

LORD WALKER OF GESTINGTHORPE

63 My Lords, I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with his opinion, which dispels several obscurities on the authorities and clarifies the nature of the court's powers under section 426 of the Insolvency Act 1986. I too would allow this appeal and make the order requested by the Supreme Court of New South Wales.

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A LORD NEUBERGER OF ABBOTSBURY

64 My Lords, this appeal concerns the English assets of four insolvent Australian insurance companies, in compulsory liquidation in Australia and in provisional liquidation in England, pursuant to the Australian liquidators' request. The question is whether those assets should be remitted to the Australian liquidators for distribution in accordance with the Australian insolvency regime, or whether they should be distributed here in accordance B with the English insolvency regime.

65 Your Lordships all agree that the answer is that the assets should be remitted for distribution in accordance with the Australian insolvency regime, albeit that the Australian liquidators and the English provisional liquidators have very sensibly agreed what the practical consequences are to be in either case, as my noble and learned friend Lord Hoffmann explains in C para 12 of his speech (which I have had the opportunity of seeing in draft), so that there will be no need for any formal remittal. However, there is disagreement as to the basis upon which the assets can be distributed in accordance with the Australian insolvency regime. Accordingly, I shall give my reasons for allowing the appeal, albeit that they can be expressed relatively shortly, as the relevant facts, statutory provisions, case law and the relevant principles are comprehensively covered in the preceding speeches. D

66 The question I shall primarily address is whether the remittal of the English assets to the Australian liquidators for distribution in accordance with the Australian insolvency regime can be effected pursuant to the established judicial practice described in paras 8 and 9, or whether it can only be effected pursuant to section 426 of the Insolvency Act 1986. I have come to the conclusion that, while remittal of assets can be effected pursuant E to established judicial practice, the power to do so where the distribution will not be in accordance with the English insolvency regime derives from section 426.

67 The main substantive features of the English insolvency regime in relation to unsecured creditors can be broadly summarised as follows. First, preferential creditors (listed in Schedule 6 to the 1986 Act) enjoy priority on a pari passu basis as between themselves (sections 175 and 386 of the F 1986 Act). Secondly, all other creditors rank behind them, also on a pari passu basis as between themselves (rule 4.181 of the 1986 Rules). Thirdly, there is a mandatory set-off requirement (rule 4.90 of the 1986 Rules) as explained by Lord Hoffmann (albeit in a bankruptcy context) in *Stein v Blake* [1996] 1 AC 243.

68 As a matter of general principle, it seems to me that, at any rate in the G absence of section 426(4) and (5), where a company is wound up in this country, its assets are held on terms that they must be applied in accordance with that statutory insolvency regime: see *Ayerst v C & K (Construction) Ltd* [1976] AC 167, 176E–177F. As Millett LJ put it in *Mitchell v Carter* [1997] 1 BCLC 673, 686,

> "the making of a winding up order divests the company of the H beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company."

69 This principle applies in the case of an English liquidation of a foreign company. In particular, section 221(1) of the 1986 Act confirms that

the provisions of that Act "about winding up" apply to "unregistered companies", which includes foreign companies, in the same way that they apply to English companies. That is confirmed by the judgment in *In re International Tin Council* [1987] Ch 419, 446–447. As Millett J there explained, the application of the English insolvency regime applies in theory to all the assets of the foreign company, and in theory and practice to its assets within the jurisdiction. In the absence of a provision such as section 426, I therefore find it difficult to see on what basis an English court could have jurisdiction to disapply the English insolvency regime to assets in this jurisdiction of a company subject to a winding up order made by an English court.

70 Of course, in this case the companies have not been the subject of a winding up order in England, although winding up petitions have been presented and provisional liquidators appointed. Further, as David Richards J said in his judgment at first instance [2006] 2 All ER 671, para 184, there is "a significant prospect that, in the absence of schemes of arrangement, winding up orders would be made" by the High Court in respect of each of the four companies. He went on to say, it was "a principal function" of the provisional liquidators "to safeguard the assets of the companies for the benefit of those interested in their distribution in the event of a winding up." Accordingly, he considered that he should not authorise them to do anything whose "effect would be to undermine the proper working out of the statutory insolvency scheme which would be mandatory if winding up orders were made".

71 That appears to me to be right. It seems clear that the companies are insolvent, and that the only reason that the English court has accepted jurisdiction is because the Australian courts have ordered them to be wound up because of their insolvency. Although no formal winding up orders have been made, provisional liquidators have been appointed ultimately because of the companies' insolvency. In those circumstances, I consider that the court's powers should not be more flexible or wider in connection with the remitting or distribution of assets than if formal winding up orders had been made. Accordingly, I approach the issue, as the parties and the courts below did, on that basis.

72 There appears to be no suggestion in any of the earlier authorities cited to your Lordships that the court, when exercising its jurisdiction to remit to another jurisdiction for distribution the assets of a company subject to a winding up order in this country, could authorise the distribution of those assets other than in accordance with the English insolvency regime. However, there are judicial observations which emphasise the mandatory nature of the English regime, although they are not directly concerned with the question of remittal, in relation to foreign insolvent companies. I have in mind the observations of Vaughan Williams J (whose decision was upheld by the Court of Appeal) in *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, 394 and of Wynn-Parry J in *In re Suidair International Airways Ltd* [1951] Ch 165, 173–174, as applied by Sir Richard Scott V-C in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 246D–E. The relevant passages are quoted by my noble and learned friend, Lord Scott of Foscote (whose speech I have had the opportunity of seeing in draft), in para 60.

A 73 In paras 95–107 of his excellent judgment at first instance, David Richards J considered a number of cases in this jurisdiction, Canada and Australia, in which courts were invited to remit to foreign liquidators local assets of a foreign company which was being wound up. In all those cases, it was made clear that the court had to be satisfied that the foreign liquidators would distribute pari passu, in accordance with the domestic insolvency regime. Of course, it can be said that those cases merely emphasise the B importance of the pari passu principle, but they appear to me to indicate that the courts concerned were seeking to ensure that the principles of their local insolvency regime were honoured.

74 I accept that in no case where the court has been asked to exercise its power to remit assets to liquidators in another jurisdiction has it refused to do so on the grounds that the categories of preferential creditors, or other C aspects, of that other jurisdiction's insolvency regime differed from those in this country. However, I do not consider that that argument goes anywhere, because, so far as I am aware, that point has not been raised in any case where the court has been invited to remit assets. Even if the court would have had power to remit in such circumstances at some point in the past, it seems to me that, absent section 426 of the 1986 Act, it would not have such D power now.

75 I accept that, on this basis, the value of the English court's inherent ancillary liquidation power is very much more circumscribed than if it could effectively disapply, or authorise the disapplication of, the English insolvency regime. However, the fact that the English court has an inherent power to relieve an ancillary liquidator in this country from the duty of distributing the assets himself, and to order that the assets be remitted to be E distributed by a foreign liquidator, does not mean that it necessarily follows that those assets can then be distributed other than in accordance with the English insolvency regime. The fact that English assets are bound to be distributed in accordance with certain principles does not prevent the assets being passed to someone else so that they can be distributed in accordance with those principles, but it would prevent the passing on of those assets for F distribution in accordance with different principles. If this is right, it means that the court's inherent power to remit assets is, I accept, of much more limited value than if the law were otherwise, but the power would nonetheless not be valueless: it could assist in achieving administrative convenience.

76 The notion that the court has inherent jurisdiction to remit English assets to liquidators in another jurisdiction on the basis that the insolvency G regime of that jurisdiction would apply, seems to me to sit uneasily with the provisions of section 426(4) and (5), at least in relation to remittal of assets. The inherent jurisdiction to remit must be exercisable in relation to any other country whereas section 426 only applies to a "relevant country or territory", i e one designated by the Secretary of State. If the courts had an inherent power to remit to a country with a different insolvency regime, either the courts could exercise that power in relation to a country which H was not so designated, or section 426 impliedly restricts the inherent jurisdiction to designated states. The former possibility renders the significance of designation questionable in a case where remittal is sought; indeed it can be said to involve the inherent jurisdiction almost thwarting the statutory purpose. The latter possibility not only involves an implication as

to the effect of section 426 which is not exactly obvious: it would mean that the inherent power (if it ever existed) had very little, if any, further purpose.

77 Accordingly, in agreement with Lord Scott, were it not for section 426, I would have been of the view that this appeal should be dismissed.

78 I should add that I agree with Lord Hoffmann when he says that "the common law power to remit is about choice of jurisdiction, whereas section 426 is about choice of law", at least in relation to the present type of case. What section 426(5) says in terms is that an English court, to which an appropriate request is made, may "apply . . . the insolvency law which is applicable by [the foreign court making the request]". Whether the English court does that in the present case by ordering the English provisional liquidators to distribute in accordance with the Australian regime, or whether it orders remittal of the assets to Australia in accordance with its common law powers, to enable the Australian liquidators to distribute in accordance with the Australian regime, is a decision for the English court in each case. However, the questions whether to remit assets to another country and whether to apply, or to permit the application of, the distribution law of that country are two different issues, although resolution of the latter question will no doubt often dictate the answer to the former question. I consider that the first of those questions is governed by the common law and the second is governed by section 426 of the 1986 Act.

79 That leads me to the second aspect which I should deal with, namely the ultimate issue in this case: should the English court accede to the Australian liquidators' request to remit the English assets for distribution in accordance with the Australian insolvency regime? This aspect can be disposed of more quickly, as I agree with all your Lordships that this would be an appropriate case for remission of the English assets to Australia for distribution by the liquidators in accordance with Australian law. It is true that this will mean that some of the creditors will be worse off than under a distribution in accordance with the English insolvency regime, but, by the same token, it will mean that some of the creditors will be better off. That is almost inevitable where one applies any regime which differs in any way from the English regime.

80 More importantly, I do not consider that any fundamental principle of English insolvency law would be offended, or any unfairness would be perpetrated, by the application of the Australian insolvency regime. Under Australian law, preferential treatment is accorded to certain creditors of insurance companies, who would not have been given such treatment in English law. However, that does not in itself mean that the application of the Australian regime should be rejected. Further, as my noble and learned friend, Lord Phillips of Worth Matravers (whose speech I have read in draft) points out, the companies are, and always have been, Australian insurance companies, and Australia has been designated as a "relevant country or territory" for section 426 purposes. Clearly the fact that Australia has been so designated cannot be the end of the matter, but it does indicate, at least in general terms, that the Secretary of State considers that the insolvency law of Australia is acceptable in principle in this jurisdiction.

81 More particularly, the notion of preferential creditors is, and long has been, part of our insolvency regime, and it is almost inevitable that different insolvency regimes will have slightly different categories of

A preferential creditors. It cannot be right that such differences should always, or (arguably) even frequently, be a bar to an order for remittal, as that would appear inconsistent with the purpose of section 426(4) and (5), especially in view of the slightly mystifying reference therein to "the rules of private international law". The fact that the categories of preferential creditors have changed significantly in this jurisdiction more than once over the past 15 years rather underlines the point. Further, there is nothing unreasonable or unfairly discriminatory in the application of the Australian statutory provisions with regard to preferential creditors in this case. On the contrary, as Lord Hoffmann and Lord Phillips point out in paras 32 and 40 respectively, since 2004 the English insolvency regime has now included preferential provisions for insurance companies which are very similar to the Australian regime. It is not as if the Australian regime would distribute C assets between groups of unsecured creditors (whether preferential or not) other than on a pari passu basis, or has significantly different set-off rules from those which apply in this jurisdiction.

82 Accordingly, although I take the view that it would not have been open to an English court to make the order sought by the Australian liquidators in the absence of section 426(4) and (5) of the 1986 Act, I consider that a different answer is appropriate in light of section 426. D David Richards J and the Court of Appeal thought otherwise, but that was at least in part because they were constrained by the reasoning in *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497 (much of which is unexceptionable as Lord Hoffmann and Lord Scott have said).

83 For these reasons, I too would allow this appeal.

E *Appeal allowed.*
Assets ordered to be remitted to Australia.
Submissions on costs invited within 14 days.

Solicitors: Norton Rose LLP; Clifford Chance LLP; Freshfields F *Bruckhaus Deringer.*

BLS

G

H

Exhibit 19

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Jyske Bank (Gibraltar) Ltd v Spjeldnaes & Ors.

Chancery Division.
Evans-Lombe J.
Judgment delivered 29 October 1998.

Winding up – Transactions defrauding creditors – Judgment creditor sought to reverse transaction between two defendants – Whether transaction was at an undervalue – Whether transfer of benefit of contract for purpose of putting asset beyond reach of creditors – Insolvency Act 1986, s. 423; Convention on Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention), art. 6(1).

This was a claim, as part of a larger action, for relief by a bank under s. 423 of the Insolvency Act 1986 that the benefit of a defendant company's contract to acquire land in Ireland had been transferred to another defendant at an undervalue.

The plaintiff bank had obtained a money judgment against various defendants in proceedings in which it claimed that approximately £46m had been fraudulently abstracted from the plaintiff bank and could be traced into the hands of some of the defendants. The bank was a judgment creditor of one of the defendants, an Irish company called Falstaff Ltd, in the sum of £154,000 and interest and Falstaff could not meet that judgment. Falstaff had entered into a contract to purchase certain land in Ireland. That land which had increased in value as a result of planning consents was not conveyed to Falstaff but to another Irish company, 'Eccleston', controlled by the wife of one of the other defendants, H. The bank argued that the land should have been conveyed to Falstaff and should be transferred to Falstaff so as to be available to meet its judgment.

Held, **ordering Eccleston to vest the land in Falstaff:**

1. The bank was not entitled to recover the benefit of the contract to purchase the land on the basis that Eccleston was a mere nominee for Falstaff or took the benefit of the contract as a trustee for Falstaff, because the bank had no direct cause of action against Eccleston and had no standing as a creditor, in the absence of a winding up of Falstaff and through the resulting liquidator, to enforce Falstaff's right to recover from Eccleston assets held by Eccleston as nominee or held on trust for Falstaff.

2. The transfer of the benefit of the contract by Falstaff to Eccleston was however at an undervalue within the meaning of s. 423(1)(a) or (c) of the Insolvency Act 1986. The contract was not valueless to Falstaff and it would have been able to complete the contract itself if its directors had allowed it to do so. Also Falstaff could have disposed of the benefit of the contract to a third party for consideration.

3. The transfer to Eccleston was for a consideration the value of which in money or money's worth was significantly less than the value of the consideration provided by Eccleston and s. 423(1)(c) was satisfied.

4. The transfer of the contract was made for the purpose of putting an asset of Falstaff, namely the benefit of the contract, beyond the reach of Falstaff's creditors, including the bank and of otherwise prejudicing their interests within the meaning of s. 423(3). The reasons given for putting Eccleston in funds to complete the purchase rather than Falstaff were first that Falstaff's survival was in doubt and secondly the existence of the bank's claim against Falstaff. It was likely that the existence of the bank's claim was the primary reason but in any event the first reason given was sufficient to satisfy the requirements of s. 423(3).

5. Section 423 bound defendants in respect of transactions entered into and performed out of the jurisdiction (Re Paramount Airways Ltd [1993] Ch 223 applied) and making an order for the transfer of the land from Eccleston to Falstaff was not an exorbitant exercise of jurisdiction without regard to the comity which should be shown to the Irish courts.

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6. The court had jurisdiction over the defendants under art. 6(1) of the Convention on Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention).

The following cases were referred to in the judgment:

Chohan v Saggar [1992] BCC 306.
Mercantile Group (Europe) AG v Aiyela [1994] QB 366.
Paramount Airways Ltd, Re (No. 2) [1992] BCC 416; [1993] Ch 223.
Reichert v Dresdner Bank (Case 115/88) [1985] ECR I-27.
SCF Finance Co Ltd v Masri [1985] 1 WLR 876.
Siskina (Cargo Owners) v Distos Compania Naviera SA [1979] AC 210.
TSB Private Bank International SA v Chabra [1992] 1 WLR 231.
Webb v Webb (Case C-294/92) [1994] QB 696; [1994] ECR I-1717.

Trevor Philipson QC and Anthony White (instructed by Herbert Smith) for the plaintiff.

Stanley Brodie QC and Tom Weisselberg (instructed by Joblings, Rugby) for the defendants.

JUDGMENT

Evans-Lombe J: These proceedings are consequent on an action to which I will refer as the 'main action' in which Jyske Bank (Gibraltar) Ltd, the plaintiff, to whom I will refer as 'the bank', proceeded against various defendants with the object of recovering approximately £46m abstracted from the bank as a result of the fraudulent breach of duty of an officer of the bank together with interest. On 23 July 1997 I gave judgment in the main action and for the background facts giving rise to the present proceedings I refer to the text of that judgment. So far as concerns these proceedings I found that the moneys so abstracted could be traced through a series of transactions into the hands of some of the defendants. The present proceedings concern the bank's claims against the 23rd defendant, Falstaff Ltd, to which I will refer as 'Falstaff', and the 40th defendant, Eccleston (International) Ltd, to which I will refer as 'Eccleston'. It was the bank's pleaded case that four payments to or on behalf of Falstaff by other defendants, of £6,304 paid to Falstaff on 7 August 1991, £15,000 paid to Malu NV, a Belgian company, on 22 July 1991 on behalf of Falstaff, of £33,174 similarly paid to Malu NV on 7 November 1991 and of £100,000 similarly paid to Malu NV on 25 August 1992 are traceable from moneys wrongfully abstracted from the bank. As will be seen, subject to the result of a pending appeal on a point of law challenging my conclusion that those moneys were, on the facts found by me, able to be so traced, the bank's claim against Falstaff has been determined by a submission to judgment by Falstaff. The present case concerns the extent of Falstaff's assets available to meet such judgment and in particular whether certain land in Ireland conveyed to Eccleston, a company whose majority shareholder was Mrs Brid Burke-Heinl in the town of Blessington is to be treated as an asset of Falstaff or should be now transferred to Falstaff Mrs Brid Burke-Heinl, to whom I will refer as 'Mrs Heinl', is the wife of Wolfgang Herbert Heinl, the 21st defendant, against whom I have given judgment in the sum of more than £7m with interest, which judgment, inter alia, is the subject of the appeal to which I have referred.

I will now set out the facts giving rise to the present proceedings.

Falstaff was incorporated in Eire on 15 August 1984. On 15 May 1986 Mrs Heinl and Patrick Burke were appointed its directors. At all material times it has had 1,000 £1 shares on issue of which one was registered in the name of Patrick Burke and the remainder in the name of Mrs Heinl, and Patrick Burke and Mrs Heinl have been Falstaff's only de jure directors.

Falstaff appears to have had two functions. The first was to carry on a business of dealing in children's clothes imported into Ireland which was a business which Mrs Heinl

said she controlled. The second function was to provide the various companies in which Mr Heinl had an interest with office accommodation and secretarial services. Falstaff's solicitors at all material times from December 1988 were the firm of Mulveys, solicitors of Dublin. Save for a short period after December 1988 the person concerned at Mulveys with instructions from Falstaff was Mr Walter Mee until he left in November 1992 to set up in practice on his own. From November 1992 it seems that Mr Heinl and his companies were prominent clients of Mr Mee's practice.

On 4 December 1989 Mrs Heinl contracted with a company, West Wicklow Inn Ltd, controlled by Mr Blake, to buy land at 1 Main Street, Blessington, County Wicklow. That contract was subsequently completed by a conveyance to Falstaff who paid the purchase price of IR£70,000 with the assistance of a building society advance of IR£58,000. Hereafter when I refer to pounds I will be referring to Irish pounds unless otherwise stated. The buildings of 1 Main Street became the headquarters of Falstaff from which it conducted its trade in imported clothes and from which it provided the secretarial services which I have mentioned to the Heinl companies. Throughout the time with which we are concerned Falstaff maintained a staff of between two and three people at 1 Main Street manning the company's office and warehouse.

During 1991 on the dates which I have already set out the first three payments traceable to money abstracted from the bank were paid to or on behalf of Falstaff.

It seems that West Wicklow Inn Ltd owned a further 1.4 acres of land adjacent to No. 1 Main Street, Blessington which was available for sale. On 31 March 1992 Falstaff contracted to buy that land, which I will hereafter refer to as 'the land', pursuant to two separate contracts for a total consideration of £29,000 and paid a deposit of £2,900 split between the two contracts, the relevant cheques of Falstaff accompanying a letter signed by Mr Heinl on Falstaff headed paper. In order to finance completion of the purchase Falstaff approached the Limerick branch of the Anglo-Irish Bank managed by Mr McDonnel with whom, as will be seen from my judgment in the main action, Mr Heinl had a close business relationship. The Anglo-Irish Bank agreed to make a sufficient facility available to Falstaff to complete the purchase on the security of a charge over the property being purchased and Mrs Heinl's personal guarantee. On 25 November the bank sent to Mulveys, who were instructed by Falstaff to complete the purchase, a cheque for £29,850. On 7 October 1992 planning permission was obtained by Falstaff for the construction of offices and warehousing on the land. However it seems that, for reasons which are obscure, the contract to purchase the land was not completed on due date notwithstanding Mrs Heinl's evidence that the completion moneys were always available at short notice. On 16 October a notice to complete was served on Mulveys. That notice to complete, again for reasons which are obscure, was not complied with and on 20 November 1992 the vendors forfeited the deposit and purported to rescind the contracts.

Falstaff did not accept the rescission of the contracts and in early December 1992 instructions were given to Mulveys and through them to counsel to prepare proceedings claiming specific performance of the contracts made on 31 March 1992 but actually dated 12 May 1992. It was Falstaff's contention in the proposed proceedings that because only a single notice to complete had been served by the vendors, there being two contracts, the notice was ineffective to make time of the essence of the contracts which, accordingly, could not have been rescinded on 20 November 1992.

In a letter to Mr John Mulvey, who had taken over conduct of Falstaffs affairs at Mulveys, dated 8 December 1992 signed by Mr Heinl 'per pro' his wife on behalf of Falstaff, the following passage appears:

> 'Our correspondence in October and November, pointed to the fact that we believed that the Vendor was becoming jealous by reason that he had found out

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A that we had obtained a Planning Permission over lands we have purchased to contract [sic]. He was unable in the past to obtain Planning Permission himself. The refusal now to complete, in part no doubt, is influenced now by the much higher value of the lands and also that effectively the new Planning Permission can strangle the existing premises.'

In a further letter to Mr Mulvey similarly signed dated 12 December, the following
B passage appears:

'Regrettably instead of receiving good news the following Monday morning, the matter deteriorated further. This in itself did not surprise us as we know the mentality of the Vendor and we understand that he now appreciates that the site has much higher value than before and in any event, it now has a Planning Permission, he himself could not obtain.'

C Meanwhile on 11 August 1992 the main action had commenced by the obtaining of Mareva injunctions against the first and second defendants, the writ being issued on 12 August. On 19 August Anglo-American Trust Ltd, to which I will refer as 'AAT', which company, it is accepted, was, at all material times, owned and controlled by Mr Heinl, was joined as a defendant to the action. The case pleaded against AAT was that it had given knowing assistance to the first defendant in the abstraction of moneys from the bank in fraudulent breach of trust or, alternatively, that it had received such moneys
D knowing them to have been so abstracted or that it was part of a conspiracy to defraud the bank. On the same day an injunction was obtained against AAT restraining it from disposing of a certain property and Mr Heinl was ordered to swear an affidavit on behalf of AAT setting out the full extent of AAT's assets. On 25 September 1992 AAT's application to discharge the injunction obtained against it was dismissed and a Mareva injunction was made on the application of the bank over the assets of AAT. These orders
E were mirrored in proceedings simultaneously commenced by the bank in Ireland.

Meanwhile on 25 August the final payment of £100,000 had been paid to Malu NV on behalf of Falstaff to which I have already referred.

On 22 December the injunctions against AAT were replaced by undertakings in similar terms and that step was mirrored in the Irish action.

On 11 January 1993 proceedings were commenced by Falstaff in the Irish High Court
F against West Wicklow Inn Ltd for specific performance of the agreement to purchase the land. Thereafter those proceedings took their normal course until a trial date of 5 November 1996 was fixed, that date being later postponed to 15 November. Over the intervening period it seems that a number of attempts were made to settle the claim. The negotiations were conducted on behalf of Falstaff by Mr Heinl. In the course of those negotiations Mr Blake wrote to his solicitors on 11 October 1993 as follows:

G 'I have had numerous meetings with Mr Wolfgang Heinl and it is clear that the only solution to the problems arising from our counsels' advice is to settle by completing the sale on the original terms. He acknowledges that if the sale were to be rescinded the property would command a substantially higher price and that we have suffered loss of interest because the sale was not completed in time . . .'

On 28 April 1995 Mr Heinl, his company Paralegal Consultancy Ltd, the 22nd
H defendant, to which I will refer as 'Paralegal', and Falstaff were joined as defendants to the main action. Against Mr Heinl and Paralegal the bank pleaded a case of knowing assistance in the fraudulent breach of trust of the first defendant, alternatively, knowing receipt of assets abstracted from the bank in breach of trust by the first defendant, alternatively conspiracy. Against Falstaff the bank pleaded a 'knowing receipt' claim in respect of the four payments to which I have referred. At para. 17.7 of the amended statement of claim it was pleaded that 'AAT has a 49 per cent shareholding in Falstaff.

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Falstaff is controlled by WH [Mr Heinl] and/or his wife Brid Heinl.' Falstaff's defence was served on 28 September and traverses the bank's 'knowing receipt' claim. At para. 2 it is pleaded that the shareholders in Falstaff 'are Brid Heinl (51 per cent) and AAT (49 per cent – from 1992).' Mr Heinl's defence served on the same day also admits 'that Falstaff is an Irish company in respect of which AAT has a shareholding . . .'

On 11 March 1996 Mr & Mrs Heinl signed their respective witness statements in the main action. At para. 10 of his witness statement Mr Heinl says:

> '(a) I am not, nor ever have been a director of Falstaff.
>
> (b) I am not nor ever was the "controlling mind" of Falstaff.
>
> (c) In 1992 Mr Pierce suggested to capitalise the inter-company accounts. The result of this would have been that AAT would have become a shareholder of Falstaff. This was not consummated and the present situation is that AAT is indebted to Falstaff.'

In her witness statement Mrs Heinl confirms the truth of this. On the same day in a letter signed by Mrs Heinl to Mulveys, which she accepted her husband drafted, Mrs Heinl wrote in response to a letter from Mulveys of 5 March in which they say:

> 'We note that Wolfgang Heinl may not be the correct person to make the affidavit [discovering documents] and you yourself may be authorised to sign on behalf of Falstaff Ltd and you might confirm this.'

In her letter Mrs Heinl says:

> 'On what authority or on what information do you rely that Wolfgang Heinl is a director of Falstaff Ltd? I would have thought that you as the company's solicitors ought to be well aware that Wolfgang Heinl is not and never was a director of this company, nor indeed has he got anything to do with this company.'

This letter follows on a series of letters passing between Mulveys and Mr Heinl which would seem to indicate that Mr Heinl was in charge of the litigation against West Wicklow Inn Ltd.

On 4 June the trial of the main action started. Between the 4 and 11 December Mr Heinl gave his evidence and was cross-examined. Mrs Heinl was not called to give evidence notwithstanding that she had served a witness statement.

In evidence was a letter, dated 12 September 1996 from J P & M Doyle Estate Agents and Valuers of Dublin to West Wicklow Inn's solicitors. That letter confirmed that the sale price of the land in January 1992 was £29,000 and that that was the open market value of the land at that time. The letter placed a current value on the land of £45,000. That letter was in due course followed by a formal valuation dated 17 October which confirmed those two values but which also described the 'zoning' of the land as 'zoned T C (Town Centre Zoned to provide for commercial and town centre use)'.

On 29 October Mulveys wrote to Mr Finnegan SC, counsel instructed by Falstaff, in the proceedings saying that Mrs Heinl was most anxious to have a meeting 'this week preferably tomorrow' as 'there have been some dramatic developments in this case which I would like to discuss with you and which may be beneficial to our case.' That meeting seems to have taken place in Dublin on 1 November. On that day West Wicklow Inn's solicitors sent a without prejudice letter to Mulveys drawing attention to the valuation of the land at £45,000 and proposing that the litigation be settled by completion of the contract with Falstaff paying an additional £8,000 being half the difference between the original contract price and the valuation figure of £45,000.

It is not clear whether this letter was considered at the meeting on 1 November. It was Mrs Heinl's evidence that she paid little attention to the Doyle valuation because she regarded it as a bargaining ploy of West Wicklow Inn's solicitors to persuade her to settle

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the action. Nonetheless she said that she was advised in the course of the meeting that Falstaff were likely to lose.

In any event it seems that the meeting took the decision, in principle, to settle the litigation because on 3 November Mr Finnegan wrote to Mulveys returning his papers 'on the assumption that the matter will settle . . .' In a letter to Brown & McCann, West Wicklow Inn's solicitors, of 4 November, Mulveys indicated that their client would settle but only by completing at the original contract price. This was in due course accepted by Brown & McCann and the settlement on those terms was confirmed by letters from Mulveys to Brown & McCann and Mrs Heinl dated 12 November. The terms provided for completion of the contract on or before 12 December In their letter to Mrs Heinl Mulveys asked her to 'put the finances in place to enable me to complete this transaction . . .'

In cross-examination Mrs Heinl was asked what steps she took to obtain such finance. She said that after the meeting of 1 November she rang Mr McDonnel of the Anglo-Irish Bank which had been prepared to provide finance back in 1992. She described her conversation with him in the course of which she said that Mr McDonnel questioned, and was discouraging, about her plans to make use of the land which she said were to develop it for light industry. She said that he declined to make the necessary finance available. Mr McDonnel was not called to confirm this conversation nor was it sought to put in a statement of evidence doing so Mrs Heinl did, however, admit that she did not draw the £45,000 valuation to Mr McDonnel's attention.

Mrs Heinl said that she also telephoned the manager of the National Irish Bank where Falstaff kept an account with a view to obtaining finance which was also refused. She said that she understood that a ground for refusal by both banks was the fact that the main action was in process and they did not wish to get involved. No evidence was put in from the National Irish Bank or Mr McDonnel to confirm this.

Eccleston was incorporated on 14 November 1996 and was acquired by Mrs Heinl the following day from company incorporation agents called 'The Company Shop Ltd' of Dublin as is shown by a paid invoice to Mrs Heinl from that company of that date.

In evidence was a document purporting to be a minute of a meeting of the board of directors of Falstaff at Blessington on 7 December at which Mrs Heinl and Mr Patrick Burke were present and which seems to have been signed by Mr Burke. The bank challenges the genuineness of this minute. The bank's solicitors first came across it when inspection was given of the minute book of Falstaff which was disclosed on discovery. It is said that this minute was loose with one other minute in the book.

The minute records that:

> '1. Brid Burke advised the meeting that Falstaff Ltd was unable to complete the purchase of the land situated behind No. 1 from West Wicklow Inns due to lack of funds and in any event the company no longer needs the property. Brid Burke informed the meeting that she was unable to purchase the property from her own private funds thus saving Falstaff from costs damages and loss of deposit.
>
> 2. It was agreed by the directors:
>
> Brid Burke can take over the contracts in her name or whatever way she thinks appropriate (sic).
>
> Provided:
>
> Deposit moneys are repaid to Falstaff and all other legal costs concerning the aborted purchase shall be waived.'

In evidence was a fax message dated 9 December from Mrs Heinl to Mr John Mulvey of Mulveys. The message reads:

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'Re site at No. 1 Main Street, Blessington, County Wicklow.

Dear John

Please note that I require ownership of this site to be taken in the name of *ECCLESTON INTERNATIONAL LTD* [emphasis as in the original]. If necessary, I am happy that Falstaff Ltd assign the benefit of the contract already in existence to Eccleston International Ltd. I do not think that the vendor will have any difficulty in disposing of the premises to Eccleston Int. Ltd. In any event I will sign any documentation necessary to effect the assignment of the contract from Falstaff Ltd to Eccleston International if you so require. Please confirm that you will do this.'

Mrs Heinl accepted that the message was marked 'urgent' in her writing.

It was Mrs Heinl's evidence that Eccleston was acquired for the purpose of taking a transfer of the property on the advice of Mr Walsh of Walsh Warren, solicitors of Dublin, who were instructed by her as a result of her dissatisfaction with the service that she had obtained from Mulveys but who had persuaded her to continue to employ Mulveys for the purposes of the litigation. Mr Walsh signed a witness statement and it appears to have been intended that he be called to give evidence and be cross-examined. However after Mrs Heinl had opened her case I was informed that Mr Walsh had been taken ill and had returned to Ireland and so was unable to do so. Before returning, however, he handed over to the bank's solicitors copies of documents appearing on his file with relation to his instructions from Mrs Heinl and Falstaff. I gave leave for Mr Walsh's statement to be put in under the Civil Evidence Acts. From that statement it appears that Mrs Heinl consulted Mr Walsh on three occasions on 4 November and 5 and 9 December 1996. Paragraph 1(b) of the statement reads:

'She sought my advice in relation to the incorporation of a new company to take a conveyance of the said property in the event of the High Court proceedings proving successful and I advised that in view of the close proximity of the trial and completion of the sale, it would be prudent to purchase a shelf company and I referred her to a company which specialises in shelf companies . . . She instructed me that Falstaff was not financially capable of completing the purchase and that she would have to consider bringing in a third party who was financially capable of completing the sale.'

It seems, therefore, that the discussion of the proposed 'shelf company' took place at Mrs Heinl's consultation with Mr Walsh on 4 November.

The witness statement continues at para. 2:

'2. She had further consultations with me on 5 and 9 December 1996. At that stage her case was settled strictly on condition that the purchase of the lands be completed without delay. She was concerned that Falstaff Ltd was not financially capable of completing the purchase and she had instructed her solicitor to assign the contract to a new company which she had incorporated namely Eccleston Ltd. She confirmed that she would advance a loan to Eccleston Ltd to complete the transaction out of the proceeds of two personal life assurance policies which she had recently cashed . . .'

Mr Walsh concludes by stating that in addition to matters involving Falstaff and its purchase of the land Mrs Heinl consulted him 'in relation to a number of personal matters which have no relevance to the matters at issue herein.'

In Mr Walsh's file was a hand-written minute of his consultation with Mrs Burke on 5 December, That contains notes as follows:

'Falstaff can't complete purchase. Consideration to be given to assignment to another Co. or to herself personally to complete sale.'

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The acquisition of the land was completed on 12 December, the last available day, upon payment to Brown & McCann of £26,100 which sum, it is accepted, was derived from Mrs Heinl's personal resources. Before completion, however, there came into existence a letter signed by Mrs Heinl addressed to Mulveys dated 12 December. Mrs Heinl stated that this letter was drafted by Mulveys and was placed before her for signature before completion of the purchase. The material parts of the letter read as follows:

> 'Dear Mr Mulvey
>
> With reference to the above matter and the closing of this transaction on Thursday 12 December, I would prefer if you would request West Wicklow Inn Ltd to execute a deed in favour of Eccleston International Ltd and accordingly, I would ask you now to prepare two purchase deeds reflecting this request.
>
> I indicated to you that the true situation is that Falstaff was authorised by me to sign a contract on my behalf. I also confirm that the purchase moneys required to purchase the property have come out of my own personal funds and have nothing whatsoever to do with Falstaff Ltd
>
> Consequently, I am satisfied that Falstaff Ltd will assign the benefit of the contract to me or a nominated company which in this case is Eccleston International Ltd
>
> . . .
>
> I also confirm to you that by transferring the property to Eccleston International Ltd, it no way contravenes any regulations and there is no illegality relating thereto. I also confirm that I will indemnify you or your firm against any action proceedings or claims which may arise out of these instructions.'

When she was questioned about this letter and in particular the first sentence of the second paragraph which I have quoted, Mrs Heinl stated that it was never her position that Falstaff made the original contract dated 12 May 1992 other than on its own behalf. A copy of the letter appears to have been delivered to Brown and McCann, West Wicklow Inn's solicitors, for reasons which were not explained.

Also in evidence and dated 12 December was a 'deed of trust' executed by Mrs Heinl on behalf of Falstaff and on her own behalf. This deed having recited the agreement, the specific performance proceedings and the settlement of agreement declared that:

> '1. Falstaff Ltd was instructed by Brid Burke [Mrs Heinl] to sign the contract on her behalf.
>
> 2. None of the purchase moneys used in these transactions were provided by Falstaff Ltd. The purchase moneys were provided by Brid Burke personally.
>
> 3. Falstaff has agreed to transfer the beneficial interest in the contract to Brid Burke or her nominee Eccleston International Ltd'.

When asked about this document Mrs Heinl accepted that para. 1 was incorrect. Notwithstanding what appears at para. 2 of this document in an affidavit sworn in interlocutory proceedings by Mrs Heinl on 18 November 1997 at para. 26(v) Mrs Heinl draws attention to a previously exhibited bank statement of Falstaff which 'clearly shows payment of £2,900 by cheque 1621, debited on 27 April 1992. It clearly also shows that the source of funds are general trading receipts.' She goes on to describe the repayment of this sum in para. (vi) as follows:

> 'As to the repayment of the deposit on 7 February 1997, there is at page 47 of Exhibit BBH11 a copy of the relevant bank statement of the account of Falstaff with National Irish Bank NAAS. I repaid the deposit with my money. The lodgement of £3,192.90 includes the payment of £2 900 for the deposit.'

It seems from the relevant lodgement slip that this repayment must have been made in cash. A

On 18 April 1997 architects, McCauley & Associates, on behalf of Eccleston submitted an application for planning permission over the land recently acquired for residential development. This appears to have followed from a meeting between Mrs Heinl and the architects which took place in the preceding February as a letter from the architects to Mrs Heinl on 7 May describes. B

It was Mrs Heinl's evidence that at the time of Eccleston's acquisition of the land on 12 December 1996 she had no idea that it might be possible to apply for a more extensive and profitable planning permission in respect of the land. She said that she was given the idea as a result of a telephone call from Doyle, who had previously been advising West Wicklow Inn Ltd in the proceedings against her, congratulating her on her acquisition and suggesting that the land might be more profitably developed for residential accommodation, an idea which she had never previously considered. No evidence was sought to be introduced from Doyle to confirm this conversation. C

In due course such planning permission has been granted on 7 May 1998. The bank called expert valuation evidence from Mr Patrick Stevenson of James H North & Co of Dublin. He placed a value on the land with the benefit of this planning permission as at 28 August 1998 of £450,000. That figure approximates to a value of the land put forward on behalf of Falstaff at an interlocutory stage of the proceedings of £500,000. Mr Stevenson valued the land as at November/December 1996 at £50,000. In the course of cross-examination he confirmed that he had arrived at this latter value without having seen or been referred to the valuation of Doyle. D

On 23 July 1997 I gave judgment in the main action which included a judgment against Mr Heinl in a sum of rather more than £7m sterling. An appeal is pending against that judgment, inter alia, by Mr Heinl. For reasons which are immaterial to this judgment I did not deal with the bank's claim to trace its money into the four payments made to or on behalf of Falstaff. When that failure was raised on 1 October 1997 Falstaff applied to re-open the evidence and the argument as to whether the bank was entitled to any relief against Falstaff. I permitted this to be done on terms. E

On 20 November on the plaintiff's application I made a world-wide Mareva injunction against Falstaff restraining the disposition of its assets and I made an order joining Eccleston to the proceedings as 40th defendant and an order restraining Eccleston from dealing with the land. Those orders were appealed and the matter came on for hearing before the Court of Appeal on 26 June of this year. The Court of Appeal varied the Mareva injunction which I had made against Falstaff reducing the amount covered by the Mareva to the amount of the four payments with interest. On 31 July of this year Falstaff submitted to judgment in the sum of £154,478 and interest subject to an appeal, to be heard at the same time as the other appeals in the main action directed to whether my conclusion that the bank was entitled to trace its money lent as a result of the fraud of the first defendant was not open to me to arrive at as a matter of law on the facts which I had found. F G

The case as originally pleaded by the bank against Eccleston was based on allegations that Eccleston was at all material times a nominee, alternatively, trustee of the benefit of the contract to acquire the land from West Wicklow Inn Ltd and is now such nominee or trustee of the fruits of that contract, namely the land itself. At the outset of the trial application was made by the bank to amend the writ and statement of claim to include relief against Eccleston under s. 423 of the *Insolvency Act* 1986. I allowed that application. The necessary allegations of fact to support relief under s. 423 already largely appeared in the bank's pleading. Relevant to each way in which the bank presented its case was, therefore, the intention of Falstaff through its officers de jure and de facto in transferring H

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A the benefit of the contract to Eccleston. Such intention could be established subjectively from the evidence of those officers or objectively from the surrounding circumstances existing or to be anticipated at the time the decision to transfer was made.

It was the bank's case that at all material times the moving spirit and directing mind behind Falstaff was Mr Heinl or alternatively was Mr Heinl together with his wife. There was an issue therefore, whether Mr Heinl was, in effect, the de facto controlling director B of Falstaff which acted in accordance with his wishes at all material times. In the result, as will be seen, it is possible to dispose of this case without having to decide that question. Nonetheless a substantial part of the cross-examination of Mrs Heinl was taken up with probing the respective parts which she and her husband played in the conduct of the various aspects of Falstaff's business.

Beside Mr Stevenson their expert valuer the only oral evidence to be called on behalf C of the bank was Mr Roger Van Craen, the managing director of Malu NV of Belgium, a supplier from whom Falstaff imported into Ireland a large part of the clothing which its business was then to distribute and sell. Malu was the recipient of all save £6,000 odd of the money comprising the four payments. Mr Van Craen's evidence was directed to how he saw Mr Heinl's role in the management of that part of Falstaff's business which affected Malu. On the same issue the bank relied on the witness statement of Pascalle De Leeuw of De Leeuw Textiles, also of Belgium, another supplier to Falstaff of clothing, D and Mr James Blake who owned and controlled West Wicklow Inn Ltd whose evidence was directed to Mr Heinl's role in the property transactions between Falstaff and his company. The statements of Madame De Leeuw and Mr Blake were put in under the Civil Evidence Act without opposition. Otherwise, as is to be expected, the bank relied entirely on documentary evidence and the inferences to be drawn from such evidence.

The only evidence called on behalf of Eccleston was Mrs Heinl whose cross-E examination extended over one full day and two part days. Her evidence-in-chief was given by a witness statement and two supplemental statements. In addition to the witness statement of Mr Walsh, which I admitted under the Civil Evidence Act, witness statements were filed on behalf of Mr Kieran Pierce who was the Heinls' accountant and gave oral evidence in the main action, Mr Walter Mee, the solicitor with Mulveys until November 1992 whose role I have already described, and Mr Patrick Burke, Mrs Heinl's fellow director of Falstaff. It was not sought to put in the statement of Mr Pierce under F the Civil Evidence Act. Those of Mr Mee and Mr Burke were admitted.

I have to say straight away that I found Mrs Heinl's evidence unsatisfactory to the extent that I am reluctant to place any reliance upon it when it conflicts with evidence adduced by the bank or inferences which I can properly reach from that evidence. I have arrived at this conclusion for the following reasons. Mrs Heinl persisted in the face of clear documentary evidence, in maintaining that her husband did not exercise the G authority of a director over the affairs of Falstaff. That documentary evidence covered Falstaff's dealings with Malu, the acquisition by Falstaff of the land in question and the conduct of the litigation between Falstaff and West Wicklow Inn Ltd leading to the settlement of those proceedings in December 1996. Amongst those documents are to be found numerous letters signed by Mr Heinl on behalf of Falstaff, signed by him 'p.p.' his wife but which she was forced to admit were drafted by him, on behalf of Falstaff, and some letters where he appears to have forged her signature. I have quoted extracts from H some of the letters already but one of the best examples is a letter of 16 December 1992 signed on behalf of Mr Heinl in his absence by a member of the staff to Malu. It reads:

> 'Dear Sirs
>
> Your fax of 15 December 1992 has been received. Dr Heinl is presently abroad but we spoke to him on the telephone. He is astonished with regard to the discourtesies visited upon him in this fax. He specifically went to Belgium to discuss these

matters with Mr Van Craen. If it takes near enough four weeks to reply to this visit, then it is unacceptable that discussion should now take place at a different level.

Yours faithfully . .'

Mrs Heinl was forced to accept that this was not the sort of letter that one would expect to be written either by or on behalf of someone having no authority of his own in Falstaff.

The attempt, in the course of the correspondence to disassociate Mr Heinl from the affairs of Falstaff, when the bank's claims in the main action threatened disaster, is palpable. I have already quoted from a letter from Mrs Heinl to Mulveys of 11 March 1996.

Mrs Heinl persisted in maintaining that the value of the land being acquired from West Wicklow Inn Ltd was never a matter of concern to her and she never paid much attention to its apparent rise in value between the making of the contract in 1992 and its acquisition at the original contract price in December 1996. I have already set out extracts from the letters of 8 December and 12 December 1992 from Falstaff to Mulveys signed by Mr Heinl per pro Mrs Heinl. Mrs Heinl's attempt to persuade the court that she did not appreciate that the land had gone up in value since the contract, in the light of the contents of these letters which she accepted she discussed with her husband before being sent out, was hopelessly unconvincing.

I have quoted from those passages in the defences of Mr Heinl and Falstaff which deal with the 49 per cent shareholding in Falstaff owned by AAT, Mr Heinl's company. In the result no relief was claimed by the bank in the main proceedings with relation to this shareholding but, if it exists, it may be a source of value for the purpose of executing the bank's judgment against AAT or Mr Heinl. I have also quoted a passage from Mr Heinl's witness statement of 11 March 1996 confirmed by Mrs Heinl in her witness statement of the same date.

In an affidavit sworn in the main proceedings on 28 August 1992 at p. 10 Mr Heinl says:

> 'The consideration that AAT receives for this confirming facility is a serviced office. AAT pays no rent for its business premises, office furniture or secretarial staff. All of these expenses are met by Falstaff. Falstaff and AAT agreed on 1 January 1992 that the moneys invested in stock through AAT's confirming payments, be capitalised, e.g. by granting AAT shares in Falstaff. Auditors and bankers were accordingly instructed.'

This passage and the quoted passage in Mr Heinl's witness statement of 11 March 1996 are to be contrasted with written submissions in the main action adduced on behalf of Falstaff which, at para. 6, read:

> 'This showed a net amount owing by Falstaff to AAT of £34,908. This amount was after capitalisation (see below) of £184,255 and after provision of £60,000 in respect of administration, secretarial and office services provided to AAT by Falstaff. It is admitted that a share issue was effected at 31 December 1991 whereby shares representing 49 per cent of the resultant capital of Falstaff Ltd was made available to AAT at a price of £184,255. These shares were paid for by forgiveness of debt.'

In Mr Heinl's closing written submissions in the main action he said at para. 2:

> 'The Plaintiffs persist, without foundation in their assertion that the company [Falstaff] is managed by WH [Mr Heinl]. In paragraph 87 of the Plaintiffs' submissions they justify this by stating that AAT was a 50 per cent shareholder in

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Falstaff Ltd. The statement is incorrect. AAT do not have a 50 per cent shareholding, it is 49 per cent. The Plaintiff by arbitrarily increasing the share by 1 per cent have made an outrageous assumption, that Falstaff Ltd is a joint venture company. The fact is that the shareholding of AAT is 49 per cent they thus have a minority interest. The control is in the hands of its majority shareholder, Mrs Heinl.'

In written submissions in the main action submitted inter alia on behalf of AAT and Mr Heinl it is submitted that AAT is a 49 per cent shareholder in Falstaff and such a shareholding is shown in a 'statement of affairs' prepared by Mr Pierce which was in evidence in the main action and was deposed to in the further affidavit of Mr Heinl sworn on 5 September 1997. At para. 2 of its defence in these proceedings Eccleston pleads:

'It is admitted that the Twenty-Third Defendant ('Falstaff') is an Irish company as alleged in paragraph 17.7 of the statement of claim but it is denied that AAT has a 49 per cent or any shareholding therein or that Falstaff is controlled by WH. The registered shareholders in Falstaff are Mrs Burke Heinl and Mr Patrick Burke who are the directors thereof and Mrs Burke Heinl controls Falstaff. At one stage it was proposed that AAT should become a shareholder in Falstaff but this proposal was never effectuated.'

It was Mrs Heinl's evidence that she approved both Falstaff's defence in the main action and Eccleston's defence. It is, of course, impossible to reconcile these various accounts of the presence or absence of a shareholding of AAT in Falstaff but Mrs Heinl's attempts to do so had the effect of undermining her general credibility.

It seems to me that I am also entitled to draw inferences adverse to Mrs Heinl's account of the facts from the fact that there were available to her to call a number of witnesses who could have confirmed that account. I have already drawn attention to three of them. Mrs Heinl's account of the facts could also have been confirmed by Mr Mee or Mr Mulvey of Mulveys and by Mr Patrick Burke, her fellow director. I do not read Mr Walsh's statement and the documents contained in his file as supporting the contention that the idea to acquire Eccleston and transfer the benefit of the contract to that company was the result of his advice.

I turn to consider the bank's claim as initially pleaded, namely its claim to recover the benefit of the contract from Eccleston on the basis that Eccleston was a mere nominee for Falstaff when the contract was completed or, alternatively, took the benefit of the contract as trustee for Falstaff, resulting or constructive.

It seems to me that a fundamental difficulty stands in the way of the bank making good its claims under these heads against Eccleston namely that the bank has no direct cause of action against Eccleston and has no locus standi as a creditor in the absence of a winding up of Falstaff and through the resulting liquidator, to enforce Falstaff's right to recover from Eccleston assets held by Eccleston as its nominee or held on trust for Falstaff.

It was contended by Mr Philipson on behalf of the bank that a cause of action to obtain declarations that Eccleston holds the benefit of the contract as nominee or trustee for Falstaff and to recover from Eccleston the product of that contract, namely, the land, can be found in the decision of Mummery J in *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and in three decisions of the Court of Appeal, one of which preceded Mummery J's decision in the *Chabra* case and is referred to by him in his judgment, *SCF Finance Co Ltd v Masri* [1985] 1 WLR 876, and *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, where the *Chabra* case was cited with approval, and the decision of the Court of Appeal in this case, which is unreported but in which the judgment was given on 26 June 1998 on appeal from orders of mine made on 20 November 1997, by one of which I granted a Mareva injunction against Falstaff in

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an amount exceeding £7m being the amount of the judgment which I had given against Mr Heinl in the main action.

I am unable to find in the reports of these cases any authority for the proposition that in the absence of a direct cause of action by the bank against Eccleston I can grant the relief sought by the bank.

Each of the four decisions to which I have been referred are concerned with the grant of Mareva injunctions obtained against third parties against whom there was no direct cause of action by the plaintiff, granted either in anticipation of or consequent upon an undoubted cause of action against another defendant or judgment obtained against such defendant.

The point is best illustrated by reference to the *Chabra* case. In that case Mummery J was dealing with circumstances where a plaintiff bank had issued a writ against Mr Chabra for a substantial sum due under a guarantee in respect of advances made by the bank. Prior to the hearing the bank had obtained a Mareva injunction against Mr Chabra restraining him from removing his assets and, in particular, certain proceeds of sale of business assets belonging to a UK registered company, out of the jurisdiction which Mr Chabra himself had fled. In the course of interlocutory proceedings the judge, of his own motion, joined that company to the proceedings as a defendant and made a Mareva injunction against it in similar terms to that made against Mr Chabra. At ([1992] 1 WLR 231) p. 238F of the report the following passage appears in the judge's judgment:

> 'In brief, in the light of the plaintiff's evidence and the absence of any detailed evidence on the part of the defendants, I am of the view that there is a good arguable case that there are assets, apparently vested in the company, which may be beneficially the property of Mr Chabra and therefore available to satisfy the plaintiff's claims against him if established at trial. I am also of the view that it is arguable that the company was, in fact, at relevant times the alter ego of Mr Chabra and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established.'

On an application to discharge the injunction it was argued on behalf of the company on the authority of *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 that the court ought not to have made an order against the company in the absence of a direct cause of action by the bank against it. Mummery J, having referred to the *Masri* case amongst others, concluded his judgment [1992] 1 WLR 231 at p. 241H by saying:

> 'In the present case there are two defendants. There is one defendant, Mr Chabra, against whom the plaintiff undoubtedly has a good arguable case of action: the claim on the guarantee. That is justiciable in the English court; Mr Chabra is amenable to the jurisdiction of the English court to make a final judgment against him on the guarantee. The claim for an injunction to restrain disposal of assets by Mr Chabra is ancillary and incidental to that cause of action. In my judgment, the claim to a similar injunction to the company is also ancillary and incidental to the claim against Mr Chabra and the court has power to grant such an injunction in an appropriate case. It does not follow that, because the court has no jurisdiction to grant a *Mareva* injunction against the company, if it were the sole defendant, the court has no jurisdiction to grant an injunction against the company as ancillary to, or incidental, to the cause of action against Mr Chabra . . . I agree that such a course is an exceptional one, but I do not accept that it is one that the court has no jurisdiction to take.'

A Mareva injunction is an order designed to 'ring-fence' the assets of a defendant so that he is prevented from rendering any judgment ultimately obtained against him from being valueless. The order which Mummery J made in the *Chabra* case was simply an

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A extension of the order which had been made against Mr Chabra himself to ensure that there was no disposition by the company of assets which properly belonged, not to the company, but to Mr Chabra, thereby defeating any future judgment. It seems to me that the fact that Mummery J was able to find a jurisdiction to do this in no way means that had he been trying the action he could have done other than give judgment against Mr Chabra under the undoubted cause of action that the bank had against him, leaving it to the bank to execute that judgment on the assets in question, in the course of which B execution the issue of whether those were in fact assets available for such execution would have been dealt with in the usual way by Sheriff's inter pleader, etc.

In the *Aiyela* case ([1994] QB 366) at p. 375H of the report Hoffmann LJ says:

> 'In this case, the plaintiff's substantive right is a judgment debt owed by Mr Aiyela. The *Mareva* injunction against Mrs Aiyela is incidental to and in aid of the C enforcement of that right.'

Later (at p. 376D) when reviewing the *Chabra* case Hoffmann LJ says:

> 'The plaintiff [in the *Chabra* case] had a *Siskina* cause of action against Mr Chabra and the injunction against the company was ancillary to that cause of action.'

It does not seem to me that the judgments of the Court of Appeal given in this case differ in their effect from the judgment in the Court of Appeal in the *Aiyela* case as is D apparent from the passage in the judgment of Peter Gibson LJ at p. 15 of the transcript where he says:

> 'The correctness of Mummery J's decision in that case was challenged in this court in . . . Aiyela but this court held that Mummery J was right to order the company to be joined and to grant a Mareva injunction against the company, controlled as it was by Mr Chabra and holding assets of which Mr Chabra was arguably the E beneficial owner, notwithstanding that the plaintiff had no substantive cause of action against the company.'

In my judgment these cases confer no legal basis upon which I can grant the relief sought by the bank against Eccleston even if I were satisfied, on the facts, that Eccleston was to be treated as a nominee or trustee for Falstaff of the benefit of the contract.

F Even if I were wrong in this conclusion of law I would find myself unable on the evidence before me to find that the bank had proved that the benefit of the contract was transferred to Eccleston as a mere nominee and not beneficially or that Eccleston held the property on resulting trust for Falstaff. It seems to me to be highly likely that Eccleston was intended to fulfil the role of nominee but the only indications in the evidence as to such nomineeship are that Eccleston was intended to be a nominee for Mrs Heinl. I entertain some doubt that the £2,900 deposit paid by Falstaff on the making G of the contract was ever actually repaid to Falstaff by Mrs Heinl for herself or on behalf of Eccleston. If it was not actually repaid then Falstaff has to that extent contributed to the cost of completion of the contract. However, it is not in issue that the balance of £26,100 to complete the contract was provided by Mrs Heinl to Eccleston. In those circumstances, it seems to me difficult to find that Eccleston now holds the land on resulting trust to Falstaff.

H For reasons which I will deal with when I come to consider the bank's claim under s. 423 of the Insolvency Act it seems to me that the directors of Falstaff were guilty of misfeasance and breach of trust in transferring the benefit of the contract to Eccleston for no or no adequate consideration and that in consequence, Eccleston, who must through Mrs Heinl be fixed with knowledge of such breach of trust, holds the land upon constructive trust for Falstaff. But for the reasons which I have already set out the bank, as a mere creditor of Falstaff, has no locus standi to enforce that trust against Eccleston.

I turn to consider the bank's claim under s. 423, 424 and 425 of the *Insolvency Act* 1986 in respect of which I gave the bank leave to amend its proceedings. So far as material to this case those sections provide:

'423. Transactions defrauding creditors

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if–

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) . . .

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such orders as it thinks fit for–

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose–

(a) of putting assets beyond the reach of a person who making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) In this section "the court" means the High Court . . .

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

424. Those who may apply for an order under s. 423

(1) An application for an order under section 423 shall not be made in relation to a transcript except–

(a) [in the case of a bankruptcy or liquidation the trustee in bankruptcy liquidator etc.];

(b) [in the case of a voluntary arrangement with creditors the supervisor or creditor under the arrangement];

(c) in any other case, by a victim of the transaction.

(2) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.'

Section 425 sets out the wide ranging powers of the court to re-open any transaction found to have been made in fraud of creditors.

From the passages from the three sections which I have set out it emerges that before the court can exercise the powers conferred by s. 423(2) and 425 'restoring the position' it must be satisfied, first, that the transaction was entered into either for no consideration flowing to the transferor or for a 'significant' undervalue when calculated in money or money's worth and, secondly, that the transfer was made for the purpose of defeating creditors or otherwise prejudicing their interests.

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A Save where there has been a bankruptcy in respect of an individual transferor or a winding up or an administration where the transferor is a company or where there is either an individual or corporate voluntary arrangement, the only persons entitled to apply for relief under the sections are 'victims of the transaction'. If the effect of the transaction has been to transfer value out of Falstaff to Eccleston it has not been contended that the bank as a judgment creditor for £154,000 and interest is not a victim of this transaction. It is accepted that Falstaff, if called upon to meet that judgment, would not have been able to do so.

In the course of her cross-examination Mrs Heinl accepted that she was aware from April 1995 that Falstaff had been joined to the main action and the extent of the claim against Falstaff to trace the bank's money into payments made to or on behalf of Falstaff, which, if successful, would require Falstaff to repay the amount so paid. It was Eccleston's case that the relevant time at which the court had to assess whether the two pre-requisites for the exercise of the court's powers under s. 425 were met was the date of the transaction and that at that date, Falstaff was unable, from its own resources, or by borrowing from banks, to raise the money with which to complete the contract, It follows, so it was contended, that the contract was valueless to Falstaff or, alternatively, had a value less than the £2,900 deposit which, as part of the transaction, Eccleston had agreed to repay. Accordingly the directors of Falstaff were justified in deciding to assign the contract to Eccleston so saving Falstaff from claims for damages and resulting costs. Mrs Heinl had the money to complete the contract. She, however, elected not to make that money available to Falstaff but rather to Eccleston to complete the contract a course of action which was legitimately open to her.

In the course of her cross-examination Mrs Heinl was asked why it was that she elected not to make her money available to Falstaff to complete the contract but rather to Eccleston. Her answer was to give two reasons. The first and, she said, primary reason was the fact that the trading of Falstaff for the period preceding December 1996 had not been satisfactory and only marginally profitable. When asked why this was a reason for not backing Falstaff she accepted that she actually meant that she regarded Falstaff as 'shaky' at that time. By this answer I took her to mean that Falstaff's future survival was in question. The second reason that she gave for not backing Falstaff was the existence of the bank's claim against Falstaff of which she was then well aware.

In my judgment in the first stage of the case of *Chohan v Saggar* [1992] BCC 306, I held that for the purposes of s. 423(3), where more than one reason is found for putting into effect a transaction which prejudices creditors, one of which is an intention to do just that, for the requirement of the subsection to be met the intention to defeat creditors must be the dominant intention.

I do not accept that the existence of the bank's claim against Falstaff was a secondary reason why Mrs Heinl declined to make her funds available to Falstaff which led to the transfer of the benefit of the contract to Eccleston. However even if that factual conclusion were wrong, in my judgment, the requirements of the subsection are still met because what Mrs Heinl said was the primary reason amounts also to an intention to defeat creditors, in this instance, Falstaff's creditors generally as at the time of the transaction, as opposed to the bank in particular. Subsection (3) only requires the applicant to establish that the purpose of the transaction challenged was to put assets beyond the reach of '*a* person who is making or may at some time make a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make. It does not require the applicant to establish that the purpose of the transaction was to put assets beyond the applicant's reach.

It follows, in my judgment, that the bank has proved the necessary intention in Falstaff to put an asset, namely, the benefit of the contract, beyond the reach of the bank or

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otherwise to prejudice the bank as a result of the transaction to satisfy the requirements of s. 423(3). I have no doubt that if the board meeting on 7 December 1996 of the directors of Falstaff, of which what purports to be a minute is in evidence, actually took place, then its decision to transfer the benefit of the contract to Mrs Heinl or her nominee was a decision made for such purpose.

I turn to consider whether the requirements of s. 423(1) have been satisfied by the bank. I have already set out Eccleston's submissions why it is said that the contract was valueless to Falstaff. I am unable to accept those submissions.

When giving leave to the bank to amend its proceedings to include a claim under s. 423 I gave to Eccleston the opportunity of an adjournment to adduce any further evidence that they might wish to bring to deal with that case including expert valuation evidence to set against the evidence of Mr Stevenson. That opportunity was not taken up. In the result I am left with the valuation evidence of Mr Stevenson which placed a value on the land as at the time of the transaction of £50,000. This compares with Doyle's valuation taken immediately before the transaction of £45,000. I find that from the moment that the litigation against West Wicklow Inn Ltd was settled in early November 1986 Falstaff had the opportunity to complete for £26,100 the purchase of property worth between £45,000–50,000. In the absence of any confirmatory evidence from the managers of the banks concerned, I do not accept Mrs Heinl's account that she was unable to obtain a bank advance to enable Falstaff to complete the contract. Notwithstanding her account of her conversation with Mr McDonnel at about the time of the settlement I do not accept that this was a genuine attempt to obtain finance if that conversation ever took place. Mrs Heinl admits that she did not tell Mr McDonnel of the £45,000 valuation of Doyle of the land. I take the same view of the alleged approach by Mrs Heinl to the National Irish Bank. In the result I am not satisfied that Falstaff would not have been able from its own resources, including its ability to borrow, to complete the contract if its directors had permitted it to do so.

But further I accept the bank's submission that completing the contract was not the only way which Falstaff could have employed to realise the value of the contract. It was open to Falstaff, even if it was, contrary to my findings, unable to borrow sufficient money, to dispose of the benefit of the contract by assignment to a third party for consideration. I do not accept that this could not have been done before 12 December 1996 the date fixed by the contract for completion. In conclusion, in the absence of any confirmatory evidence from Mr Doyle I entertain considerable doubts as to Mrs Heinl's account of her conversation with Mr Doyle at around Christmas 1996. It seems to me quite unlikely that Mrs Heinl had not by this date considered the possibility of residential development on the land which was already zoned for town centre uses.

In my judgment the bank have made good a case that, even if it be accepted that it was part of the transaction that Eccleston repay the £2,900 deposit paid by Falstaff in 1992 the transfer of the benefit of the contract to Eccleston was entered into for a consideration the value of which in money or money's worth was significantly less than the value of the consideration provided by Eccleston.

It was finally argued on behalf of Eccleston that even if I found that the requirements of s. 423 were met, I should nonetheless decline to grant any relief under s. 423(2) as a matter of discretion because by granting relief I would be making orders against an Irish company with no connections with England in respect of a contract made and to be performed in Ireland governing the disposition of Irish land. This argument was initially advanced as part of Eccleston's resistance to my granting the bank leave to amend to include a claim under s. 423. On that application I ruled, on the authority of the judgment of Sir Donald Nicholls V-C in *Re Paramount Airways Ltd (No. 2)* [1992] BCC 416; [1993] Ch 223, that s. 423–425 of the Insolvency Act were to be construed as having effect

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so as to bind defendants in respect of transactions entered into and performed outside the jurisdiction and in particular in Ireland. It seems to me that the fact that, by contrast with the facts in the *Paramount Airways* case where only the transferee was a foreign company, the fact that the transferor is also such a company does not affect the application of the sections. Following the judgment of the Vice-Chancellor in that case I concluded that I should wait until I had heard full evidence and argument before deciding, if all other requirements for the exercise of the power in s. 423(2) were met, whether I should nonetheless refuse relief on the ground that to do so would be to exercise the wide powers given by the sections in an exorbitant manner that is without due regard to the comity which this court should show to the Irish courts.

I have come to the conclusion that I should grant the relief sought and that to do so would not offend against such comity.

In *Re Paramount Airways Ltd* the Vice-Chancellor was considering the extra-territorial effect of s. 238 of the Insolvency Act on the issues in the case before him. In his analysis of such extra-territorial effect, however, he also considered other provisions of the Insolvency Act by which transactions can be challenged on behalf of creditors including s. 423. His conclusion with relation to s. 423 was that it had unlimited extra-territorial effect.

It seems to me that both Falstaff and Eccleston were properly before the court in respect of the s. 423 claim. Leave to serve them outside the jurisdiction was not obtained by the bank but this was not necessary because the claim falls within the Rules of the Supreme Court, O. 11, r. 1(2)(b) being,

> 'a claim which by virtue of any other enactment the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.'

It would also fall within r. 1(2)(a) because the claim comes within art. 6(1) of the Brussels Convention (*Enforcement of Judgments in Civil and Commercial Matters* 1968).

Article 16(1) of the Brussels Convention as incorporated by the *Civil Jurisdiction and Judgments Act* 1982 does not, on the facts of this case, confer on the Irish courts an exclusive jurisdiction to try the issue with which I am dealing, notwithstanding that it concerns land situate in Ireland. My attention was drawn to the decision of the Court of Justice of the European Communities in *Webb v Webb* (Case C-294/92) reported at [1994] QB 696; [1994] ECR I-1717. My attention was also drawn to the decision of the same court in *Reichert v Dresdner Bank* (Case 115/88) decided on 10 January 1990 and reported at [1990] ECR I-27 in which it was decided that art. 16(1) did not apply to an action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor. In that case the court was dealing with a submission by a German defendant to a claim by a German plaintiff bank to set aside a transfer by a husband and wife of property in France to their son, on the ground that it constituted a fraud of the plaintiff's rights as a creditor, that that claim should nonetheless be brought in Germany because of the provisions of art. 2 of the Brussels Convention requiring persons domiciled in a contracting State to be sued in the courts of that State. The defendants in the present case fall within an exception to the rule in art. 2 by reason of the provisions of art. 6(1). It follows, it seems to me, that I have jurisdiction to try the case and make orders under s. 423(2) if otherwise minded to do so.

In the *Paramount Airways Ltd* case the Vice-Chancellor was dealing with an application under s. 238 of the Insolvency Act brought by administrators of an English company being wound up in England. It is plain from his judgment that he was reluctant to come to the conclusion, which ultimately he did, that the sections of the Insolvency

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Act with which he was dealing had unlimited extra-territorial effect. At p. 424; 239 onwards of his judgment the Vice-Chancellor sets out the safeguards which the English court should, in his view, apply to ensure that the English court does not exercise such jurisdiction in an exorbitant manner. The two heads under which that discretion arose in the *Paramount* case were the discretion of the court whether to grant relief which he held the court had under each of the sections being considered including s. 423, and the discretion of the court whether or not to permit service abroad which arose in that case because r. 12.12 of the *Insolvency Rules* 1986 (SI 1986/1925) applied but which does not in this case because it is not, as I ruled on the application to amend an 'insolvency proceeding' within the Insolvency Rules.

At [1992] BCC 416, p. 425B; [1993] Ch 223, p. 239H of his judgment in the *Paramount* case the Vice-Chancellor, having drawn attention to the discretion in the court whether or not to make orders under s. 423(2), continues:

> 'The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.'

The Vice-Chancellor then sets out the sort of matters which he considered should be taken into consideration by the court in deciding whether there was a sufficient connection with England to justify the exercise of the discretion to make an order. He concludes by saying (p. 425F; 240E):

> 'The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.'

I do not read this passage in the Vice-Chancellor's judgment as laying down that a court should never grant an order under s. 423(2) in the exercise of its discretion in the absence of any of the sort of connections with England which the Vice-Chancellor set out but it has to be accepted that there are no such connections in the present case.

I have nonetheless come to the conclusion that I should grant the relief sought. I do so for the following reasons: I was the judge who tried the main action and, as a result, am all too familiar with the background facts and the roles played by the *dramatis personae*. If I were here dealing with English companies and English land a clear case for relief under s. 423(2) has been made out. I understand that at Irish law there are provisions similar to those contained in s. 172 of the *Law of Property Act* 1925, the predecessor of s. 423–425. However, before an Irish court could make any order, fresh proceedings would have to be launched in Ireland. Although the interlocutory stages of those proceedings might be foreshortened because of the material assembled in these proceedings, a fresh judge with no previous knowledge of the case would have to try it. He would need to hear all the evidence over again in order to come to the necessary findings of fact which would found his jurisdiction to make any order. The costs incurred in the English proceedings dealing with the issue would be thrown away and fresh costs incurred in Ireland.

The issue which I have tried is logically part of the bank's claim to trace the money abstracted from it in fraudulent breach of trust involving parties to the main action. No application has been made to stay the proceedings on grounds such as forum non conveniens. There has been no apparent disadvantage to the defendants in dealing with the issue in the English court. I believe that I have been in as good a position as an Irish judge to deal with it. The facts of the case are not substantially in issue although the

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parties' roles and intentions are. The documentary evidence is extensive and most of the facts can be established from those documents. Eccleston has put in the filed witness statements of witnesses which were not called, under the Civil Evidence Act. It was open to Eccleston to obtain witness statements from the other witnesses whose importance I have pointed out and to put those in under the Civil Evidence Act if there were difficulties in persuading those witnesses to attend Court. Again this was not done.

In conclusion any order which I make can operate in personam only and requires the assistance of the Irish court to be effective to dispose of any interest in the land or to require persons resident in Ireland to act in a particular way.

I turn, therefore, to consider the relief which the bank seeks.

It seems to me that there should be a declaration that the transfer of the benefit of the contract by Falstaff to Eccleston on or about 12 December 1996 was at an undervalue within the meaning of s. 423(1)(a), alternatively, (c), and was made for the purpose of putting an asset of Falstaff, namely the benefit of the contract, beyond the reach of Falstaff's creditors, including the bank, and of otherwise prejudicing their interests within the meaning of subs. (3). There should then be an order that Eccleston do all things necessary to vest the land in Falstaff subject to a charge in favour of Eccleston securing payment to Eccleston of £50,000, the sum agreed between the parties for which Eccleston was to have access to the land for the purpose of paying its costs of these proceedings, and securing payment of the sum of £26,100 and interest at the correct rate from 12 December 1996 to the date of payment to Eccleston. I direct that the order should not be enforced but should lie on the file pending disposal of the appeal in the main action. There should be liberty to apply to both parties.

(Order accordingly)

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forced construction upon the Act for the purpose of enabling that injustice to be done. L. JJ. 1874 BUSH'S CASE.

This appeal is dismissed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Harper, Broad, & Battcock.*
Solicitors for Mr. *Bush:* Messrs. *Linklaters & Co.*

In re ORIENTAL INLAND STEAM COMPANY.
Ex parte SCINDE RAILWAY COMPANY. L. JJ. 1874 *July* 1.

Winding-up—Attachment—Property Abroad—Foreign Judgment—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.

When a company has in this country been ordered to be wound up, judgment creditors who are in this country, and have proved under the winding-up, will not be allowed to attach property in *India* belonging to the company

Order of *Malins*, V.C., affirmed.

THE *Oriental Inland Steam Company* and the *Scinde Railway Company* were both English companies having their chief offices in *England*, but carrying on business in *India*. On the 23rd of May, 1867, the *Scinde Company* obtained in *India* judgment against the *Oriental Company* for Rs.40,122.

On the 8th of November, 1867, an order to wind up the *Oriental Company* was made in *England*, and on the 12th of March, 1868, the *Scinde Company* came in under the winding-up and proved their debt.

On the 28th of January, 1869, the *Scinde Company*, proceeding under their judgment, attached certain property in *India* belonging to the *Oriental Company*. By an order made on the 4th of March, 1869, in the winding-up, the *Scinde Company* was ordered to withdraw the attachment, without prejudice to any question; and upon the *Scinde Company* undertaking to abide by any order of the Court, the official liquidator was ordered, out of the proceeds of the sale of property in *India* belonging to the *Oriental Company*,

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L. JJ. 1874

In re ORIENTAL INLAND STEAM COMPANY. *Ex parte* SCINDE RAILWAY CO.

to pay the *Scinde Company* the amount of principal, interest, and costs then due to them.

The attachments were accordingly withdrawn, and Rs.19,813 were paid by the official liquidator to the *Scinde Company* in satisfaction of their claim; the remainder of their claim having been satisfied by sales under attachments before the winding-up.

The official liquidator applied by summons that the *Scinde Company* should repay this sum of Rs.19,813, and the Vice-Chancellor *Malins*, on the 18th of April, 1874, made an order accordingly.

The *Scinde Company*, appealed.

Mr. *J. Pearson*, Q.C., and Mr. *Marten*, Q.C., for the Appellants:—

We are ready to abandon our claim under the winding-up here, and then we ought not to be prevented from retaining what we have received in *India*. The only result of our giving up our attachment, or not issuing it, would have been to allow other execution creditors in *India* to take the property. If those creditors are not in this country this Court will have no jurisdiction over them: *Bank of Hindustan* v. *Premchand* (1), and it is very hard upon us that they should thus obtain an advantage over us. If this is the law the result in all these cases will be to hand over the assets to those creditors who happen to be out of the jurisdiction. *In re Kelson* (2) was a case of inspectorship only.

Mr. *Glasse*, Q.C., and Mr. *Whitehorne*, for the *Oriental Company*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case is perfectly right.

The winding-up is necessarily confined to this country. It is not immaterial to observe, that there could now be no possibility, having regard to the decision of the Supreme Court of *Calcutta*, in *Bank of Hindustan* v. *Premchand*, which we must take to be quite right, of treating this case as if there were an auxiliary winding-up in *India*. If this is so with regard to a company domiciled in *England*, but having its business and assets in *India*, there would be no ground for the contention on the part of the

(1) 5 Bomb. H. C. Rep. 83. (2) Law Rep. 4 Ch. 125.

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Appellants that they would obtain an equitable and rateable distribution of the assets between the creditors. All the assets there would be liable to be torn to pieces by creditors there, notwithstanding the winding-up, and there would be an utter incapacity of the Courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company.

There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court, or take the same view of the law as the Courts of this country have taken as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur.

In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust*. So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. The assets must be distributed in *England* upon the footing of equality.

The Vice-Chancellor's judgment must therefore be affirmed, and the appeal dismissed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I quite agree that the 87th section of the Act of 1862, pro-

L. JJ. 1874

In re ORIENTAL INLAND STEAM COMPANY. *Ex parte* SCINDE RAILWAY CO.

viding that no action shall be brought without the leave of the Court, and the 163rd section, enacting that no execution shall issue, apply only to the Courts in this country. Of course, Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts, unless they are expressly mentioned. Still, that appears to me not to prevent the general application to this case of the principles which have been established in cases of bankruptcy.

No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this Court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor.

Then it is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding-up was presented, or possibly prior to the time when the winding-up order was made, and a judgment, for instance, had been put on the register, that might, by the law of *Bombay*, have constituted a charge on the property of the company, and then the trust for the benefit of the creditors would have been subject to that charge. But here there is no allegation that the judgment in *Bombay*, any more than a judgment here, simply *quâ* judgment, operates as any charge at all. It is quite clear that it does not, and that until the execution and attachment have issued and been executed, there is no actual charge on the property. That charge is subsequent to the creation

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of the trust, and is made by the particular Appellants here with full notice of the trust.

The consequence necessarily follows, that in this Court these creditors cannot be allowed by such means to obtain priority; and that they must give up, for the benefit of the creditors, what they have so obtained.

The appeal will be dismissed with costs.

Solicitors for the Appellants: Messrs. *Hollams, Son, & Coward.*

Solicitors for the Official Liquidator: Messrs. *Tilleard, Godden, & Holme.*

VAUGHAN *v.* HALLIDAY.

[1872 V. 1.]

Securities for Bills of Exchange—Doctrine of Ex parte Waring—Unaccepted Bills—Right of Double Proof—Practice—Appeal by one of two Defendants.

R & Co., of *Brazil*, in the course of exchange operations with *A.*, of *Manchester*, drew bills on him for £2000, which they sold to the Plaintiff, and about the same date transmitted to *A.* acceptances of another house for £1900 to cover the bills drawn. Before the covering remittances reached *England*, *R. & Co.* stopped payment and presented a petition for liquidation. *A.*, being also in difficulties, refused to accept the bills drawn on him, and also became a liquidating debtor. The Plaintiff, as holder of the dishonoured bills, filed a bill against the trustees of the estates of *R. & Co.* and *A.*, praying that the remittances might be applied in payment of the bills:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff had no equity to support the bill.

The doctrine of *Ex parte Waring* (1) does not apply to a case where the bills drawn by one of the insolvent firms on the other have not been accepted, nor in any other case in which the holder of the bills has no right of double proof against the two firms.

Ex parte Smart (2) distinguished.

On bill by *P.* against *R.* and *A.*, who all separately claimed the same property, decree made in favour of *P.* On appeal by *A.* alone, the Court being of opinion that *R.* was entitled, dismissed the bill against both Defendants.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

C. W. Ryder carried on business as a merchant at *Bahia* and *Pernambuco*, in *Brazil*, under the firm of *Ryder & Co.*, and at *Manchester* under the firm of *J. O. Ryder & Co.*

(1) 19 Ves. 345. (2) Law. Rep. 8 Ch. 220.

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A us in deciding the questions with which we have been concerned on this appeal. Equally, however, we have not had to consider whether our decision would have been different if all the provisions of the Act of 1992 had already come into force.

RUSSELL L.J. I agree.

B FARQUHARSON L.J. I also agree.

Appeal allowed.
Declaration accordingly.
Order for costs to be agreed.

C *Solicitors: Sharpe Pritchard for Director of Legal and Secretarial Services, Oldham Borough Council; Treasury Solicitor.*

M. I. H.

D

[COURT OF APPEAL]

E *In re* PARAMOUNT AIRWAYS LTD. (IN ADMINISTRATION)

1992 Feb. 11, 12, 13; 27 Sir Donald Nicholls V.-C., Taylor and Farquharson L.JJ.

Insolvency—Transaction at undervalue—Service out of jurisdiction—Director transferring company's money to bank in Jersey—Bank having no place of business in England—Company's administrators seeking order for recovery of money from bank—Whether jurisdiction to make order against foreign bank—Insolvency Act 1986 (c. 45), s. 238—Insolvency Rules 1986 (S.I. 1986 No. 1925), r. 12.12

F

G The administrators of a company issued an originating application against a bank registered in Jersey seeking, inter alia, declarations that the transfer to the bank of considerable sums of money belonging to the company by one of its directors constituted transactions at an undervalue within the meaning of section 238 of the Insolvency Act 1986,[1] and also orders for repayment. The bank carried on business in Jersey but not in England and Wales. The administrators also commenced proceedings by writ against the director and others in respect of H those transactions, claiming that the bank was liable to the company as constructive trustee for those sums. The registrar granted the administrators leave to serve the originating

[1] Insolvency Act 1986, s. 238(2)(3): see post, p. 233D–E.

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application on the bank in Jersey pursuant to rule 12.12 of the Insolvency Rules 1986.[2] Mervyn Davies J. granted the bank's application to set aside the registrar's order, holding that section 238 of the Act of 1986 did not have extraterritorial effect so as to include a foreigner resident abroad, and that "any person" in the section could not apply to the bank.

On the administrators' appeal:—

Held, allowing the appeal, that it was not possible, in construing the expression "any person" in section 238 of the Insolvency Act 1986, to identify any particular limitation which could be said to represent the presumed intention of Parliament in enacting the legislation, and the words had to be given their literal meaning, unrestricted as to persons or territory; and that the court, therefore, had jurisdiction under section 238 to make an order against a foreigner resident abroad; that, having regard to the unambiguous terminology of rule 12.12(1) of the Insolvency Rules 1986, the jurisdiction deriving from it to order service out of the jurisdiction was not to be confined, by analogy, to cases falling within R.S.C., Ord. 11, r. 1(1); and that, accordingly, the judge's order would be set aside and the registrar's order restored (post, pp. 239D–E, 241C–E, H–242A, C).

Dicta of Lord Scarman and Lord Wilberforce in *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130, 145, 152, H.L.(E.) applied.

Ex parte Blain; In re Sawers (1879) 12 Ch.D. 522, C.A. distinguished.

Per curiam. By virtue of sections 423(2) and 238 of the Act of 1986 the court has an overall discretion wide enough to enable it, if justice so requires, to make no order against the other party to the transaction. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element (post, pp. 239G–240A, 242C).

Decision of Mervyn Davies J. [1992] Ch. 160; [1991] 3 W.L.R. 318; [1991] 4 All E.R. 267 reversed.

The following cases are referred to in the judgment of Sir Donald Nicholls V.-C.:

Blain, Ex parte; In re Sawers (1879) 12 Ch.D. 522, C.A.
Clark v. Oceanic Contractors Inc. [1983] 2 A.C. 130; [1983] 2 W.L.R. 94; [1983] 1 All E.R. 133, H.L.(E.)
Company (No. 00359 of 1987), In re A [1988] Ch. 210; [1987] 3 W.L.R. 339; [1987] 3 All E.R. 137
Galbraith v. Grimshaw [1910] A.C. 508, H.L.(E.)
Jogia (A Bankrupt), In re [1988] 1 W.L.R. 484; [1988] 2 All E.R. 328
Ormiston, Ex parte; In re Distin (1871) 24 L.T. 197
Rousou's Trustee v. Rousou [1955] 1 W.L.R. 545; [1955] 2 All E.R. 169; [1955] 3 All E.R. 486
Sill v. Worswick (1791) 1 H.Bl. 665
Tucker (A Bankrupt), In re [1988] 1 W.L.R. 497; [1988] 1 All E.R. 603
Tucker (R. C.) (A Bankrupt), In re, Ex parte Tucker (K. R.) [1990] Ch. 148; [1988] 2 W.L.R. 748; [1988] 1 All E.R. 603, C.A.
Vocalion (Foreign) Ltd., In re [1932] 2 Ch. 196

[2] Insolvency Rules 1986, r. 12.12: see post, p. 241A–C.

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A The following additional cases were cited in argument:

Anglo-African Steamship Co., In re (1886) 32 Ch.D. 348, C.A.
Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147; [1989] 1 All E.R. 1189, C.A.
Bishopsgate Investment Management Ltd. v. Maxwell [1993] Ch. 1; [1992] 2 W.L.R. 991; [1992] 2 All E.R. 856, C.A.
Clark v. Oceanic Contractors Inc. [1981] 1 W.L.R. 59
B *Cooke v. Charles A. Vogeler Co.* [1901] A.C. 102, H.L.(E.)
Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation [1986] Ch. 482; [1986] 2 W.L.R. 453; [1986] 1 All E.R. 653
Seagull Manufacturing Co. Ltd., In re [1992] Ch. 128; [1991] 3 W.L.R. 307; [1991] 4 All E.R. 257
Shilena Hosiery Co. Ltd., In re [1980] Ch. 219; [1979] 3 W.L.R. 332; [1979] 2 All E.R. 6
C *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)
Theophile v. Solicitor-General [1950] A.C. 186; [1950] 1 All E.R. 405, H.L.(E.)
Tracomin S.A. v. Sudan Oil Seeds Co. Ltd. (Nos. 1 and 2) [1983] 1 W.L.R. 1026; [1983] 3 All E.R. 137, C.A.

D The following cases, although not cited, were referred to in the skeleton arguments:

Air-India v. Wiggins [1980] 1 W.L.R. 815; [1980] 2 All E.R. 593, H.L.(E.)
Ashtiani v. Kashi [1987] Q.B. 888; [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.
Attorney-General for Alberta v. Huggard Assets Ltd. [1953] A.C. 420; [1953] 2 W.L.R. 768; [1953] 2 All E.R. 951, P.C.
E *Babanafi International Co. S.A. v. Bassatne* [1990] Ch. 13; [1989] 2 W.L.R. 232; [1989] 1 All E.R. 433, C.A.
Banque des Marchands de Moscou (Koupetschesky) v. Kindersley [1951] Ch. 112; [1952] 1 All E.R. 1269, C.A.
Compania Merabello San Nicholas S.A., In re [1973] Ch. 75; [1972] 3 W.L.R. 471; [1972] 3 All E.R. 448
F *Derby & Co. Ltd. v. Weldon (No. 6)* [1990] 1 W.L.R. 1139; [1990] 3 All E.R. 263, C.A.
Draper (C. E. B.) & Son Ltd. v. Edward Turner & Son Ltd. [1965] 1 Q.B. 424; [1964] 3 W.L.R. 783; [1964] 3 All E.R. 148, C.A.
Dulles' Settlement, In re [1951] Ch. 265; [1950] 2 All E.R. 1013, C.A.
English, Scottish and Australian Chartered Bank, In re [1893] 3 Ch. 385, C.A.
G *Farrell v. Alexander* [1977] A.C. 59; [1976] 3 W.L.R. 145; [1976] 2 All E.R. 721, H.L.(E.)
Gold Star Publications Ltd. v. Commissioner of Police of the Metropolis [1981] 1 W.L.R. 732; [1981] 2 All E.R. 257, H.L.(E.)
Haiti (Republic of) v. Duvalier [1990] 1 Q.B. 202; [1989] 2 W.L.R. 261; [1989] 1 All E.R. 456, C.A.
Holmes v. Bangladesh Biman Corporation [1989] A.C. 1112; [1989] 2 W.L.R. 481; [1989] 1 All E.R. 852, H.L.(E.)
H *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455, P.C.
Reg. v. West Yorkshire Coroner, Ex parte Smith [1983] Q.B. 335; [1982] 3 W.L.R. 920; [1982] 3 All E.R. 1098, C.A.
Whitney v. Inland Revenue Commissioners [1926] A.C. 37, H.L.(E.)

APPEAL from Mervyn Davies J.

On 29 November 1990 the joint administrators of Paramount Airways Ltd., Roger Arthur Powdrill and Joseph Beaumont Atkinson, issued an originating application against the respondent, Hambros Bank (Jersey) Ltd., seeking, inter alia, (1) a declaration that the payment of £346,800 made on or about 31 July 1989 into the account of Anser General Investments S.A. held with the bank, effectively reducing the indebtedness of Anser General Investments S.A. to the bank, constituted a transaction at an undervalue within section 238 of the Insolvency Act 1986; (2) an order that the bank pay to the administrators the sum of £346,800; (3) a declaration that the payment of £1,300,000 made on or about 4 July 1989 into the account of Anser General Investments S.A. with the bank, effectively reducing the indebtedness of Anser General Investments S.A. to the bank, constituted a transaction at an undervalue within section 238 of the Act of 1986; and (4) an order that the bank pay to the administrators the sum of £1,300,000.

On 30 November 1990 Mr. Registrar Buckley made an order granting the administrators liberty to serve the originating application by post upon the bank at 13, Broad Street, St. Helier, Channel Islands. On 19 June 1991 Mervyn Davies J. set aside the registrar's order on the ground that section 238 of the Act of 1986 did not have extraterritorial effect so as to apply to a foreign bank incorporated and resident abroad having no place of business in the United Kingdom, with the consequence that the court had no jurisdiction to make an order under the section against the bank.

By a notice of appeal dated 22 July 1991 the administrators appealed on the grounds, inter alia, that (1) the judge had erred in law in holding that the court had no jurisdiction to make any order under section 238 of the Act of 1986 against the bank; (2) the judge should have held that the words "any person" in section 238 meant (in the case of a company) any company, whether or not registered in England and Wales, or having a place of business in England and Wales, or carrying on business in England and Wales at the time of the transaction complained of; alternatively, that those words (in the case of a company) meant any company with a sufficient connection with England and Wales: and that, on the facts of the case, there was a sufficient connection; and in either case the court accordingly had jurisdiction to entertain the originating application against the bank, and to grant leave under rule 12.12 of the Insolvency Rules 1986 to serve the bank in Jersey; and (3) in construing section 238 of the Act of 1986 the judge had erred in failing (i) to hold that the bank, even though a Jersey company, was within the class of persons with respect to whom Parliament was to be presumed to be legislating in section 238; (ii) to give sufficient weight to the mischief which the section was intended to remedy, and/or to the disastrous practical consequences for all insolvencies with any international element if the operation of the section were limited to those within England and Wales at the time of the transaction complained of; (iii) to give sufficient weight to the legislative context of the section and related sections; and (iv) to give sufficient weight to the fact that the transactions dealt with by the sections necessarily had a connection with England and Wales in

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A that they involved a disposition of the property of a person or company the subject of insolvency proceedings before the courts of England and Wales.

By a respondent's notice the bank notified its intention of contending that the judge's decision should be affirmed on the additional ground that he should in any event have exercised his discretion under rule 12.12 and set aside the registrar's order on the ground that it was not a B proper case for service of the originating application out of the jurisdiction; and in particular because (i) the bank had at all relevant times no presence in, and/or sufficient connection with, England and Wales; and/or (ii) the judge should have applied and/or had regard to the provisions of R.S.C., Ord. 11 and, had he done so, should have concluded that the claims raised did not fall within the ambit of the C order and that leave to serve out should thus be refused.

The facts are stated in the judgment of Sir Donald Nicholls V.-C.

Nicholas Merriman Q.C. and *Richard Salter* for the administrators. On its true construction section 238 of the Insolvency Act 1986 gives the court jurisdiction to make orders against "any person" provided that the D criteria laid down in sections 238 and 241 are satisfied. The "territorial principle" in *Ex parte Blain; In re Sawers* (1879) 12 Ch.D. 522 is not an invariable rule of law but a rebuttable presumption used to construe statutes expressed in general terms: see *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130, 145, 152. The court should treat the presumption simply as one of the factors to be taken into account.

The wording, structure, subject matter, scheme and legislative history E of the Act show that Parliament intended that the provisions of the Act should apply to offshore companies as well as persons in England and Wales. Difficulties of enforcement can be dealt with on a practical basis: either the administrator will not bring proceedings or leave to serve out can be refused under rule 12.12 of the Insolvency Rules 1986. Moreover, comity does not require an implied territorial limitation. Decisions on F predecessor provisions have been concerned with the construction of the rules governing leave to serve proceedings out of the jurisdiction, not with any implied territorial limitation: see *Rousou's Trustee v. Rousou* [1955] 1 W.L.R. 545; [1955] 3 All E.R. 486.

There has been a shift in the law's attitude to assertion of jurisdiction over foreigners: see *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd. (Nos. 1 and 2)* [1983] 1 W.L.R. 1026 and *In re Vocalion (Foreign) Ltd.* [1932] G 2 Ch. 196. The *Ex parte Blain* presumption is weak where the English courts are already seised of the primary subject matter and the conduct which Parliament is regulating has an English connection and effects within England. Since section 238 contains an express definition of the classes of person to whom it applies, no additional limitations on those classes should be implied. *In re Tucker (R.C.) (A Bankrupt), Ex parte* H *Tucker (K.R.)* [1990] Ch. 148 is distinguishable since it was concerned with the special case of the power to summon witnesses on a private examination in bankruptcy. [Reference was also made to *In re Seagull Manufacturing Co. Ltd.* [1992] Ch. 128.]

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Prior to 1962 there was no statutory power, corresponding to R.S.C., Ord. 11, authorising the Bankruptcy Court to assert extraterritorial jurisdiction against persons other than the debtor. This deficiency was remedied by the Bankruptcy (Amendment) Rules 1962 (S.I. 1962 No. 295 (L. 3)): see *In re Jogia (A Bankrupt)* [1988] 1 W.L.R. 484. Rule 12.12 of the Insolvency Rules 1986 expressly dissociated jurisdiction to grant leave for service out of the jurisdiction in insolvency proceedings from Order 11: see *In re Tucker (A Bankrupt)* [1988] 1 W.L.R. 497. It is improbable that Parliament intended by the Act of 1986 to reduce the court's jurisdiction and, in particular, to restrict the remedies available to the trustee in bankruptcy formerly conferred by section 42 of the Bankruptcy Act 1914 and section 172 of the Law of Property Act 1925. [Reference was made to *Bishopsgate Investment Management Ltd. v. Maxwell* [1993] Ch. 1.]

The Act of 1986 contains no limitation on those companies which may be made the subject of the primary jurisdiction similar to the conditions which have to be satisfied in respect of a debtor before a bankruptcy petition can be presented. Under Part V of the Act the court has jurisdiction to wind up "any unregistered company," which includes overseas companies: see section 220. The courts have developed a flexible test for assuming this jurisdiction: see *In re A Company (No. 00359 of 1987)* [1988] Ch. 210. Although there are no limitations on the phrase "any person" the courts should, when deciding whether to make an order, take into account (a) the closeness of connection between the transaction in question and this country and (b) the likelihood of benefit accruing to the creditors.

It is necessary, in order to obtain leave under rule 12.12 of the Rules of 1986, to satisfy the court that the case is a proper one for leave to be granted in the exercise of the court's discretion. [Reference was made to *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460.]

Nigel Davis for the bank. Section 238 should be construed in conformity with the principle in *Ex parte Blain; In re Sawers*, 12 Ch.D. 522, 526, that English legislation, unless the contrary is expressly enacted or plainly to be implied, is presumed to be applicable only to British subjects or to foreigners abroad who have come to this country and made themselves subject to the jurisdiction: see *In re Tucker (R.C.) (A Bankrupt), Ex parte Tucker (K.R.)* [1990] Ch. 148. [Reference was made to *Cooke v. Charles A. Vogeler Co.* [1901] A.C. 102.] The making of an order under the section against a foreigner depends on establishing his presence in the jurisdiction at the time of the transaction. The *Ex parte Blain* principle is not merely a factor to be taken into consideration but involves an initial presumption that Parliament does not intend to legislate extraterritorially: see *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130. [Reference was made to *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch. 482.] Thus the administrators have to establish that the section by express words or necessary implication has extraterritorial effect. Section 426 of the Act of 1986 illustrates the limited jurisdictional approach contemplated by Parliament.

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A *Rousou's Trustee v. Rousou* [1955] 1 W.L.R. 545 does not support the administrators' case. It would be surprising if the Act of 1986 were to extend to money received in a foreign country. On the administrators' argument an innocent foreign recipient of property transferred abroad under a transaction valid under local law could fall within the section. That would be repugnant to international law. [Reference was made to *Cheshire & North's Private International Law*, 11th ed. (1987), p. 911; B *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 2, pp. 1110–1112; *Sill v. Worswick* (1791) 1 H.Bl. 665; *Galbraith v. Grimshaw* [1910] A.C. 508 and *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196.] The *Ex parte Blain* principle is neither outdated (see *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130) nor superseded: see *In re Seagull Manufacturing Co. Ltd.* [1992] Ch. 128 and *Theophile v. Solicitor-*C *General* [1950] A.C. 186.

Section 238 is not aimed primarily at wrongdoing, but at the fair distribution of assets among creditors. Even if it is aimed at wrongdoing, it does not follow that it should be construed liberally. In any event, some limitation should be implied by analogy with R.S.C., Ord. 11. It is unlikely that Parliament intended to enlarge the jurisdiction of the court by the insolvency rules. As to the exercise of discretion, this was not a D proper case for granting leave to serve out of the jurisdiction since the discretion ought to be exercised by analogy with Order 11 and the claims do not fall within any of the paragraphs of Ord. 11, r. 1(1).

Merriman Q.C. in reply. *In re Jogia (A Bankrupt)* [1988] 1 W.L.R. 484; *In re Shilena Hosiery Co. Ltd.* [1980] Ch. 219; *In re Tucker (A Bankrupt)* [1988] 1 W.L.R. 497 and *Rousou's Trustee v. Rousou* E [1955] 1 W.L.R. 545 show that sections 42 and 44 of the Bankruptcy Act 1914, section 172 of the Law of Property Act 1925 and section 320 of the Companies Act 1985 were all treated as applying to foreign recipients of property. It was against that background that the Act of 1986 was passed. Section 426(4), which empowers English courts to assist foreign courts exercising insolvency jurisdiction, is plainly based on the expectation that foreign courts will make extraterritorial orders F affecting persons or property within the jurisdiction of the English courts, and that English courts will act similarly.

As to the relationship between exercise of discretion and assumption of jurisdiction, see *Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade* [1989] 1 W.L.R. 1147. Where the jurisdiction under section 238 is unlimited and unfettered the exercise of jurisdiction G extraterritorially must be based on demonstration of a sufficient connection with this country. As to connecting factors, see *Clark v. Oceanic Contractors Inc.* [1981] 1 W.L.R. 59, 65. As to the need for a statutory authority to serve out of the jurisdiction, see *In re Anglo-African Steamship Co.* (1886) 32 Ch.D. 348.

Cur. adv. vult.

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27 February. The following judgments were handed down.

SIR DONALD NICHOLLS V.-C. All legal systems have to deal with the situation which arises where a debtor is unable to pay his debts. Under

English law, where the debtor is a corporate body, its assets are sold, the proceeds distributed among its creditors, and then the debtor ceases to exist, i.e., it is dissolved. The law is more merciful to an individual. His property is sold and the proceeds distributed among his creditors. Thereafter, in due course, he is discharged from bankruptcy and is permitted to resume a normal life, freed from the burden of his past debts.

This simple scheme has to be buttressed by statutory provisions concerned to prevent abuse by debtors and to achieve a fair distribution of a debtor's property among his creditors. In some circumstances it would not be reasonable that a disposition of property made by an individual before his bankruptcy, or by a company before being wound up, should be allowed to stand. This may be because of the purpose for which the disposition was made, or because of the time at which it was made. One instance is where a debtor, anticipating insolvency, seeks to discharge one of his debts in priority to the others. For example, a company may pay off its bank overdraft ahead of its other liabilities because the directors have given personal guarantees to the bank. The directors are anxious to relieve themselves of their personal liability, so they decide to use what money is available in repaying the bank and to leave those who have supplied goods to the company to whistle for their money. Another instance is when an individual, anxious about the consequences of his insolvency, gives away his property shortly before he becomes bankrupt. For example, he transfers his share of his house to his wife. Fairness to his creditors demands that he should not be able to deplete his assets in this way in a deliberate attempt to put them beyond the reach of his creditors.

Successive statutes, principally the Bankruptcy Acts and the Companies Acts, contained provisions regulating this subject matter. They were something of a hotchpot. The provisions are to be found now in the Insolvency Act 1986. They comprise a coherent, modernised and expanded code. Section 238 enables the court, in prescribed circumstances, to make orders restoring the original position where a company has made gifts or entered into other transactions at an undervalue. Section 239 gives the court a like power in respect of a transaction by a company which has put a creditor or guarantor into a better position in the event of the company going into insolvent liquidation than otherwise would have been the case. Sections 339 and 340 contain similar, although not identical, provisions where an individual is adjudged bankrupt. The question raised by this appeal concerns the territorial scope of these provisions and, in particular, of the phrase "any person" in section 238(2). The applicants, who are the administrators of an English company, Paramount Airways Ltd., claim that the words mean exactly what they say: any person. Hence the expression is apt to include the respondent bank, Hambros Bank (Jersey) Ltd. ("Hambros Jersey"). The contrary argument is that Hambros Jersey is outside the ambit of the section, because the apparent width of the phrase is subject to an implied limitation that the expression applies only to (1) British subjects and (2) all persons present in England and Wales at the time of the impugned transaction. Hambros Jersey does not fall within either of

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these heads. Hambros Jersey is part of the Hambros Bank Group, but it is a Jersey company. It carries on business in Jersey, and does not carry on business in England and Wales. Mervyn Davies J. [1992] Ch. 160 upheld this argument and implied a limitation, although in not precisely these terms. He held that section 238 applies to British subjects, companies registered in England, foreigners present in England and, possibly, foreign companies carrying on business in England. The administrators have appealed from that decision.

The facts

Before turning to the precise terms of the statutory provisions I must set the scene by referring to the facts. For the purposes of this appeal the barest outline is sufficient. Paramount Airways Ltd. ("the company") is a company which carries on business as a charter airline. On 7 August 1989 an administration order was made in respect of the company. In the present proceedings the joint administrators are alleging that in July 1989 the company had £1·3m. standing to the credit of its bank account in England. The company is also said to have been the beneficial owner of £346,800 held by solicitors in London. These two sums of money were then transferred from England to Jersey by being paid, on the instructions of Mr. Ferriday, a director and chairman of the company, to the credit of a bank account held by Ryco Trust Ltd., a Jersey company, with Hambros Jersey. Ryco is a company administration agent which is said to have managed Anser General Investments S.A., a Panamanian company, on behalf of Mr. Ferriday. Anser is alleged to be owned or controlled by Mr. Ferriday. On the instructions of Ryco the money was then transferred to Anser and paid into an account which Anser maintained in Jersey with Hambros Jersey. The payments were in reduction of Anser's overdraft. The administrators are alleging that the company's money was misappropriated and paid away for no benefit to the company. They assert that the payments to Anser were transactions at an undervalue made at a time when the company was unable to pay its debts and within the relevant period of time stipulated in section 240. They seek an order that Hambros Jersey restore the money to the company. They are alleging that the benefit Hambros Jersey received from partial repayment of the overdraft was not acquired in good faith and for value and without notice of the relevant circumstances.

Hambros Jersey has denied this claim, but it admits, for the purposes only of this appeal, that (subject to the jurisdiction point) the administrators have an arguable case against the bank under section 238. An originating application was issued by the administrators on 23 November 1990, and on 30 November 1990 the registrar gave leave to serve these proceedings out of the jurisdiction. Hambros Jersey applied to set aside that order, and it is against the judge's decision of 14 June 1991 acceding to that application that this appeal was brought.

The company, acting by the administrators, also commenced actions against Mr. Ferriday and others in England and Jersey in respect of these transactions. The primary claim against Hambros Jersey is that it is liable to the company as constructive trustee for the sums of £1·3m. and £346,800. Hambros Jersey has submitted to the jurisdiction of the

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English court in respect of the claims in the English action, and the Jersey action has been stayed. Subject to one argument to which I shall come, concerning the proper application of the relevant insolvency rule, Hambros Jersey does not challenge the judge's view that, if the court has jurisdiction to grant leave to serve these section 238 proceedings on Hambros Jersey out of the jurisdiction, this was a proper case for the court to exercise its discretion in favour of granting leave.

An aid to construction

Next I must refer to an established principle of statutory construction which looms large on this appeal. The principle was stated by James L.J. in *Ex parte Blain; In re Sawers* (1879) 12 Ch.D. 522, 526, in a much quoted passage:

> "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."

Brett and Cotton L.JJ. gave judgments to the like effect. That decision concerned the scope of the expression "the debtor" in the Bankruptcy Act 1869 (32 & 33 Vict. c. 71). The court held that, despite its literal width, the expression did not embrace two Chileans resident in Chile who had never been to England, although they were partners with persons in England carrying on a business here.

The principle was the subject of authoritative exegesis by the House of Lords recently in the tax case of *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130. I need refer only to passages in the speeches of Lord Scarman and Lord Wilberforce. Commenting on the judgments in *Ex parte Blain*, 12 Ch.D. 522, Lord Scarman said [1983] 2 A.C. 130, 145:

> "Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only, and secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test."

Lord Wilberforce said, regarding the "territorial principle," at p. 152:

> "That principle, which is really a rule of construction of statutes expressed in general terms, and which as James L.J. said a 'broad

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A principle,' requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? The contention being that, as regards companies, the statute cannot have been intended to apply to them if they are non-resident, one asks immediately—why not?"

B From these observations the task before the court on this appeal can be distilled in this form: the court is concerned to inquire as to the persons with respect to whom Parliament is presumed to have been legislating when using the expression, "any person," and in making that inquiry Parliament is to be taken to have been legislating only for British subjects or foreigners coming to the United Kingdom, unless the C contrary is expressed (which it is not here) or is plainly implicit.

The sections

In summary form, the provisions of the relevant sections are as follows. Section 238 applies in the case of a company in respect of which D an administration order has been made or which has gone into liquidation. "Company" means, in short, a company registered under the Companies Acts: see sections 251 and 735(1) of the Companies Act 1985. Section 238(2) and (3) provides:

> "(2) Where the company has at a relevant time . . . entered into a transaction *with any person* at an undervalue, the [administrator or liquidator] may apply to the court for an order under this section. E (3) . . . the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction." (My emphasis.)

In short, a transaction at an undervalue means a gift or a transaction for a consideration which is significantly less in value than the consideration F provided by the company: subsection (4). An order is not to be made under the section if the company entered into the transaction in good faith and for the purpose of carrying on its business and at the time there were reasonable grounds for believing the transaction would benefit the company: subsection (5).

Section 239, concerned with preferences, applies in the same circumstances as section 238. Subsections (2) and (3) provide:

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> "(2) Where the company has at a relevant time . . . given a preference *to any person*, the [administrator or liquidator] may apply to the court for an order under this section. (3) . . . the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference." (My emphasis.)

H Giving a "preference" means doing anything which has the effect of putting one of the company's creditors, or a guarantor for any of the company's debts, into a better position in the event of the company going into liquidation than otherwise would have been the case:

subsection (4). An order is not to be made under the section unless, in deciding to give the preference, the company was influenced by a desire to produce that effect: subsection (5). Where a preference is given to a person "connected with the company," the court is to presume that the company was so influenced unless the contrary is shown: subsection (6).

Sections 240 and 241 contain ancillary provisions. Section 240 sets out an elaborate definition of the expression "relevant time." For present purposes it is sufficient to note that the expression embraces the period of two years prior to the onset of insolvency in the case of transactions at an undervalue and of preferences given to a person connected with the company, provided that at the time of the transaction the company was unable to pay its debts or it became unable to pay its debts by reason of the transaction. In the case of other preferences the period is six months. Section 241 lists some of the types of orders the court may make under section 238 or section 239. The court may require any property transferred as part of the transaction to be vested in the company, release any security given by the company, require "any person" to make payments to the administrator or liquidator in respect of benefits received by him from the company, provide for a guarantor whose obligations have been discharged to be under revived obligations, provide for security to be given for the discharge of obligations imposed by the order and for the priority which such security shall have, and provide for the extent to which persons may be able to prove in the winding up. Subsection (2) is in wide terms, enabling the court to make an order against a person even though he was not a party to the transaction with the company:

> "(2) An order under section 238 or 239 may affect the property of, or impose any obligation on, *any person* whether or not he is the person with whom the company in question entered into the transaction or . . . the person to whom the preference was given; . . ." (My emphasis.)

There is a saving in respect of interests which were acquired, for value and in good faith and without notice of the relevant circumstances, from a person other than the company.

Sections 238 and 239 are matched by comparable provisions, in sections 339 to 342, regarding individuals who are adjudged bankrupt. Section 339, concerning transactions at an undervalue, provides:

> "(1) . . . where an individual is adjudged bankrupt and he has at a relevant time . . . entered into a transaction *with any person* at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section. (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction." (My emphasis.)

Section 340 makes corresponding provision for an application to the court, and for the court making an order, where an individual has given a preference "to any person." "Relevant time" is defined in similar terms to those applicable to companies so far as preferences are

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concerned, but a more extended period, of five years, is provided for transactions at an undervalue. The need for insolvency at the relevant time does not apply to transactions at an undervalue entered into less than two years before the individual is adjudged bankrupt. Section 342, regarding the orders which the court may make, is in similar terms to section 241.

Finally, section 423, coupled with sections 424 and 425, makes provision regarding "transactions defrauding creditors." This section applies whether or not insolvency proceedings of any kind have been taken, and it applies however long before the application to the court the transaction being impugned was entered into. Where the debtor has been adjudged bankrupt or is a company which is being wound up or in relation to which an administration order is in force, the application can only be made by the official receiver, the trustee of the bankrupt's estate, the liquidator or the administrator or, with the leave of the court, by a victim of the transaction. In other circumstances an application may be made by a victim of the transaction, viz., a person who is, or is capable of being, prejudiced by the transaction. Shortly stated, the section applies to transactions "with another person" entered into by way of a gift, or in consideration of marriage or for a consideration significantly less in value than the consideration provided by the debtor: subsection (1). The court has power to make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into and also, in this case, for protecting the interests of persons who are the victims of the transaction: subsection (2). A prerequisite to making such an order is that the court is satisfied that the transaction was entered into by the debtor for the purpose either of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or of otherwise prejudicing the interests of such a person in relation to such a claim: subsection (3).

The persons in respect of whom Parliament was legislating

It will have been seen from the above summary that, on its face, the legislation is of unlimited territorial scope. To be within the sections a transaction must possess certain features. For instance, it must be at an undervalue and made at a time when the company was unable to pay its debts, the company must be in the course of being wound up in England or subject to an administration order, and so on. If a transaction satisfies these requirements, the section applies, irrespective of the situation of the property, irrespective of the nationality or residence of the other party, and irrespective of the law which governs the transaction. In this respect the sections purport to be of universal application. The expression "with any person" merely serves to underline this universality. It is, indeed, this generality which gives rise to the problem.

In these circumstances one is predisposed to seek for a limitation which can fairly be read as implicit in the scheme of the legislation. Parliament may have been intending to legislate in such all-embracing terms. Parliament may have intended that the English court could and should bring before it, and make orders against, a person who has no

connection whatever with England save that he entered into a transaction, maybe abroad and in respect of foreign property and in the utmost good faith, with a person who is subject to the insolvency jurisdiction of the English court. Indeed, he might be within the sections and subject to orders even though he had not entered into a transaction with the company or debtor at all. Such an intention by Parliament is possible. But self-evidently in some instances such a jurisdiction, or the exercise of such a jurisdiction, would be truly extraordinary.

The difficulty lies in finding an acceptable implied limitation. Let me say at once that there are formidable, and in my view insuperable, objections to a limitation closely modelled on the formula enunciated in *Ex parte Blain*, 12 Ch.D. 522 as explained by Lord Scarman in *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130, 145. The implied limitation for which Hambros Jersey contended is riddled with such serious, glaring anomalies that Parliament cannot be presumed to have intended to legislate in such terms.

In the first place, to treat presence of the other party within England and Wales as the factor which determines whether a transaction is within the ambit of the sections would be to adopt a criterion which would be capricious in the extreme. A transaction with a foreigner who is resident here would be outside the embrace of the legislation if he happened to be abroad, or chose to be abroad, at the time the transaction was effected. Conversely, a foreign national resident abroad would find that the transaction with him was within the Act if, but only if, he was physically present in this country at the time of the transaction. Secondly, this criterion would leave outside the scope of the legislation a transaction by a debtor with an overseas company wholly controlled by him. Siphoning money abroad in this way is a typical case to which the new legislation must have been intended to apply. Thirdly, this test would draw a distinction between the position of British subjects and others on a matter of substantive law affecting property transactions. It would be surprising if Parliament had such an intention today. Fourthly, this test would mean that there was no remedy under the Act in respect of a transaction with an overseas company, or a foreigner living here but abroad at the crucial moment, even if the subject matter was English land. Mr. Davis felt constrained to accept that such a case might be within the purview of the legislation. This concession betrays the weakness of Hambros Jersey's argument. If a transaction relating to English land is within the legislation regardless of the identity or whereabouts of the other party to the transaction, why should not this equally be so with regard to a transaction relating to shares in an English company? Or United Kingdom Government stocks? Or money in an English bank account? What this shows is that the physical absence or presence of the other party at the time of the transaction by itself bears no necessary relationship to the appropriateness of the transaction being investigated and made the subject of an order by an English court. As a sole touchstone it is useless.

The oddities do not end there. Hambros Jersey's contention, if correct, would mean that the jurisdiction of the English court under the sections would be much more restricted than the circumstances in which

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A an individual may be adjudged bankrupt or a company may be wound up by the English court. Under section 265 the English court has jurisdiction, for example, over a debtor who is a foreign national who has never lived or been here so long as, at a time within the last three years, he was a member of a firm which carried on business in this country. As to companies, under section 221 the court has jurisdiction to wind up overseas companies, a subject to which I shall return. Given
B the width of the ambit of these basic provisions, it would be surprising if Parliament is to be taken to have intended to limit the sections now under consideration as Hambros Jersey contended. Particularly, perhaps, since English law provides for the distribution of the assets of the insolvent among all the creditors worldwide. English law does not erect a "ring fence" to exclude creditors living abroad.

C For completeness I mention one further small pointer in the same direction, if one be needed. It is of a linguistic nature. As already seen, the sections make special provision for transactions with persons who are connected with the company or are associates of the debtor. For example, a company which has given a preference to a person connected with the company is rebuttably presumed to have been influenced by a desire to prefer that person. Under the statutory definitions one of the
D circumstances in which a person is connected with a company is where the person is a company which is under common control: see sections 249 and 435(6). Section 435(11) provides that for this purpose "company" includes any body corporate, whether incorporated in England or elsewhere. These provisions do not sit happily with the implied limitation for which Hambros Jersey contended.

E For these reasons Parliament cannot be taken to have been legislating only for transactions with the two classes of persons within Hambros Jersey's suggested limitation. So I cast around to see whether there is some other limitation implicit in the legislation: is there some other class with respect to whom Parliament is to be presumed to have been legislating? For example, in *In re Tucker (R. C.) (A Bankrupt), Ex parte Tucker (K. R.)* [1990] Ch. 148, where the application of the *Ex parte*
F *Blain*, 12 Ch.D. 522 principle was urged, this court declined to construe the words "any person" in section 25 of the Bankruptcy Act 1914 as embracing British subjects wherever they might be, and held that the power given to the court by that section to summon persons before it was even more limited and extended only to persons who were available to be served in England.

G In the end I am unable to discern any satisfactory limitation. I am unable to identify some other class. The case for some limitation is powerful, but there is no single, simple formula which is compelling, save for one expressed in wide and loose terms (e.g., that the person, or the transaction, has a "sufficient connection" with England) that would hardly be distinguishable from the ambit of the sections being unlimited territorially and the court being left to display a judicial restraint in the
H exercise of the jurisdiction. I mention, to dismiss, some examples of unacceptable simple tests. One possibility might be that the section applies only to transactions with persons who are available to be served with process in England and Wales. Such a limitation would have similar

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defects to those discussed above. Another possibility is that the transactions are confined to those governed by English law. But the remedies given by the sections include personal remedies, such as an order that the recipient of property transfer it back to the company, or an order that the other party to a transaction pay a sum of money to the trustee of the bankrupt's estate. It would be odd if a transaction were outside the section in all circumstances solely because it was governed by a foreign law even though, for instance, all the parties were in this country at all times. The same objection applies to a third possibility, namely, that the sections apply only to dealings with property, immovable or movable, situate in England and Wales at the relevant time.

Authority does not provide any guidance. Surprisingly, the court seems never to have decided this "territoriality" question in relation to the predecessor sections in the earlier Acts, such as sections 42 and 44 of the Bankruptcy Act 1914, section 320 of the Companies Act 1948 and section 172 of the Law of Property Act 1925. The questions which arose turned on the construction of the then rules concerning leave to serve proceedings out of the jurisdiction: *Rousou's Trustee v. Rousou* [1955] 1 W.L.R. 545 and, later, [1955] 3 All E.R. 486; *In re Jogia (A Bankrupt)* [1988] 1 W.L.R. 484; and *In re Tucker (A Bankrupt)* [1988] 1 W.L.R. 497. One analogy prayed in aid in the course of argument on the present appeal was the "relation back" doctrine applied in English insolvency. This still exists in a limited form in relation both to companies and to individuals, in that where a person is adjudged bankrupt or a company is wound up by the court, dispositions of property made by the debtor or the company after a prescribed date, usually the date of the presentation of the petition for a bankruptcy order or a winding up order, are void unless the court otherwise orders: sections 127 and 284. There is some authority that, although under English law the assignment of a bankrupt's property to the trustee in bankruptcy operates as a worldwide assignment of all his property wherever situated (sections 283, 306 and 436), the relation back principle applies only to property situated in England: *Galbraith v. Grimshaw* [1910] A.C. 508, especially *per* Lord Dunedin, at p. 513.

Given that the remedies under consideration in the present case are primarily of an in personam character, perhaps a closer analogy is to cases concerned with the circumstances in which English courts have granted or refused injunctions to restrain creditors, who have not proved in an English bankruptcy, from taking proceedings abroad or compelling them to refund property obtained abroad. The decided cases are few and mostly not of recent date. Residence in England was used as the test in some cases such as *Sill v. Worswick* (1791) 1 H.Bl. 665 and *Ex parte Ormiston; In re Distin* (1871) 24 L.T. 197. Likewise, in relation to companies Maugham J. in *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196 held that it would be more conducive to substantial justice to permit foreign proceedings, brought by a creditor domiciled overseas, to proceed. In *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 2, pp. 1110–1111, the test propounded is of residence at the time the other party received the payment. A different view is espoused in *Cheshire & North's Private International Law*, 11th ed. (1987), p. 914.

The suggestion made there is that it is only equitable that the jurisdiction cannot be exercised against a creditor unless the same conditions are applicable to him at the time he receives the payment as are applicable to jurisdiction over the debtor. This would be a wider test than residence.

There are areas of doubt and real difficulty here. There are unresolved conflict of laws problems. There is a crying need for an international insolvency convention. As it is, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 does not apply to bankruptcy, winding up and analogous proceedings. Section 426(4) of the Act of 1986 envisages co-operation between United Kingdom courts and the insolvency courts of other countries, but the only order made so far is of limited application: see the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (S.I. 1986 No. 2123).

In my view the solution to the question of statutory interpretation raised by this appeal does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression "any person" in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of *Ex parte Blain*, 12 Ch.D. 522. The expression therefore must be left to bear its literal, and natural, meaning: any person.

The court's discretion: a sufficient connection with England

This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make. Section 423(2) provides that the court "may" make such order as it thinks fit for restoring the position and protecting victims of transactions intended to defraud creditors. Sections 238, 239, 339 and 340 provide that the court "shall," on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb "shall," the phrase "such order as it thinks fit" is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign

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element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would *by itself* be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not *by itself* normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.

Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.

I pause to observe that this would not be the first time that, in this field, Parliament has conferred on the English court a jurisdiction of unlimited territorial application. Section 221 provides that an unregistered company may be wound up under the Act. This embraces all overseas companies, but in practice this has not given rise to difficulties. Despite the width of the statutory provision, the English court does not exercise its jurisdiction to wind up a foreign company unless a sufficient connection with England and Wales is shown and there is a reasonable possibility of benefit for the creditors from the winding up: see the review of the authorities by Peter Gibson J. in *In re A Company (No. 00359 of 1987)* [1988] Ch. 210.

The court's discretion: leave to serve abroad

The other safeguard arises at an earlier stage of the proceedings, and provides an additional protection for persons who are abroad and not able to be served with proceedings in this country in the usual way. They are not to be brought here unless the court first grants leave for the proceedings to be served on them abroad. In this regard the

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A difficulties of interpretation which existed under the old bankruptcy rules have been cured by the unambiguous terms of rule 12.12 of the Insolvency Rules 1986:

> "(1) Order 11 of the Rules of the Supreme Court, and the corresponding County Court Rules, do not apply in insolvency proceedings. (2) A bankruptcy petition may, with the leave of the
B court, be served outside England and Wales in such manner as the court may direct. (3) Where for the purposes of insolvency proceedings any process or order of the court, or other document, is required to be served on a person who is not in England and Wales, the court may order service to be effected within such time, on such person, at such place and in such manner as it thinks fit, and may also require such proof of service as it thinks fit. (4) An
C application under this rule shall be supported by an affidavit stating—(*a*) the grounds on which the application is made, and (*b*) in what place or country the person to be served is, or probably may be found."

Applications under the sections with which this appeal are concerned
D are "insolvency proceedings:" rule 13.7.

Hambros Jersey contended that the jurisdiction conferred by this rule can only properly be exercised by analogy to R.S.C., Ord. 11, so that leave should not be granted unless the case falls within one of the paragraphs of Ord. 11, r. 1(1). This is not a tenable interpretation of rule 12.12 of the Rules of 1986, given the clear language of paragraph (1) of the rule and given also that by their nature proceedings under the
E Insolvency Act 1986 cannot be expected to be addressed by Ord. 11, r. 1.

Thus the second safeguard is that he who wishes to serve the proceedings abroad must first obtain an exercise by the court of its discretion in his favour. In deciding whether the case is a proper one for service out of the jurisdiction, one of the circumstances the court will take into account is the strength or weakness of the plaintiff's claim in
F the proceedings. There must be a real issue, between the plaintiff and the defendant, which the plaintiff may reasonably ask the court to try. As Millett J. observed in *In re Tucker (A Bankrupt)* [1988] 1 W.L.R. 497, 502B, the plaintiff must make out a sufficiently strong case to justify his being given leave. How strong that case should be depends on the circumstances of the particular case. Where a foreign element is involved
G one of the factors which the court will consider is the apparent strength or weakness of the plaintiff's claim that the defendant has a sufficient connection with England, in respect of the relief sought in the proceedings.

Conclusion

H For these reasons I am not able to accept Hambros Jersey's submissions on the proper interpretation of section 238(2). The judge was persuaded into error on this point. It is not necessary to consider the facts further in this case, since Hambros Jersey does not challenge

the judge's view on the way the court's discretion under rule 12.12 should be exercised (save on the one point I have rejected).

I would therefore allow this appeal, set aside the judge's order and restore the order of the registrar. These proceedings should be permitted to proceed in England, hand-in-hand with the action in respect of which the bank has submitted to the jurisdiction of the English court. When the judge hears these proceedings he will have further evidence before him and he will make findings of fact on disputed issues such as whether Hambros Jersey had notice of the alleged misappropriation of some £1·65m of the company's money. It will be for him to decide, in the light of all the evidence, whether in respect of the relief claimed Hambros Jersey has a sufficient connection with England for it to be just for the English court to grant such relief. The grant of leave to serve Hambros Jersey abroad does not preclude the bank from raising this issue as a defence at the trial.

TAYLOR L.J. I agree.

FARQUHARSON L.J. I also agree.

Appeal allowed with costs in Court of Appeal and below. Leave to appeal refused.

Solicitors: Norton Rose; Wilde Sapte.

[Reported by CHRISTOPHER CHAMPNESS ESQ., Barrister]

Exhibit 22

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 0140 of 2010

IN TH E MATTER OF BERNARD L MADOFF INVESTMENT SECURITIES LLC (In Securities Investor Protection Act Liquidation)

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

IRVING H PICARD

Applicant

and

BERNARD L MADOFF INVESTMENT SECURITIES LLC
(In Securities Investor Protection Act Liquidation)

Respondent

Appearances: Mr Seamus Andrew and Mr Nikitas Olympitis for the Applicant

JUDGMENT

[2010; 11, 12 November]

(Foreign insolvency proceeding – foreign representative seeking recognition in British Virgin Islands – foreign representative seeking order that he is entitled to make applications pursuant to section 467(2) of the Insolvency Act, 2003 – foreign representative seeking order that he be entitled by written notice to require any person to deliver up to him any property of the foreign estate – proper form of order to be made)

[1] **Bannister J [ag]:** On 11 November 2010 I heard an application by Mr Irving H Pickard ('Mr Pickard'), the Trustee appointed on 15 December 2008 by the United States District Court for the Southern District of New York as trustee for the liquidation of the business of Bernard L Madoff

Investment Securities LLC ('BLMIS') with the duties and powers of a trustee as prescribed in the United States Securities Investor Protection Act of 1970 ('SIPA', 'the SIPA liquidation'). As I understand it, a SIPA liquidation is conducted under the auspices of (and paid for) by the United States Securities Investor Protection Corporation, but a trustee so appointed is vested with the same powers as a trustee appointed under the United States bankruptcy code. Importantly, for present purposes, a SIPA liquidation is subject to the supervision of the Court. In the present case, the SIPA liquidation is proceeding under the supervision of the United States Bankruptcy Court for the Southern District of New York (the Honourable Burton R Lifland).

[2] Mr Pickard's application to this Court was issued on 25 October 2010 and sought the following relief:

> '1. That the Applicant be recognized under the laws of the Virgin Islands as a foreign representative in the foreign proceedings in respect of which he is authorized, being the SIPA Liquidation of the Respondent (US Bankruptcy Court Southern District of New York – Adv. Pro. No. 08-179 BRL) ("the SIPA Liquidation"), within the meaning of Part XIX of the Act;
> 2. That the Applicant be entitled to apply to the Court for one or more orders under subsection (3) of section 467 of the Act in aid of the SIPA Liquidation;
> 3. Without prejudice to the generality of the foregoing, that the Applicant be entitled by written notice to require any person to deliver up to the Applicant any property of the Respondent ("SIPA Liquidation Property");
> 4. That any person affected by this Order, and in particular any person who is the subject of a notice pursuant to paragraph 3, shall have liberty to apply, within 28 days of receipt of the written notice referred to at paragraph 3 of this Order, upon 14 days' written notice to the Applicant's legal representatives.'

[3] I indicated at the hearing that I was not prepared to make an order in the terms sought and gave my reasons for that in the course of argument. It seems to me that this is a matter of considerable importance, both from the perspective of this jurisdiction and from the perspective of the United States Bankruptcy Court. In the interests of comity, therefore, if nothing else, it seems to me that I should set out my reasons for acting (or, as Mr Pickard would see it, failing to act) as I have done.

[4] Current insolvency legislation in the British Virgin Islands is enshrined in the Insolvency Act, 2003, as amended ('the Act'). Cross-border matters are dealt with in Part XVIII (entitled 'Cross-Border

Insolvency') and Part XIX (entitled 'Orders in Aid of Foreign Proceedings'). Part XVIII is, in short, an enactment of the code familiarly known as the UNCITRAL code ('UNCITRAL'). It proceeds on the basis of permitting persons appointed as administrators (put shortly) of insolvent estates to apply to the local court to have those proceedings recognised and lays down criteria for recognition. It is a precondition for recognition that the foreign insolvency proceedings are being conducted under the control or supervision of a court within a 'designated' jurisdiction. In other words, no proceedings may be recognised unless they are being conducted in a 'designated' state. Once recognition is granted, certain consequences (principally, stay and freezing relief) follow automatically and the foreign representative may apply to the local court for a wide range of relief designed, if granted, to enable the foreign representative to act in the British Virgin Islands as if, or substantially as if, he were a locally appointed liquidator or bankruptcy trustee.

[5] Part XVIII is not in force in the British Virgin Islands.

[6] Part XIX is in force. Under Part XIX a foreign representative (defined for practical purposes in the same way as in Part XVIII) appointed to act in a 'relevant' (rather than a 'designated') foreign country may apply to the British Virgin Islands Court for an order in aid of the proceedings in which he is appointed. The United States of America is a 'relevant' foreign country for the purposes of Part XIX. I had better set out in full the provisions of section 467 of the Act:

> 'Order in aid of foreign proceeding
>
> 467(1) For the purposes of this section "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized.
>
> (2) A foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.
>
> (3) Subject to section 468, upon an application under subsection (1), the Court may
>
> (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
>
> (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

(d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;

(e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorise the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such order or grant such other relief as it considers appropriate.

(4) An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realize or otherwise deal with property of the debtor over which the creditor has a security interest.

(5) In making an order under subsection (3), the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding.'

....

Section 470 of the Act provides as follows:

'Additional assistance

470. Subject to section 443, nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands.'

[7] Even though Part XVIII is not in force, it is nevertheless part of the same statute as Part XIX. Neither Part, in my judgment, can be properly construed without reference to the other. Subsections 466(2) and (3) of the Act are in the following terms:

> 'Interpretation for this Part
>
> 466(2) Notwithstanding subsection (1), a country or territory that is designated as a designated country for the purposes of Part XVIII ceases to be a relevant foreign country from the date of its designation as a designated country.
>
> (3) The designation of a country for the purposes of Part XVIII does not affect the validity of any order made under this Part.'

It is thus clear that Parts XVIII and XIX are mutually exclusive. It follows, in my judgment, that, not having brought Part XVIII into force, the legislature must be taken to have intended and to intend that foreign representatives are for the present to be confined (subject always to section 470) to the grant of discretionary relief under section 467. In contrast to the provisions of Part XVIII, which operate on the basis of recognition of foreign *proceedings* and provides for certain consequences of such recognition to follow automatically in accordance with UNCITRAL, Part XIX is designed to operate (as its heading indicates) on an application-by-application basis. Although some of the relief obtainable by a foreign representative under Part XVIII is discretionary, the fundamental difference between Part XVIII and Part XIX is that Part XVIII confers *status* on the foreign representative through the recognition of the foreign proceedings in which he has been appointed, whereas Part XIX merely gives a foreign representative from a relevant country express rights to apply to the British Virgin Islands Court for orders in aid, but without conferring status.

[8] It follows, in my judgment, that the common law concept of recognition has no place under the British Virgin Islands legislation. Recognition has been codified under Part XVIII. Because the concept of recognition of an individual foreign representative is absent from Part XIX, the consequences of the making of such a recognition order would be uncertain. If it meant merely that the Court accepted (as of course I do) that Mr Pickard is the validly appointed trustee in the SIPA liquidation, then it would achieve nothing. If it was intended to mean that Mr Pickard had some status in this jurisdiction deriving from the authority of the Court, then, as I have attempted to explain, that is not something which the legislation currently in force envisages, or empowers me to confer.

[9] Quite apart from that, the incidents of any such status, not springing from any statutory source, would be undefined. If the Court is to confer authority, not only must the source of that authority be identifiable, so that it can be seen whether it is being used for the purposes for which it has been granted, but the nature and extent of the power granted must be strictly delimited. I hope I will not

be misunderstood if I say that in my judgment the relief sought on this application, even if I had the power to grant it, would not meet those essential criteria.

[10] Mr Andrew, who appeared on this application together with Mr Nikitas Olympitis, argued with great skill that I could grant recognition under either section 467(3)(h) of the Act or under section 470. So far as section 467(3)(h) is concerned, that, in my judgment, is confined by context to orders in aid of the foreign proceedings. It does not give the Court the power to clothe the foreign representative with any general authority or status. As for section 470, given the elaborate statutory code enacted in Parts XVIII and XIX, that section cannot, despite the fact that Part XVIII is not in force, bring in by the back door the general common law concept of recognition. Section 470, in my judgment, does no more than provide, as its language makes plain, that the express provisions of Part XIX do not impliedly exclude the power of the Court to give assistance where it is otherwise able to provide it under any enactment or rule of law – for example, any rule of law which provided for the automatic vesting of property in a particular foreign representative. It does not mean that the whole common law edifice of recognition survives in tandem with Parts XVIII and XIX, which is a self contained code: see per Lord Hoffmann in **Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)**[1]**:**

> 'What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do.'

Compare Lord Walker of Gestingthorpe in **Al-Sabah v Grupo Torras SA**[2]

> 'If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section.'

[11] I was invited to grant relief by way of declaration. In the light of my reasoning as set out above, the point is largely academic, but I should perhaps explain that my reluctance to grant any sort of declaration springs from the peculiar force which a declaration has in the law of the British Virgin Islands. A declaration, when made, binds all persons subject to the jurisdiction of the Court. It is

[1] [2007] 1 AC 508 at para 22
[2] [2005] 2 AC 333 at para 35

for that reason that it would take quite extraordinary circumstances for the Court to grant a declaration in unopposed proceedings in which there is, in reality, no respondent.

Conclusion

[12] For these reasons, I must decline to grant the relief sought in Mr Pickard's application. It is my hope that this will not be seen by Mr Pickard or by the United States Bankruptcy Court as evidencing any want of comity on the part of this Court, which remains ready, in a proper case, to grant whatever relief it may decide is appropriate upon an application made by Mr Pickard under Part XIX of the Act.

Commercial Court Judge

12 November 2010

Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
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Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
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Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
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Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
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Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
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McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
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Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 23

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Supreme Court

Rubin and another *v* Eurofinance SA and others (Picard and others intervening)

In re New Cap Reinsurance Corpn Ltd (in liquidation)

New Cap Reinsurance Corpn Ltd and another *v* Grant and others

[2012] UKSC 46

2012 May 21, 22, 23, 24; Oct 24

Lord Walker of Gestingthorpe, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption JJSC, Lord Collins of Mapesbury

Insolvency — Liquidation — Foreign company — Liquidators of foreign companies seeking to enforce in England judgments of United States and Australian courts to recover moneys transferred to defendants before liquidation — Defendants claiming not to have been present in or submitted to jurisdiction of foreign courts — Whether judgments in personam — Whether ordinary rules for enforcing judgments in personam inapplicable to bankruptcy proceedings — Whether judgments enforceable at common law — Whether alternative method of enforcement through international assistance provisions of Model Law on Cross-Border Insolvency — Statutory provisions allowing English court to "assist" Australian court in insolvency matter and for registration and enforcement of Australian judgment in "civil or commercial" matter — Whether either provision allowing English court to enforce Australian judgment against defendants — Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo 5, c 13), s 6 — Insolvency Act 1986 (c 45), s 426(4) — Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 (SI 1994/1901), art 4(a) — Cross-Border Insolvency Regulations 2006 (SI 2006/1030), Sch 1, art 21

In the first case the company settled a trust under English law to hold funds for consumers who successfully participated in sales promotions organised by it in the United States of America. Following a successful challenge to the promotion under United States consumer protection legislation, resulting in the trust having to pay a substantial sum by way of settlement, it obtained an order from the English High Court appointing the applicants as receivers of the trust's property and the applicants then filed for protection before the bankruptcy court in New York under Chapter 11 of the United States Bankruptcy Code. The applicants were appointed as legal representatives of the trust, as debtor, with authority to prosecute all causes of action against potential defendants, and they commenced adversary proceedings in New York, being the equivalent of undervalue transaction and preference claims under sections 238 and 239 of the Insolvency Act 1986[1], against the defendants, the company and its founder and his sons. The defendants, who were not present in New York at the relevant time, did not submit to the court's jurisdiction and did not defend the proceedings. Default and summary judgment was entered against them. The applicants applied to the High Court for enforcement of the orders in England against the defendants under CPR Pts 70 and 73 on the ground that the English court had power to do so both at common law and under article 21 of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, scheduled to the

[1] Insolvency Act 1986, s 426(4)(5): see post, para 146.

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Cross-Border Insolvency Regulations 2006[2]. The judge held that the Chapter 11 proceedings fell within the ambit of the Model Law but that its provisions for co-operation did not extend to the enforcement of judgments. He refused to recognise the New York court's judgment at common law on the ground that it was an in personam judgment which could not be enforced where the defendants had neither been present in nor submitted to the New York court's jurisdiction. On the applicants' appeal, the Court of Appeal held that the New York court's judgments made in the adversary proceedings, despite having the indicia of judgments in personam, were none the less judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings, that the ordinary rule precluding the enforcement of a foreign judgment in personam where the judgment debtor had neither been present in, nor submitted to the jurisdiction of the courts of, the country where judgment had been given did not apply to such proceedings, and that since there should be an unitary bankruptcy proceeding in the court of the bankrupt's domicile which received worldwide recognition, the judgment of the New York court could be enforced against the defendants at common law. Given that decision, the Court of Appeal deemed it unnecessary to decide whether the judgments could have been enforced under the 2006 Regulations.

In the second case the defendants were members of a Lloyd's syndicate which placed reinsurance with an Australian reinsurance company and had received payments from it shortly before it went into liquidation. The liquidator brought proceedings in New South Wales to recover the payments made to the syndicate, on the basis that the company had been insolvent when they were made. The defendants did not accept service of the proceedings or submit to the jurisdiction of the New South Wales court in that matter but did participate in creditors' meetings in Australia in relation to some unsettled claims which they had against the company. The New South Wales court held that the payments had been a preference and therefore liable to be set aside, and issued a letter of request asking, inter alia, that the English court exercise its jurisdiction under section 426(4) of the Insolvency Act 1986 to order the defendants to pay the sum specified in the order. The liquidator and the company issued proceedings in England for relief as sought in the letter of request. The judge held that the English court was entitled to enforce the Australian judgment either at common law, given the decision of the Court of Appeal in the first case, or under section 426(4). Dismissing the defendants' appeal the Court of Appeal, having decided that the Foreign Judgments (Reciprocal Enforcement) Act 1933[3] was applicable because the insolvency proceedings fell within the ambit of "civil or commercial matter" in article 4(a) of the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994[4], held that, by reason of section 6 of that Act, the judgment was enforceable under section 426 but not at common law.

On appeal by the defendants in both cases—

Held, (1) allowing the appeal in the first case (Lord Clarke of Stone-cum-Ebony JSC dissenting), that the common law would only enforce a foreign judgment in personam if the judgment debtors had been present or, where the 1933 Act was applicable, resident in the foreign country when the proceedings had been commenced, or if they had submitted to its jurisdiction; that, as a matter of policy, the court would not adopt a more liberal rule in respect of enforcement judgments in the interests of the universality of bankruptcy; that any change in the settled law of the recognition and enforcement of judgments was a matter for the legislature; that,

[2] Cross-Border Insolvency Regulations 2006, Sch 1, art 21: see post, para 136.
[3] Foreign Judgments (Reciprocal Enforcement) Act 1933, s 6: see post, para 149.
[4] Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, art 4: "The following judgments shall be judgments to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies, that is to say— (a) any judgment, decree, rule, order or other final decree for the payment of money (other than in respect of taxes or other charges of a like nature or an order requiring the payment of maintenance) given by a recognised court in respect of a civil or commercial matter . . ."

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moreover, the Model Law was not designed to provide for the reciprocal enforcement of judgments and so the 2006 Regulations could not be used to enforce a foreign judgment against a third party; and that, accordingly, applying the common law, since the proceedings against the defendants in the first case had been in personam and they had not submitted to the jurisdiction of the United States bankruptcy court, the orders which it had made against them could not be enforced by the English court (post, paras 10, 115, 128–129, 142–144, 169, 177, 178, 179).

In re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, HL(E) considered.

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, PC disapproved.

(2) Dismissing the appeal in the second case, that although the English court could give assistance to the Australian court under section 426 of the Insolvency Act 1986, such assistance did not extend to the enforcement of judgments; that the defendants' participation in the Australian insolvency proceeding, albeit not the actual recovery proceedings, was sufficient for them to be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding; that it followed that there could be enforcement in the English court; that since the 1994 Order applied Part I of the 1933 Act to Australian judgments in respect of "civil and commercial matters" and since insolvency proceedings were not to be excluded from that term, enforcement in such cases would be under the 1933 Act rather than at common law; and that, accordingly, the Australian judgment in the second case would be enforced by the English court on that basis (post, paras 152, 167, 175–177, 178, 203, 205).

England v Smith [2001] Ch 419, CA distinguished.

Per Lord Walker of Gestingthorpe, Lord Mance, Lord Sumption JJSC and Lord Collins of Mapesbury. Declining to sanction a departure from the traditional rules is unlikely to cause serious injustice. Several of the ways in which the claims were put in the United States proceedings in the first case might have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). There are several other avenues available to office-holders. Avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to section 426(4) of the Insolvency Act 1986, applying Australian law under section 426(5). In appropriate cases, article 23 of the Model Law will allow avoidance claims to be made by foreign representatives under the Insolvency Act 1986. In the cases where the insolvent estate has its centre of main interests in the European Union, judgments will be enforceable under article 25 of Council Regulation (EC) No 1346/2000 (post, paras 131, 178).

Decision of the Court of Appeal in *Rubin v Eurofinance SA* [2010] EWCA Civ 895; [2011] Ch 133; [2011] 2 WLR 121; [2011] Bus LR 84; [2011] 1 All ER (Comm) 287 reversed.

Decision of the Court of Appeal in *In re New Cap Reinsurance Corpn Ltd* [2011] EWCA Civ 971; [2012] Ch 538; [2012] 2 WLR 1095; [2012] Bus LR 772; [2012] 1 All ER 755; [2012] 1 All ER (Comm) 1207 affirmed on different grounds.

The following cases are referred to in the judgments:

Adams v Cape Industries plc [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, Scott J and CA

African Farms Ltd, In re [1906] TS 373

Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90

Akande v Balfour Beatty Construction Ltd [1998] IL Pr 110

Al Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC

Amin Rasheed Shipping Corpn v Kuwait Insurance Co [1984] AC 50; [1983] 3 WLR 241; [1983] 2 All ER 884; [1983] 2 Lloyd's Rep 365, HL(E)

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A *Bank of Credit and Commerce International SA, In re (No 10)* [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796
Banque Indosuez SA v Ferromet Rescources Inc [1993] BCLC 112
Barcelona Traction, Light and Power Co Ltd (Second Phase), Case concerning (Belgium v Spain) [1970] ICJ Rep 3
Beals v Saldanha 2003 SCC 72; [2003] 3 SCR 416
Bergerem v Marsh (1921) 6 B & CR 195; 91 LJKB 80
B *Berliner Industriebank AG v Jost* [1971] 2 QB 463; [1971] 3 WLR 61; [1971] 2 All ER 1513, CA
Byers v Yacht Bull Corpn [2010] EWHC 133 (Ch); [2010] BCC 368
CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589
Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR
C 689; [2006] 3 All ER 829; [2006] 2 All ER (Comm) 695, PC
Cavell Insurance Co, In re (2006) 269 DLR (4th) 679
Condor Insurance Ltd, In re (2010) 601 F 3d 319
Credit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA
Desert Sun Loan Corpn v Hill [1996] 2 All ER 847, CA
England v Smith [2001] Ch 419; [2000] 2 WLR 1141, CA
D *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma* (Case C-213/10) (unreported) 19 April 2012, ECJ
Flightlease (Ireland) Ltd, In re [2006] IEHC 193; [2012] IESC 12
Galbraith v Grimshaw [1910] AC 508, HL(E)
German Graphics Graphicsche Maschinen GmbH v van der Schee (Case C-292/08) [2009] ECR I-8421, ECJ
Gibson (Gavin) & Co Ltd v Gibson [1913] 3 KB 379
E *Godard v Gray* (1870) LR 6 QB 139
Gourdain v Nadler (Case 133/78) [1979] ECR 733, ECJ
Gourmet Resources International Inc Estate v Paramount Capital Corpn (1991) 3 OR (3d) 286, [1993] IL Pr 583; 14 OR (3d) 319 (Note)
HIH Casualty and General Insurance Ltd, In re [2008] UKHL 21; [2008] 1 WLR 852; [2008] Bus LR 905; [2008] 3 All ER 869, HL(E)
F *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, CA
Impex Services Worldwide Ltd, In re [2004] BPIR 564
Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader) [1996] 2 Lloyd's Rep 585
Indyka v Indyka [1969] 1 AC 33; [1967] 3 WLR 510; [1967] 2 All ER 689, HL(E)
Maxwell Communication Corpn, In re (1994) 170 BR 800
Metcalfe & Mansfield Alternative Investments, In re (2010) 421 BR 685
G *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512
Morguard Investments Ltd v De Savoye [1990] 3 SCR 1077
New Cap Reinsurance Corpn v Grant [2009] NSWSC 662; 257 ALR 740
New Cap Reinsurance Corpn v Renaissance Reinsurance Ltd [2002] NSWSC 856
Nouvion v Freeman (1889) 15 App Cas 1, HL(E)
Oakley v Ultra Vehicle Design Ltd [2005] EWHC 872 (Ch); [2006] BCC 57; [2006] BPIR 115
H *Owens Bank Ltd v Bracco* [1992] 2 AC 443; [1992] 2 WLR 621; [1992] 2 All ER 193, HL(E)
Paramount Airways Ltd, In re [1993] Ch 223; [1992] 3 WLR 690; [1992] 3 All ER 1, CA
Pattni v Ali [2006] UKPC 51; [2007] 2 AC 85; [2006] 2 WLR 102; [2007] 2 All ER (Comm) 427, PC

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Picard v Harley International (Cayman) Ltd (unreported) 10 November 2010, US Bankruptcy Ct, Southern District of New York
Rein v Stein (1892) 66 LT 469, DC
Robertson, Ex p; In re Morton (1875) LR 20 Eq 733
Seagon v Deko Marty Belgium NV (Case C-339/07) [2009] 1 WLR 2168; [2009] Bus LR 1151; [2009] ECR I-767, ECJ
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Société Eram Shipping Co Ltd v Cie Internationale de Navigation [2003] UKHL 30; [2004] 1 AC 260; [2003] 3 WLR 21; [2003] 3 All ER 465, HL(E)
Solomons v Ross (1764) 1 H Bl 131n
Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843, HL(E)
Starlight International Inc v Bruce [2002] EWHC 374 (Ch), [2002] IL Pr 617
Stone & Rolls Ltd v Moore Stephens [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431; [2010] 1 All ER (Comm) 125, HL(E)
SwissAir Schweizerische Luftverkehr-Aktiengesellschaft, In re [2009] EWHC 2099 (Ch); [2010] BCC 667
Television Trade Rentals Ltd, In re [2002] EWHC 211 (Ch); [2002] BCC 807; [2002] BPIR 859
Travers v Holley [1953] P 246; [1953] 3 WLR 507; [1953] 2 All ER 794, CA
Trepca Mines Ltd, In re [1960] 1 WLR 1273; [1960] 3 All ER 304, CA
Turners & Growers Exporters Ltd v The ship Cornelis Verolme [1997] 2 NZLR 110
Williams v Jones (1845) 13 M & W 628
Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA [1984] 1 WLR 438; [1984] 1 All ER 760; [1984] 1 Lloyd's Rep 453, HL(E)

The following additional cases were cited in argument:

AWB (Geneva) SA v North American Steamships Ltd [2007] EWCA Civ 739; [2007] 2 Lloyd's Rep 315; [2007] 2 CLC 117, CA
Atlas Shipping A/S, In re (2009) 404 BR 726
Barlow Clowes Gilt Managers Ltd, In re [1992] Ch 208; [1992] 2 WLR 36; [1991] 4 All ER 385
Drumm (A Bankrupt), In re (unreported) 13 December 2010, High Ct of Ireland
Fairfield Sentry Ltd v Citco Bank Nederland NV [2012] IEHC 81
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
Pantmaenog Timber Co Ltd, In re [2003] UKHL 49; [2004] 1 AC 158; [2003] 3 WLR 767; [2003] 4 All ER 18, HL(E)
Stegmann, Ex p [1902] TS 40
UBS AG v Omni Holding AG [2000] 1 WLR 916; [2000] 1 All ER (Comm) 42

APPEALS from the Court of Appeal

Rubin v Eurofinance SA

On 31 July 2009 Nicholas Strauss QC sitting as a deputy judge of the Chancery Division [2010] 1 All ER (Comm) 81 granted an application by the applicants, David Rubin and Henry Lan, being the foreign representatives of the Consumer Trust, for (1) recognition of proceedings brought under Chapter 11 of the United States Bankruptcy Code, including adversary proceedings, in relation to the trust and taking place in the United States Bankruptcy Court for the Southern District of New York, as a foreign proceeding under article 2(i) of the United Nations Commission on

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International Trade Law Model Law on Cross-Border Insolvency and (2) recognition of themselves as foreign representatives of the trust under article 2(j), but refused to grant an order that the United States Bankruptcy Court's order of 23 July 2008 be enforced as a judgment of the English courts in accordance with CPR Pts 70 and 73 against the defendants to the New York proceedings, Adrian Roman, Justin Roman, Nicholas Roman and Eurofinance SA.

On 30 July 2010, the Court of Appeal (Ward, Wilson LJJ and Henderson J) [2011] Ch 133 allowed the applicants' appeal against the dismissal of their claim for enforcement and dismissed the defendants' cross-appeal against the orders for recognition of the adversary proceedings as part of the Chapter 11 proceedings.

On 27 October 2010 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) allowed an application by the defendants for permission to appeal, pursuant to which they appealed. On 29 November 2011, 3 April 2012 and 24 April 2012 respectively the Supreme Court gave leave to intervene in the appeal to (1) Irving H Picard, as trustee for the substantively consolidated "SIPA" liquidation (under the (United States) Securities Investor Protection Act 1970) of the business of Bernard L Madoff Investment Securities LLC and Bernard L Madoff, (2) Asphalia Fund Ltd, and (3) Vizcaya Partners Ltd. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were whether (1) the relevant proceedings should be recognised as a "foreign main proceeding" in accordance with the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, scheduled to the Cross-Border Insolvency Regulations 2006; (2) the applicants should be recognised as "foreign representatives" within the meaning of article 2(j) of the Model Law in relation to those proceedings; and (3) that part of the United States Bankruptcy Court's order of 23 July 2008 relating to the avoidance proceedings be enforced against the defendants as a judgment of the English courts in accordance with CPR Pts 70 and 73.

The facts are stated in the judgment of Lord Collins of Mapesbury.

In re New Cap Reinsurance Corpn Ltd

On 15 March 2011 Lewison J [2011] EWHC 677 (Ch) granted an application by the first applicant, New Cap Reinsurance Corpn Ltd (in liquidation), and the second applicant, John Raymond Gibbons (the first applicant's liquidator) for an order enforcing in England an order made on 11 September 2009 by the Supreme Court of New South Wales that the defendants, AE Grant and others, as members of Lloyd's Syndicate 991 for the 1997 and 1998 year accounts, pay the applicants certain commutation payments made by the first applicant to the defendants, and in respect of which order the court had issued a letter of request to the English High Court requesting assistance in enforcing that order. The judge held that the order of the New South Wales court could not be registered and enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (as applied to Australia by the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994), that the High Court therefore had power to assist the New South Wales court either at common law or under section 426 of the Insolvency Act 1986 and that, in the exercise of his discretion, he would

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assist the New South Wales court by ordering payment of the Australian judgment debt under section 426. A

On 9 August 2011, the Court of Appeal (Mummery, Lloyd and McFarlane LJJ) [2012] Ch 538 dismissed an appeal by the defendants against the judge's order.

On 30 November 2011 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance, Lord Dyson JJSC) allowed an application by the defendants for leave to appeal, pursuant to which they appealed. On 18 January 2012 the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Dyson JJSC) allowed an application by the applicants to cross-appeal, pusuant to which they cross-appealed. B

The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were (1) whether the court was being asked to apply section 426(4) of the Insolvency Act 1986 to the enforcement of foreign judgments or (2) whether instead the court was being asked (i) to apply that part of section 588FF(1) of the (Australian) Corporations Act 2001 which empowered the court to make an order directing the defendants to pay money to the claimants and/or (ii) to direct the defendants to pay money to the claimants under the court's general jurisdiction and powers; (3) whether, if the court was being asked to apply section 426(4) to the enforcement of foreign judgments, that section extended to the enforcement of foreign judgments; (4) whether section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 had application to judgments for the payment of money in foreign insolvency proceedings; (5) (on the cross-appeal) whether the Australian judgment was a judgment to which Part I of the 1933 Act (as applied by the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994) applied; (6) (on the cross-appeal) whether, if the Australian judgment was a judgment to which Part 1 of the 1933 Act applied, the declarations in the Australian judgment (a) were binding under section 8 of the 1933 Act and/or at common law, and/or (b) could form the subject of judicial assistance; (7) whether *Rubin v Eurofinance SA* [2011] Ch 133 was rightly decided; (8) whether, if *Rubin's* case was wrong, registration of the Australian judgment under the 1933 Act would be set aside by the English court, and whether the courts below were right to assist the Australian court under section 426(4) of the 1986 Act; (9) whether, if section 426(4) was available but registration of the Australian judgment under the 1933 Act would be set aside, it was appropriate to assist the Australian court under section 426(4); (10) whether the defendants had submitted to the insolvency jurisdiction of the Australian court and, if so, with what consequence; and (11) whether the English court should in any event assist the Australian court at common law. C D E F G

The facts are stated in the judgment of Lord Collins of Mapesbury.

Robin Knowles QC and *Blair Leahy* (instructed by *Edwards Wildman Palmer UK LLP*) for the defendants in the second case.

Section 426(4) of the Insolvency Act 1986 does not provide a procedure by which a judgment of a court having jurisdiction in relation to insolvency law in a "relevant country or territory" may be enforced in the United Kingdom. It is not concerned with "assistance", not "enforcement" of judgments. Enforcement is dealt with by section 426(1)(2), where it is confined to orders made by courts in other parts of the United Kingdom. H

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Although Lloyd LJ [2012] Ch 538, paras 58, 61, 72 refers to "assistance by way of enforcement", enforcement is not to be treated as a form of assistance. Since section 426(4) also applies to courts having jurisdiction in other parts of the United Kingdom, if "assistance" in section 426(4) meant enforcement, section 426(1)(2) would be redundant. Enforcement of judgments, a subject which goes to jurisdiction, has always been a matter for distinct provision and rules. In the context of insolvency law, section 426(4) is about assisting with information provision, evidence gathering, the conduct of an insolvency administration and the undertaking of proceedings.

Where the judgment is one to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies, the procedure provided for by that Act—registration, subject to an application to set aside the registration—must be used. Where a "relevant country or territory" under section 426 of the 1986 Act is also the country of a "recognised court" under the 1933 Act, section 6 of the 1933 Act requires proceedings for the recovery of a sum payable under a foreign judgment to be by way of registration. The availability of the 1933 Act procedure (albeit not used) precludes reliance on enforcement at common law in respect of the Australian judgment.

At common law the United Kingdom courts will not enforce a foreign money judgment obtained against a defendant not subject to the jurisdiction of the foreign court: see rule 43 of *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012). That position has not been changed by the 1933 and 1986 Acts. [Reference was made to section 426(4) of the 1986 Act and section 4(1)(a)(ii) of the 1933 Act.] The decision of the Court of Appeal in the *Rubin* case [2011] Ch 133 that a foreign insolvency judgment could be enforced in England and Wales at common law against a defendant not subject to the jurisdiction of the foreign court is a radical departure from the existing law rather than an incremental development recognisable to the common law and is wrong. Concepts of co-operation and universalism do not justify rewriting the private international law position. Universalism may be accorded to matters of distribution of the insolvent estate (see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, paras 16, 22, 25 and *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, paras 6, 9) but not to the collection of assets for the estate. Co-operation enables assistance to be given but enforcement is available only when private international law allows. Private international law is best developed uniformly by comprehensive legislation and international agreement, not by uncertain development of the common law. In insolvency law certainty is of crucial importance: see *In re Flightlease (Ireland) Ltd* [2006] IEHC 193; [2012] IESC 12. To leave this area of law subject to the incidence of discretion (at common law, or under section 426) is unsatisfactory. Parties, the courts and other litigants need to know where they stand when litigation begins, not when it comes to an attempt to enforce a judgment.

Marcus Staff (instructed by *Brown Rudnick LLP*) for the defendants in the first case.

Whether the judgment of a foreign court may be enforced at common law depends on its classification as a judgment in personam, a judgment in rem, or an order of the type recognised in *Cambridge Gas Transportation Corpn v*

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Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508.

The order in the present case does not fall within the latter classification. The purpose of the order in the *Cambridge Gas* case was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. The claims that gave rise to the foreign judgment in the present case were in adversary proceedings to determine or establish the existence of rights. As an in personam judgment that judgment did not meet the requirements of rule 43 of *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012). The defendants were not resident in New York when the proceedings were instituted and they did not submit to the jurisdiction of the New York courts by voluntarily appearing there. A decree pronounced in absentia by a foreign court, to the jurisdiction of which the defendant has not in any way submitted, is by international law a nullity.

The decision in the *Rubin* case [2011] Ch 133 drives a coach and horses through well established principles of English law in relation to the recognition and enforcement of foreign in personam judgments. The decision means that defendants cannot predict where they might be sued. Such a lack of predictability is contrary to the guiding principles of European law and undermines the principle of commercial certainty which is a constant and important objective of English commercial law. If the law on recognition of foreign judgments is to be changed, that should be done only in respect of countries or territories selected by the legislature so that the consequences of the change can be mapped out in a way which is predictable and therefore fair for all parties. The decision extends relief well beyond the provisions of the UNCITRAL Model Law.

Robin Dicker QC and *Tom Smith* (instructed by *Chadbourne & Parke LLP*) for the applicants in the first case.

The primary purpose of insolvency law is to provide a regime where the liquidator acts in the public interest and not merely in the interests of the creditors and contributories. The community itself has always been recognised as having an interest in such proceedings: see *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158, para 52; *In re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, 221 and *Ex p Stegmann* [1902] TS 40, 47.

English law takes the view that fairness between creditors requires that bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 16; *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 30; *Bergerem v Marsh* (1921) 6 B & CR 195 and *In re Impex Services Worldwide Ltd* [2004] BPIR 564. Common law courts in England and elsewhere refuse to allow execution to issue on a debtor's local assets when the debtor is subject to insolvency proceedings in another jurisdiction in which the creditors can participate: see *Solomons v Ross* (1764) 1 H Bl 131n; *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 and *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589.

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A At an early stage of the development of the law of corporate insolvency the potential conflict between the locally effective winding up of an overseas company in England and an universal winding up in the country of the debtor's incorporation was resolved by a judge-made principle which treated the English proceedings as ancillary to the principal winding up: see *In re International Tin Council* [1987] Ch 419, 446–447. [Reference was also made to the UNCITRAL Legislative Guide on Insolvency Law (2004), B paras 150–152 and *Fletcher, The Law of Insolvency*, 4th ed (2009), paras 26-001–26-003.]

The guiding principles to be applied in relation to foreign insolvency proceedings are, first, that the court should seek so far as possible to give effect to the principle of there being a single insolvency proceeding in relation to an insolvent debtor which has universal effect and, secondly, that C active assistance should be given to that insolvency proceeding. The application of these principles may require the court to recognise and enforce an order made in the course of the foreign insolvency proceedings. The rules governing the recognition of such orders are separate and distinct from the rules governing the recognition and enforcement of judgments in rem and judgments in personam. The *Cambridge Gas* case establishes that there is a third category of judgment independent of judgments in rem and D judgments in personam, namely, orders which form part of insolvency proceedings. A different approach is taken for each. A similar distinction is recognised under EU law: see *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] 1 WLR 2168; *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma* (Case C-213/10) (unreported) 19 April 2012 and *German Graphics Graphicsche Maschinen GmbH v van der Schee* (Case C-292/08) E [2009] ECR I-8421.

Avoidance provisions by which prior transactions can be adjusted and assets recovered to supplement the estate available for distribution to creditors are an integral part of the process of collective enforcement represented by an insolvency proceeding. They are central to the purpose of insolvency proceedings because they are a necessary means of constituting the estate of the debtor against which collective enforcement then takes F place.

The assistance sought in the present case is well within the limits of what the courts can properly provide: see *Byers v Yacht Bull Corpn* [2010] BCC 368; *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57 and *UBS AG v Omni Holding AG* [2000] 1 WLR 916.

The relevant parts of the judgment can also be recognised and enforced G under the Model Law as implemented by the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). The approach under the Model Law, as enacted by the Regulations, is consistent with that at common law. The court is empowered to grant appropriate relief including any type of relief which is available under the law of the enacting state. In the present case the relief sought reflects relief which would have been available under the English statutory scheme if the trust had been in an insolvency procedure in H England. It is therefore a type of relief which is available under English law. Furthermore, the relief sought is in the interests of creditors because it will facilitate the recovery of assets for distribution in accordance with the applicable statutory scheme to the creditors of the trust. [Reference was made to *In re Atlas Shipping A/S* (2009) 404 BR 726; *In re Metcalfe &*

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Mansfield Alternative Investments (2010) 421 BR 685 and *In re Condor Insurance Ltd* (2010) 601 F 3d 319.]

Whether at common law or under the Model Law there is no reason why the court should not exercise its jurisdiction to provide assistance to the Chapter 11 proceeding by recognising and enforcing the relevant parts of the judgment.

Gabriel Moss QC and *Barry Isaacs QC* (instructed by *Mayer Brown International LLP*) for the applicants in the second case.

The judge was right to grant the relief sought in the letter of request under section 426 of the Insolvency Act 1986 and/or the common law. The nature of cross-border insolvency is such that a court in one jurisdiction should render whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former: see *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827.

Section 426 is not merely concerned with procedure but is part of the substantive insolvency scheme. It imposes a duty on English courts to provide assistance to insolvency courts in relevant countries and territories: see section 426(4)(5)(10). The Australian proceedings were based on section 588FF(1) of the Australian Corporations Act 2001, which corresponds to section 239 of the 1986 Act. The English court was asked to apply that part of section 588FF(1) which empowers the court to make an order directing a person to pay money to a company. In granting this form of assistance the English court was applying Australian insolvency law; it was not applying section 426 to the enforcement of a foreign judgment. The court was also asked to make an order directing a person to pay money under its general jurisdiction and powers. The English court has the power under section 426 to apply its own general jurisdiction and powers by way of assistance to the Australian court: see *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, 517. The *Report of the Review Committee on Insolvency Law and Practice* (1982) (Cmnd 8558) refers to the "enforcement" of foreign insolvency judgments: see para 1902.

Section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 has no application to judgments for the payment of money in foreign insolvency proceedings. The intention of the 1933 Act was to provide a simpler and more convenient mode of enforcement than the common law provided. The Act applies only to cases where foreign judgments used to be enforced by bringing an action at common law based on the foreign judgment. The position in relation to foreign insolvency judgments before the 1933 Act was governed by section 122 of the Bankruptcy Act 1914. There is no indication that the 1933 Act was intended to affect this pre-existing jurisdiction. The Bankruptcy Act 1914 did not feature in the Greer Report, which led to the passing of the 1933 Act: see the *Report of the Foreign Judgments (Reciprocal Enforcement) Committee* (1932) (Cmd 4213).

The rules governing insolvency proceedings have diverged significantly from the general provisions of civil law: see *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] 1 WLR 2168, 2175, 2176–2178, paras 27, 33, 35, 39. The decision of the Court of Appeal [2011] Ch 133 was correct. All that was new in the decision was the application of the principles in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 and *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 to a foreign

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A insolvency judgment which required payment of a sum of money. As to *In re Flightlease (Ireland) Ltd* [2006] IEHC 193; [2012] IESC 12, which declined to follow the reasoning in *Cambridge Gas*, see *In re Drumm (A Bankrupt)* (unreported) 13 December 2010 (High Court of Ireland) and *Fairfield Sentry Ltd v Citco Bank Nederland NV* [2012] IEHC 81.

In any event the defendants in the present case submitted to the
B jurisdiction of the Australian court by participating in meetings of creditors of, and submitting proofs of debt in the administration, liquidation and scheme of arrangement relating to, the liquidated company. Having chosen to submit to that Australian insolvency proceeding, they should not be allowed to benefit from it without the burden of complying with the orders made in that proceeding.

Pushpinder Saini QC, *Adrian Briggs*, *Shaheed Fatima*, *Ian Fletcher* and
C *Stephen Robins* (instructed by *Taylor Wessing LLP*) for the first intervener in the first case, by written submissions.

As a matter of English private international law it is necessary to distinguish between (a) judgments in rem and in personam and (b) foreign orders which form integral parts of foreign insolvency proceedings: see *Cambridge Gas Transportation Corp v Official Committee of Unsecured*
D *Creditors of Navigator Holdings plc* [2007] 1 AC 508, paras 13–15 and *Pattni v Ali* [2007] 2 AC 85, para 23. The effect of this distinction is that where the foreign court seeks assistance in England in respect of the implementation of a foreign insolvency order such assistance (which is discretionary) will not be subject to the English private international law rules regarding the enforcement of foreign judgments in rem or in personam as set out in rule 43 of *Dicey, Morris & Collins, The Conflict of Laws*, 15th
E ed (2012). The distinction arises because the enforcement of judgments in rem and in personam is rooted in the doctrine of obligation whereby the successful party to the foreign proceedings is able, when seeking recognition and enforcement in England, to show that the other owes him an obligation by virtue of that other's being bound by the foreign judgment as res judicata. By contrast, cross-border judicial assistance and co-operation in insolvency
F does not relate to the court's function of resolving disputes between private litigants but to the separate function of administering insolvent estates in a collective process which is performed with regard to the wider public interest: see *Ex p Stegmann* [1902] TS 40 and *In re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, 220–221. English common law takes the view that insolvency proceedings should have universal application. This requires that the estate which the insolvency court administers should be the
G worldwide estate of the insolvent debtor. In order for the court which is seised of the administration of the worldwide estate to administer it effectively, it will frequently be necessary for courts in other jurisdictions to provide assistance to further that objective, acting under the principle of modified universalism: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 30 and *Credit Suisse Fides Trust SA v Cuoghi*
H [1998] QB 818, 827. To be effective, insolvency proceedings must be able to thwart the underhand conduct of debtors and connected creditors.

The proper approach, when determining whether a foreign order is an insolvency order, is to consider whether it is part of foreign insolvency proceedings. It is not correct to consider, in isolation from the context, whether the effect of the order is akin to a judgment in rem or in personam,

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nor therefore whether the order "establishes" rights rather than seeking to enforce them. Judgments in rem and in personam will, by definition, "establish" rights. In broad terms a foreign order will be part of foreign insolvency proceedings if it is integral to the foreign insolvency law's scheme for the collection and distribution of the assets of the insolvent estate to creditors. In particular, avoidance orders (which are not unique to English or United States insolvency proceedings but are a feature of every developed system of insolvency law) form an integral part of the insolvency proceedings: see *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57, para 42; *AWB (Geneva) SA v North American Steamships Ltd* [2007] 2 Lloyd's Rep 315, para 27 and the *HIH* case [2008] 1 WLR 852, para 19. Where the English court is considering whether to exercise its discretion to assist the foreign court, there is a presumption in favour of assistance, which should therefore be provided unless there is a good reason for it to be refused. It is irrelevant that the person against whom the insolvency order takes effect was not present in the foreign country at the time of the issue of the writ.

Michael Driscoll QC and *Rosanna Foskett* (instructed by *Wilsons Solicitors LLP*) for the second intervener in the first case (and instructed by *Wedlake Bell LLP*) for the third intervener in the first case, by written submissions.

The English court's inherent jurisdiction to assist a foreign representative (as that expression is used in article 2 of the UNCITRAL Model Law) should not extend to enforcement of any money judgment against a third party defendant obtained by a foreign representative in a foreign court on the application of principles of a foreign law where the foreign court does not have competent jurisdiction over the defendant according to English private international law, and the inherent jurisdiction should not extend, therefore, to the enforcement of money judgments against defendants. The assistance to be given by the English court should be limited to recognition of the foreign representative and of the rights and powers over the debtor's property which his appointment gives him. It should extend to authorising the foreign representative to bring proceedings in England equivalent to those which an English representative could bring based upon principles of English law and not foreign law.

Whilst many national insolvency laws include provisions to avoid certain preferences and fraudulent transfers made by the debtor before the commencement of the insolvency proceedings, those laws operate in materially different ways and have materially different consequences. In particular, an United States Securities Investor Protection Act ("SIPA") liquidation enables an United States SIPA trustee to bring avoidance claims which an English liquidator or trustee in bankruptcy cannot bring. Moreover, the consequences of a successful avoidance claim in the United States by a SIPA trustee defeats rather than gives effect to the fundamental principle of equitable pro rata distribution among all unsecured creditors of the debtor. The English court should not develop new law by assuming to itself a jurisdiction which Parliament has not conferred on it to enforce a money judgment obtained by a foreign representative against a third party in insolvency proceedings before a foreign court where the third party is not, as a matter of English law, subject to the jurisdiction of the foreign court.

The default judgments were judgments in personam given by a foreign court which did not have competent jurisdiction over the defendants so as to

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make the default judgments enforceable as of right in an English court: see *Adams v Cape Industries plc* [1990] Ch 433, 513, 528, 530–544, 549–550, 557–572. They are therefore a nullity as far as the English court is concerned. Until the Court of Appeal decision in the *Rubin* case [2011] Ch 133 no English court has gone so far as to enforce as a matter of discretion money judgments obtained in such circumstances. The legislature and the executive through its treaty-making powers are in a better position than the judiciary to develop and extend the laws of co-operation between English courts and others in the field of cross-border insolvency. A principle of universalism can only properly come about through international treaty.

Knowles QC replied.

Staff also replied.

The court took time for consideration.

24 October 2012. The following judgments were handed down.

LORD COLLINS OF MAPESBURY (with whom **LORD WALKER OF GESTINGTHORPE** and **LORD SUMPTION JJSC** agreed)

I Introduction

The appeals

1 There are two appeals before the court: *Rubin v Eurofinance SA* ("*Rubin*") and *New Cap Reinsurance Corpn Ltd v Grant* ("*New Cap*"). These appeals raise an important and novel issue in international insolvency law. The issue is whether, and if so, in what circumstances, an order or judgment of a foreign court (on these appeals the United States Bankruptcy Court for the Southern District of New York, and the New South Wales Supreme Court) in proceedings to adjust or set aside prior transactions, e g preferences or transactions at an undervalue ("avoidance proceedings"), will be recognised and enforced in England. The appeals also raise the question whether enforcement may be effected through the international assistance provisions of the UNCITRAL Model Law (implemented by the Cross-Border Insolvency Regulations 2006 ("CBIR")), which applies generally, or the assistance provisions of section 426 of the Insolvency Act 1986, which applies to a limited number of countries, including Australia.

2 In *Rubin* a judgment of the US Federal Bankruptcy Court for the Southern District of New York ("the US Bankruptcy Court") in default of appearance for about US$10m under State and Federal law in respect of fraudulent conveyances and transfers was enforced in England at common law. In *New Cap* (in which the Court of Appeal was bound by the prior decision in *Rubin*) a default judgment of the New South Wales Supreme Court, Equity Division, for about US$8m in respect of unfair preferences under Australian law was enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933, and, alternatively, pursuant to powers under section 426 of the Insolvency Act 1986.

3 In each of the appeals it was accepted or found that the party against whom they were given was neither present (nor, for the purposes of the 1933 Act, resident) in the foreign country nor submitted to its jurisdiction (which are the relevant conditions for enforceability at common law and

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under the 1933 Act), but that those conditions did not apply to judgments or orders in foreign insolvency proceedings.

4 In addition to the arguments on these two appeals, the court has had the great benefit of written submissions on behalf of parties to proceedings pending in Gibraltar. Those proceedings are to enforce default judgments entered by the United States Bankruptcy Court for some $247m in respect of alleged preferential payments to companies in the British Virgin Islands and Cayman Islands arising out of the notorious Ponzi scheme operated by Mr Bernard Madoff.

5 It has been necessary to emphasise that the judgments in all three matters were in default of appearance, because if the judgment debtors had appeared and defended the proceedings in the foreign courts, the issues on these appeals would not have arisen. The reason is that the judgments would have been enforceable on the basis of the defendants' submission to the jurisdiction of the foreign court. Enforcement would have been at common law, or, in the *New Cap* case either under the common law, or under the 1933 Act which substantially reproduces the common law principles—there is a subsidiary issue on this appeal as to whether the 1933 Act applies to judgments in insolvency proceedings, dealt with in section IX below.

6 Under the common law a court of a foreign country has jurisdiction to give a judgment in personam where (among other cases) the judgment debtor was present in the foreign country when the proceedings were instituted, or submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings. In the case of the 1933 Act the foreign court is deemed to have jurisdiction where the judgment debtor submitted to the jurisdiction by voluntarily appearing in the proceedings otherwise than for the purpose (inter alia) of contesting the jurisdiction; or where the judgment debtor was resident at the time when the proceedings were instituted, or being a body corporate had an office or place of business there: section 4(2)(a)(i)(iv).

The Dicey rule

7 The general principle has been referred to on these appeals, by reference to the common law rule set out in *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), as "*Dicey's* rule 36." This was only by way of shorthand, because the rules in the 1933 Act are not quite identical, and in any event has been purely for convenience, because the rule has no standing beyond the case law at common law which it seeks to re-state. What was rule 36 now appears (incorporating some changes which are not material on this appeal) as rule 43 in the new 15th edition, and I shall refer to it as "the *Dicey* rule". So far as relevant, rule 43 (*Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 1, para 14R-054) states:

> "a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> "*First Case*—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> "*Second Case*—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

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A "*Third Case*—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

"*Fourth Case*—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

B

8 The first edition of *Dicey* in 1896 stated (rule 80) that the foreign court would have jurisdiction if "the defendant was resident [or present?]" in the foreign country "so as to have the benefit, and be under the protection, of the laws thereof". By the 6th edition in 1949 the formula was repeated by Professor Wortley (rule 68) but without the doubt about presence as a basis of jurisdiction. In the 8th edition in 1967 Dr (later Professor) Clive Parry
C removed the phrase (then rule 189) about the benefit and protection of the foreign country's laws. The rule, subsequently edited by Dr Morris and then by Professor Kahn-Freund, remained in that form until the decision in *Adams v Cape Industries plc* [1990] Ch 433 (CA), which established that presence in the foreign jurisdiction, as opposed to residence, was a sufficient basis for the recognition of foreign judgments. Then, edited by myself and
D later by Professor Briggs, the rule took substantially its present form in the 12th edition in 1993.

9 The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an
E action of debt to enforce the judgment may be maintained: *Williams v Jones* (1845) 13 M & W 628, 633, per Parke B; *Godard v Gray* (1870) LR 6 QB 139, 147, per Blackburn J; *Adams v Cape Industries plc* [1990] Ch 433, 513 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484, per Lord Bridge of Harwich. As Blackburn J said in *Godard v Gray*, this was based on the mode of pleading an action on a foreign judgment in debt, and not merely as evidence of the obligation to pay the underlying liability: LR 6 QB 139, 150.
F But this is a purely theoretical and historical basis for the enforcement of foreign judgments at common law. It does not apply to enforcement under statute, and makes no practical difference to the analysis, nor, in my judgment, to the issues on these appeals.

10 Consequently, if the judgments in issue on the appeals are regarded as judgments in personam within the *Dicey* rule, then they will only be
G enforced in England at common law if the judgment debtors were present (or, if the 1933 Act applies, resident) in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction. It is common ground that the judgment debtors were not present or resident, respectively, in the United States or in Australia, although there is an issue as to whether the New Cap defendants submitted to the jurisdiction of the Australian court, which is dealt with in section VIII below.

H

Insolvency proceedings and the international dimension

11 There are some general remarks to be made. First, from as early as the mid-18th century the English courts have recognised the effect of foreign personal bankruptcies declared under the law of the domicile: *Solomons v*

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Ross (1764) 1 H Bl 131n, where Dutch merchants were declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt in priority to an English creditor of the merchants who had attached the debt after the bankruptcy: see *Nadelmann, Conflict of Laws: International and Interstate* (1972), p 273 and *Blom-Cooper, Bankruptcy in Private International Law* (1954), pp 107–108.

12 In *Galbraith v Grimshaw* [1910] AC 508 Lord Dunedin said that there should be only one universal process of the distribution of a bankrupt's property and that, where such a process was pending elsewhere, the English courts should not allow steps to be taken in its jurisdiction which would interfere with that process:

> "Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution . . .": p 513.

13 Second, in the case of corporations the English courts have exercised a winding up jurisdiction which is wider than that which at common law they have accorded to foreign courts. The court exercises jurisdiction to wind up a foreign company if there is a sufficient connection between the company and England, there are persons who would benefit from the making of a winding up order, and there are persons interested in the distribution of assets of the company who are persons over whom the court can exercise jurisdiction: see *Dicey*, 15th ed, para 30R-036. But as regards foreign liquidations, the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation: *Dicey*, 15th ed, para 30R-100. That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ("the EC Insolvency Regulation") and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties). It is ultimately derived from the civil law concept of a trader's domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor's centre of administration: see Report by M Lemontey on the draft EEC Bankruptcy Convention, Bulletin of the European Communities, Supp 2/82, p 58; American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.

14 Third, it is not only in recent times that there have been large insolvency proceedings with significant cross-border implications. Even before then there were the Russian bank cases in the 1930s (arising out of the nationalisation and dissolution of the banks by the Soviet Government) and the *Barcelona Traction* case in the 1940s and 1950s (see *Case concerning Barcelona Traction, Light and Power Co Ltd (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3), but there is no doubt that today international co-operation in cross-border insolvencies has become a pressing need. It is only necessary to recall the bankruptcies or liquidations of Bank of Credit

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and Commerce International, Maxwell Communications, or Lehman Brothers, each with international businesses, assets in many countries, and potentially competing creditors in different countries with different laws. There is not only a need to balance all these interests but also to provide swift and effective remedies to combat the use of cross-border transfers of assets to evade and to defraud creditors.

15 Fourth, there is no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent insolvency law reflects national public policy, for example as regards priorities or as regards the conditions for the application of avoidance provisions: "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme": *In re HIH Casualty and General Insurance Ltd* ("*HIH*") [2008] 1 WLR 852, para 19, per Lord Hoffmann.

16 Fifth, there has been a trend, but only a trend, to what is called universalism, that is, the "administration of multinational insolvencies by a leading court applying a single bankruptcy law": Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276, 2277. What has emerged is what is called by specialists "modified universalism."

17 The meaning of the expression "universalism" has undergone a change since the time it was first used in the 19th century, and it later came to be contrasted with the "doctrine of unity." In 1834 Story referred to the theory that assignments under bankrupt or insolvent laws were, and ought to be, of universal operation to transfer movable property, in whatever country it might be situate, and concluded that there was great wisdom in adopting the rule that an assignment in bankruptcy should operate as a complete and valid transfer of all his movable property abroad, as well as at home, and for a country to prefer an attaching domestic creditor to a foreign assignee or to foreign creditors could

> "hardly be deemed consistent with the general comity of nations . . . the true rule is, to follow out the lead of the general principle that makes the law of the owner's domicil conclusive upon the disposition of his personal property,"

citing *Solomons v Ross* 1 H Bl 131n as supporting that doctrine: *Story, Commentaries on the Conflict of Laws*, 1st ed (1834), pp 340–341, para 406.

18 Professor Cheshire, in his first edition (*Cheshire, Private International Law* (1935), pp 375–376), said that although English law "neglects the doctrine of unity it recognizes the doctrine of universality". What he meant was that English law was committed to separate independent bankruptcies in countries where the assets were situate, rather than one bankruptcy in the country of the domicile (the doctrine of unity), but also accepted the title of the foreign trustee to English movables provided that no bankruptcy proceedings had begun within England (universality). He cited *Solomons v Ross* for this proposition:

> "The English courts . . . have consistently applied the doctrine of universality, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee."

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19 In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* ("*Cambridge Gas*") [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

20 The US Bankruptcy Court accepted in *In re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:

> "the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."

II International co-operation and assistance

21 Jurisdiction in international bankruptcy has been the subject of multilateral international instruments at least since the Montevideo Treaty on International Commercial Law of 1889, Title X, although bilateral treaties go back much further, and the subject of international recognition and co-operation in insolvency was the subject of early discussion by the International Law Association (1879), the Institut de droit international (1888–1912) and the Hague Conference on Private International Law (1904): see Nadelmann, pp 299 et seq.

22 In more modern times, the European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention) was concluded under the auspices of the Council of Europe in 1990, but never came into force. The European Community/Union initiative took 40 years to come to fruition. In 1960 the European Community embarked on a project for a Bankruptcy Convention, which resulted in a draft Convention in 1980, to which there was significant opposition. But the project was renewed in 1989, and this led to the tabling of a draft Convention in 1995, which provided that it would only come into force when signed by all 15 of the then member states. The United Kingdom, however, alone of the states,

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A did not sign the Convention (for political reasons), and it never came into force. In 1999 the project was re-launched as a Council Regulation, which resulted in the EC Insolvency Regulation in 2000 (Council Regulation No 1346/2000).

23 The United Nations Commission on International Trade Law ("UNCITRAL") adopted a Model Law on cross-border insolvency in 1997. B The Model Law was adopted following initiatives in the 1980s by the International Bar Association and later by INSOL International (the International Association of Restructuring, Insolvency and Bankruptcy Professionals). In 1993 UNCITRAL adopted a resolution to investigate the feasibility of harmonised rules of cross-border insolvencies. In 1994 an expert committee was assembled consisting of members of INSOL and representatives of the UNCITRAL Secretariat, and following a series of C reports and drafts, UNCITRAL adopted the Model Law in May 1997. The Model Law provides for a wide range of assistance to foreign courts and office-holders. It has been implemented by 19 countries and territories, including the United States and Great Britain (although by some states only on the basis of reciprocity). It was not enacted into law in Great Britain until 2006, by the CBIR.

D **24** Apart from the EC Insolvency Regulation, none of these instruments deals expressly with the enforcement of judgments in insolvency proceedings. The question whether the Model Law does so by implication will be considered below in section IV.

25 Consequently, there are four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part E of regionally or internationally agreed schemes. First, section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England. They include Australia: the Co-operation of Insolvency Courts (Designation of Relevant Countries and F Territories) Order 1986 (SI 1986/2123).

26 Second, the EC Insolvency Regulation applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark). The EC Insolvency Regulation has no role in the present appeal because none of the debtors has its centre of main interests in the European Union.

G **27** Third, the CBIR came into force on 4 April 2006, implementing the Model Law. The CBIR supplement the common law, but do not supersede it. Article 7 of the Model Law provides: "Nothing in this Law limits the power of a court or British insolvency office-holder to provide additional assistance to a foreign representative under other laws of Great Britain."

28 Article 23 of the Model Law allows avoidance claims to be made by foreign representatives under the Insolvency Act 1986, and the CBIR apply H to preferences after they came into force on 4 April 2006. The UNCITRAL Guide to Enactment (to which resort may be had for the purposes of interpretation of the CBIR) also emphasises that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic

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insolvency (*UNCITRAL Legislative Guide on Insolvency Law* (2005), Annex III, Ch IV, p 311, para 20(b)):

> "The Model Law presents to enacting states the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law . . ."

29 Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition . . . carries with it the active assistance of the court": *In re African Farms Ltd* [1906] TS 373, 377; "This court . . . will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11": *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.

30 In *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

31 The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

32 An early case of recognition was *Solomons v Ross* 1 H Bl 131n, where, as I have said, the bankruptcy was in Holland, and the bankrupts were Dutch merchants declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt: see also *Bergerem v Marsh* (1921) 6 B & CR 195 (English member of Belgian firm submitted to Belgian bankruptcy proceedings: movable property in England vested in Belgian trustee).

33 One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in

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Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

34 Cases involving remittal of assets from England to a foreign office-holder include *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 (Luxembourg liquidation of Luxembourg company); and *HIH* [2008] 1 WLR 852 (the view of Lord Hoffmann and Lord Walker of Gestingthorpe) (Australian liquidation of Australian insurance company); and *In re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667 (Swiss liquidation of Swiss company).

III The Cambridge Gas and HIH decisions

35 The opinion of Lord Hoffmann, speaking for the Privy Council, in *Cambridge Gas* [2007] 1 AC 508 and his speech in the House of Lords in *HIH* [2008] 1 WLR 852 have played such a major role in the decisions of the Court of Appeal and in the arguments of the parties on these appeals that it is appropriate to put them in context at this point.

Cambridge Gas

36 The broad facts of *Cambridge Gas* [2007] 1 AC 508 were these. In 1997 a shipping business was initiated by a Swiss businessman, Mr Giovanni Mahler. The investors borrowed $300m on the New York bond market and the business bought five gas transport vessels. The venture was a failure, and ended with a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man.

37 The corporate structure of the business was that the investors owned, directly or indirectly, a Bahamian company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahamian holding company) Cambridge Gas, a Cayman Islands company.

38 Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

39 In 2003 Navigator petitioned the US Bankruptcy Court for relief under Chapter 11 of the US Bankruptcy Code, which allows insolvent companies, under supervision of the court and under cover of a moratorium, to negotiate a plan of reorganisation with their creditors. The petition was initiated by the investor interests, who proposed a plan to sell the ships nominally by auction but in fact to the previous investors, but the bondholders did not accept this and proposed their own plan under which the assets of Navigator would be vested in the creditors and the equity interests of the previous investors would be extinguished. The judge rejected the investors' plan and approved the creditors' plan.

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40 The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives, i e, the creditors' committee. That would enable them to control the shipping companies and implement the plan. The plan provided that upon entry of the confirmation order title to all the common stock of Navigator would vest in the creditors' committee to enable it to implement the plan. The order of the New York court confirming the plan recorded the intention of the court to send a letter of request to the Manx court asking for assistance in giving effect to "the plan and confirmation order" and such a letter was sent. The committee of creditors then petitioned the Manx court for an order vesting the shares in their representatives.

41 At this point it is necessary to emphasise two features of the case. The first feature is that Navigator was an Isle of Man company and 70% of its common stock was owned directly or indirectly by Cambridge Gas. Under the normal principles of the conflict of laws the shares would have been situate in the Isle of Man: *Dicey*, 15th ed, para 22-045. That is why Lord Hoffmann said, at para 6, that the New York court was aware that the order vesting title to the common stock of Navigator in the creditors' committee could not automatically have effect under the law of the Isle of Man; and also why he accepted (paras 12–13) that if the judgment were a judgment in rem it could not affect title to shares in the Isle of Man.

42 The second feature which it is necessary to emphasise is that Cambridge Gas was a Cayman Islands company which (as held by the Manx courts) had not submitted to the jurisdiction of the US Bankruptcy Court. Lord Hoffmann said, at para 8, that the position that Cambridge Gas had not submitted to the jurisdiction of the US Bankruptcy Court bore little relation to economic reality since the New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors; Vela, the parent company of Cambridge Gas, participated in the Chapter 11 proceedings; and they had been instituted by Navigator. Consequently the claim by Cambridge Gas that it had not submitted was highly technical, but there was no appeal from the decisions of the Manx courts that it had not submitted. But Lord Hoffmann also accepted that if the order of the US Bankruptcy Court were to be regarded as a judgment in personam it would not be entitled to recognition or enforcement in the Isle of Man because "the New York court had no personal jurisdiction over Cambridge [Gas]": para 10.

43 Nevertheless the Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows: first, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a

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A mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established . . .

"15. . . . bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or B there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

C

44 Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency: paras 21–22. Third, exactly the same result could have been achieved by a scheme under the Isle of Man Companies Act 1931. Fourth, it was no D objection to implementation of the plan in the Isle of Man that the shares in Navigator belonged to a person (Cambridge Gas) which was not a party to the bankruptcy proceedings for these reasons, at para 26:

"a share is the measure of the shareholder's interest in the company: a bundle of rights against the company and the other shareholders. As against the outside world, that bundle of rights is an item of property, a E chose in action. But as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152 [of the Isle of Man Companies Act 1931]. As a shareholder Cambridge is bound by the transactions into which the company has entered, including a plan F under Chapter 11 or a scheme under section 152."

45 At this point it is necessary to point out that the opinion in *Cambridge Gas* does not articulate any reason for holding that, in the eyes of the Manx court, the US Bankruptcy Court had international jurisdiction in either of two relevant senses.

46 The first sense is the jurisdiction of the US Bankruptcy Court in G relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (*Dicey*, 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over H corporations is the court of the place of incorporation: *Dicey*, 15th ed, vol 2, para 30R-100. Under United States law the US Bankruptcy Court has jurisdiction over a "debtor", and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international

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jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.

47 The second sense in which international jurisdiction is relevant is the jurisdiction over the third party, Cambridge Gas, and its shares in Navigator. Cambridge Gas was not incorporated in the United States, and it was held by the Isle of Man courts that it had not submitted to the jurisdiction of the US Bankruptcy Court (and this was, as I have said, accepted with evident reluctance by the Privy Council). The property which was the subject of the order of the US Bankruptcy Court was shares in an Isle of Man company. Consequently the property dealt with by the US Bankruptcy Court was situate, by Manx rules of the conflict of laws, in the Isle of Man, and the shareholder relationship was governed by Manx law.

48 *Cambridge Gas* [2007] 1 AC 508 was the subject of brief comment a few months later by the Privy Council in *Pattni v Ali* [2007] 2 AC 85. The decision in that case was simply that a Kenyan judgment deciding that A was bound to sell shares in a Manx company to B was entitled to recognition in the Isle of Man. It resulted in an order in personam against a person subject to the jurisdiction of the Kenyan court, and was not a judgment in rem against property in the Isle of Man and outside the jurisdiction of the Kenyan court, because the fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem. Lord Mance, speaking for the Board, said, at para 23:

> "In *Cambridge Gas* . . . the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established."

HIH

49 The decision in *HIH* does not deal with foreign judgments. *HIH* concerned four Australian insurance companies which were being wound up in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remission of assets collected in England to Australia, notwithstanding that there were differences between the English and Australian statutory regimes for distribution which meant that some creditors would benefit from remission whilst some creditors would be worse off. The House of Lords unanimously directed that remission should take place, but the reasons differed.

50 The reasoning of the majority (Lord Scott of Foscote and Lord Neuberger of Abbotsbury, with Lord Phillips of Worth Matravers agreeing) was based exclusively on the statutory power to assist foreign insolvency proceedings under section 426 of the Insolvency Act 1986, but Lord Hoffmann (with whom Lord Walker of Gestingthorpe agreed) also considered that such a power existed at common law.

51 Lord Hoffmann characterised the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's

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domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets, at para 6:

> "Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."

52 Other parts of Lord Hoffmann's speech have already been quoted above, and it is only necessary for present purposes to recall that he said that (a) "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme" (para 19) and (b) that the purpose of the principle of universality was to ensure that the debtor's assets were distributed under one scheme of distribution, and that the principle required that English courts should co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution: para 30.

Subsequent treatment of Cambridge Gas

53 The decision in *Cambridge Gas* was not applied by the Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 (to which I shall revert) and has been subject to academic criticism. Professor Briggs has expressed the view (2006) 77 BYIL 575, 581 that

> "the decision in [*Cambridge Gas*] is wrong, for it requires a Manx court to give effect to a confiscation order made by a foreign court of property belonging to a person who was not subject to the personal jurisdiction of the foreign court. That a Manx court could have done so itself is nothing to the point."

I shall return to the question whether it was correctly decided.

IV The cases before the court and the issues

Rubin

54 Eurofinance SA is a company incorporated in the British Virgin Islands. It was established by Adrian Roman, the second appellant on the *Rubin* appeal. Eurofinance SA settled "The Consumers Trust" ("TCT") under a deed of trust made in 2002 under English law, with trustees resident in England, of whom two were accountants and two were solicitors.

55 TCT was established to carry on a sales promotion scheme in the USA and Canada. The class of beneficiaries was made up of persons who had successfully participated in the scheme by claiming validly in certain sales promotions owned and operated by Eurofinance SA. The trustees were to hold the capital and income of TCT for the beneficiaries and subject thereto for Eurofinance SA as beneficiary in default. The promotion, known as the cashable voucher programme, was entered into with participating

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merchants in the United States and Canada who, when they sold products or services to their customers, offered those customers a cashable voucher comprising a rebate of up to 100% of the purchase price for the product or service. Under the terms of the voucher the rebate was to be paid to customers in three years' time provided that certain conditions were followed by the customer involving the completion by the customer of both memory and comprehension tests.

56 The participating merchants paid TCT 15% of the face value of each cashable voucher issued by the merchant during a week. TCT retained 40% of the payments received (i e 6% of the face value of each cashable voucher). About one half of the 60% balance received from merchants was paid to Eurofinance SA (and so effectively to Adrian Roman) and the remainder was paid to others involved in the operation of the programme, such as solicitors, accountants and US lawyers. From about 2002 Adrian Roman's sons, Nicholas Roman and Justin Roman, each began to receive about 2%. The trustees maintained bank accounts in the USA and Canada where the payments they had received from merchants were kept.

57 Since the trustees only retained 6% of the face value of the issued vouchers, the success of the scheme necessarily involved the consumers either forgetting to redeem the vouchers or being unsuccessful in navigating the process required to be followed in order to obtain payment. When the scheme folded in 2005 the trustees held nearly US$10m in bank accounts in the United States and Canada.

58 By about 2005 TCT's business ceased after the Attorney General of Missouri brought proceedings under Missouri's consumer protection legislation which resulted in a settlement involving a payment by the trustees of US$1,650,000 and US$200,000 in costs.

59 When it became clear that further proceedings were likely to be brought by Attorneys General in other states, that the number of consumer claims would increase, and that TCT would not have sufficient funds to meet all the valid claims of its beneficiaries, in November 2005 Adrian Roman caused Eurofinance to apply for the appointment by the High Court of the respondents on the *Rubin* appeal, David Rubin and Henry Lan, as receivers of TCT for the purposes of causing TCT then to obtain protection under Chapter 11 of Title 11 of the United States Code ("Chapter 11"). The English court was told that Chapter 11 reorganisation proceedings would result in an automatic stay of proceedings against TCT, would enable the receivers to reject unprofitable or burdensome executory contracts, and might result in the recovery as preferential payments of sums paid to consumers and to the Missouri Attorney General.

60 In November 2005 the respondents were appointed as receivers by order of Lewison J, and in the following month, the respondents and the trustees then caused TCT to present a voluntary petition to the US Bankruptcy Court for relief under Chapter 11. TCT was placed into Chapter 11 proceedings in New York as virtually all of its 60,000 creditors were located in the United States or Canada as were its assets. As a matter of United States bankruptcy law, TCT could be the subject matter of a petition for relief under Chapter 11 as a debtor. This is because a trust such as TCT is treated under Chapter 11 as a separate legal entity under the classification of a "business trust".

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A **61** A joint plan of liquidation for TCT was prepared, and in September 2007 Lewison J ordered that the respondents (as receivers) be at liberty to seek approval of the plan from the US Bankruptcy Court. Under the terms of the plan the respondents were appointed legal representatives of TCT and given the power to commence, prosecute and resolve all causes of action against potential defendants including the appellants. The US Bankruptcy Court approved the plan in October 2007, and appointed the respondents as B "foreign representatives" of the debtor to make application to the Chancery Division in London for recognition of the Chapter 11 proceedings as a foreign main proceeding under the CBIR; and to seek aid, assistance and co-operation from the High Court in connection with the Chapter 11 proceedings, and, in particular to seek the High Court's assistance and co-operation in the prosecution of litigation which might be commenced in C the US Bankruptcy Court including "the enforcement of judgments of this court that may be obtained against persons and entities residing or owning property in Great Britain . . ."

62 In December 2007 proceedings were commenced in the US Bankruptcy Court by the issue of a complaint against a number of defendants including the appellants. These claims fall within the category of "adversary proceedings" under the US bankruptcy legislation, and I will use D this term to refer to them. The adversary proceedings comprised a number of claims including causes of action arising under the US Bankruptcy Code, which related to funds received by TCT from merchants which were paid out to the defendants (including the appellants), or to amounts transferred to the defendants within one year prior to the commencement of the TCT bankruptcy case including the appellants.

E **63** The defendants were the appellants and other parties involved with the programme. The appellants were served personally with the complaint commencing the adversary proceedings but did not defend, or participate, in the adversary proceedings, although it appears from a judgment of the US Bankruptcy Court that Eurofinance SA had filed a notice of appearance in the main Chapter 11 proceedings: order of 22 July 2008, paras 42–43.

F **64** On 22 July 2008 default and summary judgment was entered against the appellants in the adversary proceedings by the US Bankruptcy Court. The US Bankruptcy Court entered a judgment against the appellants on the ten counts of the complaint.

65 In November 2008 the respondents applied as foreign representatives to the Chancery Division for, inter alia, (a) an order that the Chapter 11 proceedings be recognised as a "foreign main proceeding" (b) an G order that the respondents be recognised as "foreign representatives" within the meaning of article 2(j) of the Model Law in relation to those proceedings; and (c) an order that the US Bankruptcy Court's judgment be enforced as a judgment of the English court in accordance with CPR Pts 70 and 73.

66 Nicholas Strauss QC, sitting as a deputy judge of the Chancery Division, [2010] 1 All ER (Comm) 81 recognised the Chapter 11 H proceedings (including the adversary proceedings) as foreign main proceedings, and the respondents as foreign representatives, but refused to enforce the judgments in the adversary proceedings because (a) at common law the English court will not enforce a judgment in personam contrary to the normal jurisdictional rules for foreign judgments; and (b) there was

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nothing in CBIR, articles 21(e) (realisation of assets) and 25 (judicial co-operation), which justified the enforcement of judgments in insolvency proceedings.

67 At first instance the respondents sought to enforce the entirety of the US Bankruptcy Court's judgment, but before the Court of Appeal they sought an order for the enforcement of those parts of the judgment which were based on state or federal avoidance laws, including fraudulent conveyance under State Fraudulent Conveyance Laws, and under federal law, namely fraudulent transfers under section 548(a) of 11 USC; liability of transferees of avoided transfers under section 550; fraudulent transfers under section 548(b) and liability of transferees of avoided transfers under section 550.

68 The Court of Appeal (Ward, Wilson LJJ and Henderson J) [2011] Ch 133 allowed an appeal, and held that the judgment was enforceable.

New Cap

69 In the *New Cap* appeal the appellants are members of Lloyd's Syndicate Number 991 ("the syndicate") for the 1997 and 1998 years of account. The respondents are a reinsurance company ("New Cap") and its liquidator, a partner in Ernst & Young in Sydney.

70 New Cap is an Australian company, which was licensed as an insurance company in Australia under the (Australian) Corporations Act 2001 ("the Australian Act"). New Cap did not conduct insurance business in any country other than Australia, and the majority of New Cap's business was generated through reinsurance brokers conducting business in Australia and the balance was generated from overseas insurance brokers.

71 New Cap reinsured the syndicate in relation to losses occurring on risks attaching during the 1997 and 1998 years of account under reinsurance contracts which were subject to English law, and contained London arbitration clauses and also (oddly) English jurisdiction clauses. The reinsurance contracts were placed with New Cap by the syndicate's Australian broker, which was the sub-broker for the syndicate's London broker.

72 Each reinsurance contract contained a commutation clause. The syndicate and New Cap entered into a commutation agreement to commute the reinsurances with effect from 11 December 1998. Under the commutation agreement, New Cap agreed to make a lump sum payment to the syndicate by 31 December 1998 in consideration for its release from liability under the reinsurance contracts. The payments were calculated on the basis of a 7·5% discount and a deduction from premium. New Cap made payment pursuant to the commutation agreements in two instalments of US$2,000,000 and US$3,980,600 in January 1999. The commutation payments were made from a bank account held by New Cap at the Sydney branch of the Commonwealth Bank of Australia to a bank account in London.

73 The second respondent was appointed the administrator of New Cap by a resolution of its directors in April 1999. In September 1999 the creditors of New Cap resolved that New Cap be wound up and the second respondent ("the liquidator") was appointed its liquidator. Under the Australian legislation, the winding up is deemed to have commenced on the day on which the administration began.

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74 In April 2002 the liquidator caused proceedings to be commenced against the syndicate in the Supreme Court of New South Wales alleging that because New Cap was insolvent when the commutation payments were made in January 1999, and because those payments were made within the period of six months ending on the date when the administrator was appointed, they constituted unfair preferences and were thus "voidable transactions" under Part 5.7B of the Australian Act.

75 The syndicate (which does not accept that the payments were preferences) refused to accept service of the Australian proceedings. The liquidator obtained leave from the Australian court to serve the Australian proceedings on the syndicate's English solicitors in London. The syndicate did not enter an appearance to the proceedings, but corresponded with the liquidator's solicitors, including commenting on an independent expert's report to be used by the respondents as evidence of New Cap's insolvency in all of the avoidance proceedings including the proceedings against the syndicate.

76 The Australian court (White J in a judgment in September 2008, and Barrett J in a judgment in July 2009) recognised that there had been no submission by the syndicate to the jurisdiction of the Australian court in that it did not enter an appearance, but White J held that the Australian court had jurisdiction over the syndicate because a cause of action available under the Australian Act for the recovery of a preferential payment to an overseas party made when the company is insolvent was a cause of action which arose in New South Wales for the purposes of the New South Wales provisions for service out of the jurisdiction.

77 Barrett J gave a reasoned judgment in July 2009 holding the syndicate liable. After the respondents had been given leave to re-open their case so that the orders made by the Australian court would more accurately reflect the differences between those appellants who were members of the syndicate for the 1997 year of account and those appellants who were members for the 1998 year of account, the Australian court entered final judgment against the syndicate in its absence on 11 September 2009. The Australian judgment declared that the commutation payments were voidable transactions within the meaning of part 5.7B of the Australian Act and ordered the syndicate to repay the amount of the commutation payments to the liquidator together with interest.

78 On the liquidator's application the Australian court issued, in October 2009, a letter of request to the High Court in England and Wales requesting that the court "act in aid of and assist" the Australian court and exercise jurisdiction under section 426 of the Insolvency Act 1986 by: (1) ordering the syndicate to pay the sums specified in the Australian judgment; alternatively (2) allowing the liquidator to commence fresh proceedings under the Australian Act in the English court; (3) granting such further and other relief as the High Court may consider just; and (4) making such further or other orders as may, in the opinion of the High Court, be necessary or appropriate to give effect to the foregoing orders.

79 On 30 July 2010, the Court of Appeal handed down judgment in *Rubin* [2011] Ch 133. As a result, the respondents' alternative application for permission to commence fresh proceedings against the syndicate under the Australian Act in England pursuant to section 426 of the Insolvency Act

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1986 was adjourned generally, and the respondents were granted permission to seek relief at common law as an alternative to relief under section 426.

80 In *New Cap* Lewison J and the Court of Appeal were bound by the decision of the Court of Appeal in *Rubin*. Lewison J held [2011] EWHC 677 (Ch): (a) the judgment was not enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933 because, although it applied to Australian judgments, it did not apply to orders made in insolvency proceedings; but (b) the judgment was enforceable under the assistance provision of section 426 of the Insolvency Act 1986 and also at common law.

81 The Court of Appeal (Mummery, Lloyd and McFarlane LJJ) [2012] Ch 538 affirmed Lewison J's judgment on these grounds: (a) the 1933 Act applied, and registration would not be set aside for lack of jurisdiction in the foreign court, because of the *Rubin* decision; (b) section 426 could also be used and was not excluded by section 6 of the 1933 Act; (c) but section 6 would preclude an action at common law; (d) it was not necessary to decide whether the court's power of assistance at common law was exercisable where the statutory power was available.

Picard v Vizcaya Partners Ltd

82 This court gave permission for intervention by a written submission on behalf of Mr Irving Picard ("the trustee"), the trustee for the liquidation in the United States under the Securities Investor Protection Act of 1970 ("SIPA") of Bernard L Madoff Investment Securities LLC ("Madoff"), which was Bernard Madoff's broking company. The trustee is seeking to enforce at common law in Gibraltar judgments of the US Bankruptcy Court against Vizcaya Partners Ltd ("Vizcaya"), a British Virgin Islands company, for $180m, and against Asphalia Fund Ltd ("Asphalia"), a Cayman Islands company, for $67m, representing alleged preferential payments. He is also seeking to enforce a US Bankruptcy Court default judgment in excess of $1 billion in the Cayman Islands in *Picard v Harley International (Cayman) Ltd* (unreported) 10 November 2010. The Gibraltar and Cayman Islands proceedings have been adjourned to await the outcome of the present appeals.

83 In *Picard v Vizcaya Partners Ltd* proceedings have been brought in Gibraltar to enforce the default judgments against Vizcaya and Asphalia because $73m is held there on behalf of Vizcaya which the trustee maintains is available to satisfy the judgments. Vizcaya and Asphalia have also, with the permission of the court, intervened by written submission.

84 There is no agreed statement of facts relating to this aspect of the case, and nothing which is said here about the facts should be taken as representing or reflecting any finding. According to Vizcaya and Asphalia the position is as follows. Between 2002 and 2007, a bank in Europe, acting as a custodian trustee for Vizcaya, sent $327m to Madoff for investment in securities. Unknown to the bank, or to Vizcaya, or its shareholder Asphalia, Madoff had been engaged in a Ponzi scheme for some 30 years, and their money was never invested in securities. In 2008, at the time of the credit crunch and the banking crisis, the custodian trustee withdrew $180m (leaving $147m with Madoff) and $67m of the $180m was paid to Asphalia.

85 In late 2008, the Madoff fraud came to light, and the trustee was appointed. The trustee targeted investors who had withdrawn investments

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from Madoff in the two years before its collapse in December 2008 as a source for recovery of "customer property" for the benefit of other investors who had not withdrawn their investments. The trustee commenced adversary proceedings in the US Bankruptcy Court alleging preference and fraudulent conveyance against Vizcaya and Asphalia under SIPA and under the Bankruptcy Code, the effect of which, they say, is that (a) as the trustee argues, a person who, on the basis that he has received "customer money" has been required to repay a preference, does not necessarily become a "customer" and thereby entitled to share with other customers in the bankruptcy; and (b) the trustee may avoid a payment made by the bankrupt to a creditor 90 days before the commencement of the bankruptcy, irrespective of the intention with which the payment is made or received.

86 The trustee obtained judgments in default, and Vizcaya and Asphalia say that they took no part in the New York proceedings because they had no connection with New York, and in particular (a) Asphalia was not a customer of Madoff but a shareholder of Vizcaya; (b) arguably Vizcaya was not a customer since it had appointed the bank to act as custodian trustee and it was the bank which entered into contracts with Madoff.

The issues

87 The principal issue on these appeals is whether the rules at common law or under the 1933 Act regulating those foreign courts which are to be regarded as being competent for the purposes of enforcement of judgments apply to judgments in avoidance proceedings in insolvency, and, if not, what rules do apply: section V below. The other issues are whether, in the *Rubin* appeal, enforcement may be effected through the assistance provisions of the Cross-Border Insolvency Regulations 2006 (section VI) or, in the *New Cap* appeal, section 426 of the Insolvency Act 1986 (section VII); whether the judgments are enforceable as a result of the submission by the judgment debtors to the jurisdiction of the foreign courts (section VIII); and, in the *New Cap* appeal, if the judgment is enforceable, whether enforcement is at common law or under the 1933 Act: section IX.

V The first issue: recognition and enforcement of foreign judgments in insolvency proceedings

Reasoning of the Court of Appeal in Rubin and the issue on the appeal

88 The Court of Appeal in the *Rubin* appeal decided that a foreign insolvency judgment could be enforced in England and Wales at common law against a defendant not subject to the jurisdiction of the foreign court under the traditional rule as formulated in the *Dicey* rule.

89 As I have already said, on the *Rubin* appeal in the Court of Appeal the receivers sought only to enforce those parts of the judgment which in effect related to the avoidance causes of action. The Court of Appeal held that the judgment (as narrowed) was enforceable at common law. The reasoning [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61–62, 64 was as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not resident (this was a slip for "present" since the action was at common law and not under the 1933 Act) when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge*

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Gas decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate. It was unnecessary to decide whether the judgment was enforceable under the CBIR: para 63.

90 In short, Ward LJ accepted that the judgment was an in personam judgment, but he decided that the *Dicey* rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules.

91 The essential questions on this aspect of the appeals are these. Is the judgment in each case to be regarded as a judgment in personam within the scope of the traditional rules embodied in the *Dicey* rule, or is it to be characterised as an insolvency order which is part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them? Is that a distinction which has a role to play? Is there a distinction between claims which are central to the purpose of the proceedings and claims which are incidental procedural matters? As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other

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office-holders, than the traditional common law rule embodied in the *Dicey* rule, or should it be left to legislation preceded by any necessary consultation?

92 Ward LJ's conclusion derives from a careful synthesis of dicta in Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas* and his equally brilliant speech in *HIH*, each of which has on these appeals been subjected to an exceptionally detailed analysis. For reasons which will be developed, I do not agree with the conclusions which Ward LJ draws.

93 But I begin with two matters on which I accept the respondents' analysis. The first is that avoidance proceedings have characteristics which distinguish them from ordinary claims such as claims in contract or tort. The second is that, if it were necessary to draw a distinction between insolvency orders and other orders, it would not be difficult to formulate criteria for the distinction, along similar lines to that drawn by the European Court in relation to the Brussels Convention, the Brussels I Regulation (Council Regulation (EC) 44/2001) and the EC Insolvency Regulation.

Nature of avoidance proceedings

94 In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution. The principle of equality among creditors which underlies the pari passu principle may require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect. Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency. Thus under the Insolvency Act 1986 an administrator, or liquidator, or trustee in bankruptcy may, where there has been a transaction at an undervalue, or amounting to an unlawful preference, apply for an order restoring the position to what it would have been had the transaction not taken place: sections 238 et seq and 339 et seq. Other systems of law have similar mechanisms, but they will differ in matters such as the period during which such transactions are at risk of reversal and the role of good faith of the parties to the transaction.

95 The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance: *Fletcher, The Law of Insolvency*, 4th ed (2009), para 26-002; *Goode, Principles of Corporate Insolvency Law*, 4th ed (2011), para 13-03.

96 Thus the UNCITRAL Legislative Guide on Insolvency Law (2005) says:

> "150. Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time

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(often referred to as the 'suspect' period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects . . .

"151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate."

97 In *In re Condor Insurance Ltd* (2010) 601 F 3d 319, 326, the Court of Appeals for the Fifth Circuit said that:

"Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets . . . in favor of the collective priorities established by the distribution statute . . . [and] must be treated as an integral part of the entire bankruptcy system."

98 In different phases of the Australian proceedings in *New Cap* Barrett J made similar points. He said that in an action for unfair preference under the Australian legislation the liquidator might obtain an order for the payment of money, but the action did not contemplate recovery in the sense applicable to damages and debts; and the proceedings sought to remedy or counter the effects of that depletion caused by the payment by New Cap: *New Cap Reinsurance Corpn v Renaissance Reinsurance Ltd* [2002] NSWSC 856, paras 23, 27. The order does not vindicate property rights which the company itself would have had prior to liquidation, but statutory rights which the liquidator has under the statutory scheme in consequence of winding up. The purpose of the order for the payment of money to a company in liquidation is not to compensate the company, but to adjust the rights of creditors among themselves in such a way as to eliminate the effects of favourable treatment afforded to one or more creditors, to the exclusion of others, in the period immediately before an insolvent administration commences: *New Cap Reinsurance Corpn v Grant* (2009) 257 ALR 740, paras 20–21.

Difference between insolvency claims and others

99 I also accept that, if there were to be a separate rule for the recognition and enforcement of insolvency orders, it would not normally be difficult to distinguish between judgments in insolvency proceedings which are peculiarly the subject of insolvency law such as avoidance proceedings, and other judgments of the kind which are covered by the *Dicey* rule.

100 In the context of the Brussels Convention, the Brussels I Regulation and the EC Insolvency Regulation, the Court of Justice of the European Union has developed a distinction between claims which derive directly from the bankruptcy or winding up, and which are closely connected with them, on the one hand, and those which do not, on the other hand, and the distinction has been applied by the English court. In my judgment, the distinction is a workable one which could be adapted to other contexts should it be useful or necessary to do so.

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A 101 Claims which were regarded as bankruptcy claims have been held to include a claim under French law by a liquidator against a director to make good a deficiency in the assets of a company (*Gourdain v Nadler* (Case 133/78) [1979] ECR 733); or a claim under German law to set aside a transaction detrimental to creditors: *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] 1 WLR 2168. Claims outside the category of bankruptcy claims have been held to include an action brought by a seller based on a reservation of title against a purchaser who was insolvent (*German Graphics Graphische Maschinen GmbH v van der Schee* (Case C-292/08) [2009] ECR I-8421) or a claim by a liquidator as to beneficial ownership of an asset: *Byers v Yacht Bull Corpn* [2010] BCC 368. In *Oakley v Ultra Vehicle Design Ltd* [2006] BCC 57, para 42 Lloyd LJ (sitting as an additional judge of the Chancery Division) said:

> "it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the [Brussels I] Regulation) by article 1.2(b): see *In re Hayward decd* [1997] Ch 45, and *UBS AG v Omni Holding AG* [2000] 1 WLR 916. By contrast, proceedings by a liquidator against a director or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding up and therefore excluded from the Brussels Convention and now from the [Brussels I] Regulation."

In personam or sui generis?

102 I have already quoted the passage in *Cambridge Gas* [2007] 1 AC 508 in which Lord Hoffmann distinguished between judgments in rem and in personam, on the one hand, and judgments in bankruptcy proceedings, on the other, but it is necessary to repeat it at this point. He said, at paras 13–14:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

103 There is no doubt that the order of the US Bankruptcy Court in *Cambridge Gas* did not fall into the category of an in personam order. Even though the question whether a foreign judgment is in personam or in rem is sometimes a difficult one (*Dicey*, 15th ed, para 14-109), that was not a personal order against its shareholders, including Cambridge Gas. The order vested the shares in Navigator in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the

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functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world: see *Jowitt's Dictionary of English Law*, 3rd ed (2010) (ed Greenberg), p 1249.

104 The judgments in the *Rubin* and *New Cap* appeals were based on avoidance legislation which, with some differences of substance, performs the same function as the equivalent provisions in the Insolvency Act 1986 and its predecessors. But Ward LJ in *Rubin* accepted that the judgment was in personam and the *Rubin* respondents have not sought to argue that it was not an in personam judgment. What they say is that, even if it is in personam, it is within a sui generis category of insolvency orders or judgments subject to special rules.

105 There can be no doubt that the avoidance orders in the present appeals are in personam. In *In re Paramount Airways Ltd* [1993] Ch 223, 238 Nicholls LJ said that the remedies under section 238 of the Insolvency Act 1986 (transactions at an undervalue) were "primarily of an in personam character", and that accords with the nature of the orders in these appeals. The form of judgment of the US Bankruptcy Court in the *Rubin* case was that "plaintiffs have judgment . . . against the defendants" in the sums awarded, and the orders of the New South Wales Supreme Court in the *New Cap* case included orders that "the defendants . . . pay to the first plaintiff" the sums due under section 588FF(1) of the Australian Corporations Act.

The question of principle and policy

106 Since the judgments are in personam the principles in the *Dicey* rule are applicable unless the court holds that there is, or should be, a separate rule for judgments in personam in insolvency proceedings, at any rate where those judgments are not designed to establish the existence of rights, but are central to the purpose of the insolvency proceedings or part of the mechanism of collective execution.

107 Prior to *Cambridge Gas* [2007] 1 AC 508 and the present cases, there had been no suggestion that there might be a different rule for judgments in personam in insolvency proceedings and other proceedings. There are no cases in England which are helpful. The normal rules for enforcement of foreign judgments were applied to a claim by a liquidator for moneys due to the company (*Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379) and to a claim on a debt ascertained in bankruptcy under German law: *Berliner Industriebank AG v Jost* [1971] 2 QB 463. A judgment of the US Bankruptcy Court in Chapter 11 proceedings for repayment of a preferential transfer was enforced in Ontario on the basis of the judgment debtor's submission to the New York court, without any suggestion that the normal rules did not apply: *Gourmet Resources International Inc Estate v Paramount Capital Corpn* (1991) 3 OR (3d) 286, [1993] IL Pr 583, appeal dismissed (1993) 14 OR (3d) 319(Note) (Ont CA).

108 The principles in the *Dicey* rule have never received the express approval of the House of Lords or the UK Supreme Court and the leading decisions remain *Adams v Cape Industries plc* [1990] Ch 433 and the older Court of Appeal authorities which it re-states or re-interprets. But there can be no doubt that the references by the House of Lords in the context of foreign judgments to the foreign court of "competent jurisdiction" are

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implicit references to the common law rule: e g *Nouvion v Freeman* (1889) 15 App Cas 1, 8 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484.

109 The *Rubin* respondents question whether the rules remain sound in the modern world. It is true that the common law rule was rejected in Canada, at first in the context of the inter-provincial recognition of judgments. The Supreme Court of Canada held that the English rules developed in the 19th century for the recognition and enforcement of judgments of foreign countries could not be transposed to the enforcement of judgments from sister provinces in a single country with a common market and a single citizenship. Instead a judgment given against a person outside the jurisdiction should be recognised and enforced if the subject matter of the action had a real and substantial connection with the province in which the judgment was given: *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, para 45. This approach was applied, by a majority, to foreign country judgments in *Beals v Saldanha* [2003] 3 SCR 416 (applied to the recognition of an English order convening meetings in a scheme of arrangement in *In re Cavell Insurance Co* (2006) 269 DLR (4th) 679 (Ont CA)).

110 There is no support in England for such an approach except in the field of family law. In *Indyka v Indyka* [1969] 1 AC 33 it was held that a foreign decree of divorce would be recognised at common law if there was a "real and substantial connection" between the petitioner (or the respondent) and the country where the divorce was obtained. This rule (now superseded by the Family Law Act 1986) was in part devised to avoid "limping marriages", i e cases where the parties were regarded as divorced in one country but regarded as married in another country. It has never been adopted outside the family law sphere in the context of foreign judgments.

111 The Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 declined to follow *Cambridge Gas* (and also the decision of the Court of Appeal in *Rubin*) and also held that the *Dicey* rule should not be rejected in favour of a real and substantial connection test. In *Flightlease* the airline Swissair was in a form of debt restructuring proceeding in Switzerland, where it was incorporated. Flightlease is an Irish company in the same group as Swissair. An application was before the Swiss courts under the Swiss federal statute on debt enforcement and bankruptcy seeking the return of money paid by Swissair to Flightlease. The proceedings had reached the stage of judgment, but the liquidators of Flightlease were concerned to know whether a Swiss judgment would be enforceable in Ireland so that they could decide whether to appear in the Swiss proceedings.

112 The Irish Supreme Court held that the judgment would not be enforceable if Flightlease did not appear in the Swiss proceedings for these reasons: (1) the effect of the Swiss order would be to establish a liability on Flightlease to repay moneys and would therefore result in a judgment in personam; (2) it would be preferable for any change in the rules relating to the enforcement of foreign judgments to take place in the context of international consensus by way of treaty or convention given effect by legislation. In particular, the Irish Supreme Court said that it would not adopt the approach in *Cambridge Gas* because it had resulted from legislative changes in the United Kingdom (this appears to have been based on a misapprehension), and should not be adopted in Ireland in the absence of consensus among common law jurisdictions.

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113 But there is no suggestion on this appeal that the principles embodied in the *Dicey* rule should be abandoned. Instead the *Rubin* respondents suggest that the principles should not apply to foreign insolvency orders.

114 The respondents accept that the *Dicey* rule applies to claims which may be of considerable significance by an office-holder in a foreign insolvency, such as a claim for breach of contract, or a tort claim, or a claim to recover debts. It is clear that such claims may affect the size of the insolvent estate just as much, and often more, than avoidance claims. Like claims to recover money due to the insolvent estate such as restitutionary claims not involving avoidance, avoidance claims may establish a liability to pay or repay money to the bankrupt estate (as in the present cases). There is no difference of principle.

115 The question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment the answer is in the negative for the following reasons.

116 First, although I accept that it is possible to distinguish between avoidance claims and normal claims, for example in contract or tort, it is difficult to see in the present context a difference of principle between a foreign judgment against a debtor on a substantial debt due to a company in liquidation and a foreign judgment against a creditor for repayment of a preferential payment. The respondents suggest that a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation. Quite apart from the fact that the suggestion is wholly unrealistic, why should the seller/creditor be in a worse position than a buyer/debtor?

117 The second reason is that if there is to be a different rule for foreign judgments in such proceedings as avoidance proceedings, the court will have to ascertain (or, more accurately, develop) two jurisdictional rules. There are two aspects of jurisdiction which would have to be satisfied if a foreign insolvency judgment or order is to be outside the scope of the *Dicey* rule: the first is the requisite nexus between the insolvency and the foreign court, and the second is the requisite nexus between the judgment debtor and the foreign court.

118 In *Cambridge Gas* Navigator was an Isle of Man company, and the jurisdiction of the United States Bankruptcy Court depends on whether the "debtor" resides or has a domicile or place of business, or property, in the United States. The shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. The Privy Council, as noted above, did not articulate any rule for the jurisdiction of the US Bankruptcy Court over Navigator (although it had plainly submitted to its jurisdiction) or over Cambridge Gas (which, the Manx courts had held and the Privy Council accepted, had not submitted) or over Cambridge Gas' Manx assets.

119 Nor did the Court of Appeal in *Rubin* articulate the reasons why the English court recognised the jurisdiction of the US Bankruptcy Court over TCT, or over the appellants. The receivers appear to have proceeded originally on the basis that the US Bankruptcy Court had jurisdiction under

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United States bankruptcy law because of TCT's residence and principal place of business in New York (petition, 5 December 2005), but the US Bankruptcy Court, in deciding to appoint the receivers as foreign representatives also noted that TCT's business operations were conducted primarily in the United States, the majority of its creditors, substantially all of its assets, and its centre of main interests, were all in the United States. The basis of jurisdiction of the US Bankruptcy Court under United States law over the individual defendants in *Rubin* was that they were subject both to the general jurisdiction of the court (i e connection of the defendant with the jurisdiction) and also to the specific jurisdiction of the court (i e connection of the cause of action with the jurisdiction) because they specifically sought out the United States as a place to do business and specifically sought out United States merchants and consumers with whom to do business. Accordingly, the exercise of jurisdiction satisfied the due process requirements of the Fifth Amendment.

120 The basis of jurisdiction in *New Cap* over New Cap itself was of course that it was incorporated in Australia. The basis of jurisdiction over the syndicate under New South Wales law was that the cause of action against the syndicate arose in New South Wales.

121 The respondents do not put forward any principled suggestion for rules which will deal with the two aspects of jurisdiction. They accept, as regards the jurisdictional link between the foreign country and the insolvent estate, that English law has traditionally recognised insolvency proceedings taking place in an individual bankrupt's place of domicile, or, in the case of corporations, the place of incorporation, but (because the connection which the trustees of the TCT, or the TCT itself, had with the United States was that the trust's main business was there) they rely on what Lord Hoffmann said in *HIH* [2008] 1 WLR 852, para 31:

> "I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."

122 They propose that each of these issues be resolved, not by a black letter rule like the common law rule for enforcement of judgments, but instead by an appeal to what was said in oral argument to be the discretion of the English court to assist the foreign court.

123 On the second aspect, the jurisdictional link between the foreign country and the judgment debtor, they accept that it is necessary for there to be an appropriate connection between the foreign insolvency proceeding and the insolvency order in respect of which recognition and enforcement is sought. They propose that, in the exercise of the discretion, the court should adopt an approach similar to that taken by the English court in deciding whether to apply provisions of the Insolvency Act 1986, such as section 238 (transactions at an undervalue), to persons abroad, relying on *In re Paramount Airways Ltd* [1993] Ch 223.

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124 That case decided that there is no implied territorial limitation to the exercise of jurisdiction over "any person". The Court of Appeal rejected the argument that the section applied only to British subjects and to persons present in England at the time of the impugned transaction. In particular the physical absence or presence of the party at the time of the transaction bore no necessary relationship to the appropriateness of the remedy. Nor was the test of "sufficient connection" with England satisfactory because it would hardly be distinguishable from the ambit of the sections being unlimited territorially: p 237. Instead, the approach was to be found in the discretion of the court, first to grant permission to serve the proceedings out of the jurisdiction, and secondly, to make an order under the section. On both aspects the court would take into account whether the defendant was sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.

125 The *Rubin* respondents say that *In re Paramount Airways Ltd* is instructive because, if the facts of the present case were reversed such that TCT had carried on the scheme in England and had been placed into insolvency proceedings here and the appellants were resident in New York, then it can be expected that the English court would have considered that England was the correct forum in which to bring section 238 proceedings to recover payments made to the appellants and would have given permission to serve out of the jurisdiction accordingly. They go on to say that it is implicit in this that the English court would have expected the New York court then to recognise and enforce any judgment of the English court even if the appellants had remained in New York and had not contested the proceedings; and that by the same token that the court seeks and expects the recognition and enforcement abroad of its own insolvency orders, the court should recognise and enforce in England insolvency orders made in insolvency proceedings in other jurisdictions.

126 There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts, or its expectation of the recognition of its judgments abroad. It has frequently been said that the jurisdiction exercised under what used to be RSC Ord 11, r 1 (and is now CPR Practice Direction 6B, paragraph 3.1) is an exorbitant one, in that it was a wider jurisdiction than was recognised in English law as being possessed by courts of foreign countries in the absence of a treaty providing for recognition: see *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, 254, per Lord Diplock; *Amin Rasheed Shipping Corpn v Kuwait Insurance Co* [1984] AC 50, 65, per Lord Diplock and *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 481, per Lord Goff of Chieveley.

127 Outside the sphere of matrimonial proceedings (see *Travers v Holley* [1953] P 246, disapproved on this aspect in *Indyka v Indyka* [1969] 1 AC 33) reciprocity has not played a part in the recognition and enforcement of foreign judgments at common law. The English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction: *In re Trepca Mines Ltd* [1960] 1 WLR 1273.

128 In my judgment, the dicta in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal reached. This would not be an

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A incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the *Dicey* rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.

B

129 A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the C legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, "if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it": *Owens Bank* D *Ltd v Bracco* [1992] 2 AC 443, 489.

130 Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient E connection", a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the Madoff case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the F dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.

131 Nor is there likely to be any serious injustice if this court declines to sanction a departure from the traditional rule. It would not be appropriate to express a view on whether the office-holders in the present cases would G have, or would have had, a direct remedy in England, because there might be, or might have been, issues as to the governing law, or issues as to time-limits or as to good faith. Subject to those reservations, several of the ways in which the claims were put (especially those parts of the judgment which were not the subject of these proceedings) in the United States proceedings in *Rubin* could have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). In addition there are H several other avenues available to office-holders. Avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to section 426(4) of the Insolvency Act 1986, applying Australian law under section 426(5). In appropriate cases, article 23 of the Model Law will allow avoidance claims to be made by

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foreign representatives under the Insolvency Act 1986. In the cases where the insolvent estate has its centre of main interests in the European Union, judgments will be enforceable under article 25 of the EC Insolvency Regulation.

132 It follows that, in my judgment, *Cambridge Gas* [2007] 1 AC 508 was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man.

VI Issue 2: Rubin: Enforcement under the Cross-Border Insolvency Regulations

133 In the *Rubin* appeal it was argued by the respondents that the judgment should also be enforced through the CBIR, implementing the UNCITRAL Model Law.

134 The order made by the deputy judge [2010] 1 All ER (Comm) 81, paras 46, 47 recognised the Chapter 11 proceeding "including the adversary proceedings," because "bringing adversary proceedings against debtors of the bankrupt is clearly part of collecting the bankrupt's assets with a view to distributing them to creditors" and "the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings". The Court of Appeal was of the same view [2011] Ch 133, para 61(2)–(3). The appellants no longer maintain that the adversary proceedings should not be recognised under the Model Law.

135 The issue which still arises in relation to the Model Law as implemented by the CBIR is whether the court has power to grant relief recognising and enforcing the relevant parts of the judgment.

136 Article 21 provides:

> "1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph l(a) of article 20; (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph l(b) of article 20; (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; (e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court; (f) extending relief granted under paragraph 1 of article 19; and (g) granting any additional relief that may

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be available to a British insolvency office-holder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986."

137 The reference to relief under paragragh 43 of Schedule B1 to the Insolvency Act 1986 (as inserted by section 248 of and Schedule 16 to the Enterprise Act 2002) is a reference to a moratorium on claims in an administration.

138 The Guide to Enactment states, at paras 154, 156:

"154. . . . The types of relief listed in article 21, paragraph 1, are typical or most frequent in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting state and needed in the circumstances of the case . . .

"156. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions that it considers appropriate."

139 Article 25 provides (under the heading "Co-operation and direct communication between a court of Great Britain and foreign courts or foreign representatives") that:

"1. . . . the court may co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency office-holder.

"2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives."

140 Article 27 provides that the co-operation referred to in article 25 may be implemented "by any appropriate means", including

"(a) appointment of a person to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the coordination of proceedings; (e) coordination of concurrent proceedings regarding the same debtor."

141 The respondents say that (a) the power under article 21 is to grant any type of relief that is available under the law of the relevant state, and that the fact that recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted; (b) the recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court; and (c) the examples of co-operation in article 27 are merely examples and are not exhaustive.

142 But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance JSC pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private

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International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.

143 It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.

144 The respondents rely on United States decisions but the only case involving enforcement of a foreign judgment in fact supports the appellants' argument. The Model Law has been implemented into United States law through Chapter 15 of Title 11 of the United States Code, which has in sections 1521, 1525 and 1527 provisions which are, with modifications not relevant for present purposes, equivalent to articles 21, 25 and 27 of the CBIR. In *In re Metcalfe & Mansfield Alternative Investments* (2010) 421 BR 685 (Bankr SDNY) the US Bankruptcy Court ordered that orders made by a Canadian court in relation to a plan of compromise and arrangement under the (Canadian) Companies' Creditors Arrangement Act 1985 be enforced. That decision does not assist the respondents because the US Bankruptcy Court applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States: pp 698–700. In my judgment the Model Law is not designed to provide for the reciprocal enforcement of judgments.

VII Issue 3: New Cap: Enforcement through assistance under section 426 of the Insolvency Act 1986

145 In view of my conclusion in the next section (section VIII) that the syndicate submitted to the jurisdiction of the Australian court, the issues on section 426(4)(5) of the Insolvency Act 1986, and their relationship with section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 do not arise, but since the matter was fully argued I will express a view on the applicability of section 426(4) to a case such as this.

146 Section 426(4)(5) of the Insolvency Act 1986 provides:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> "(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom, or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matter specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

147 The reference to the application of rules of private international law in section 426(5) is difficult and obscure: see *Dicey*, 15th ed, para 30-119; my discussion in *In re Television Trade Rentals* [2002] BCC 807, para 17, and the cases there cited; and *Al-Sabah v Grupo Torras SA* [2005] 2 AC 333, para 47. But nothing turns on it on these appeals.

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A **148** The question is whether section 426(4) of the 1986 Act provides a procedure by which a judgment of a court having jurisdiction in relation to insolvency law in a "relevant country or territory" may be enforced in the United Kingdom. As I have said, Australia is a relevant country.

149 A further question arises if section 426(4) applies to the enforcement of foreign judgments and that is whether section 426 is ousted by section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, B which provides:

> "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of the Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom."

C **150** Both Lewison J and the Court of Appeal [2012] Ch 538 held that section 426(4) was available as a tool for the enforcement of the judgment.

151 Section 426(4) has been given a broad interpretation: see *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 (CA); *England v Smith* [2001] Ch 419 (CA) and *HIH* [2008] 1 WLR 852. It has been held that the fact that a letter of request has been made is a weighty factor, and public policy and comity favour the giving of assistance: *Hughes* D *v Hannover*, at pp 517–518 and *England v Smith*, at p 433. Thus in *England v Smith* the Australian court overseeing the liquidation of the Bond Corporation made an order for the examination of a London partner in Arthur Andersen. It issued a letter of request asking the English court to assist it by making its own order for the examination. The Court of Appeal decided that the order should be made.

E **152** But, despite the respondents' argument to the contrary, *England v Smith* was not a case of the enforcement of the Australian order, but rather the making of the court's own order in aid of the Australian liquidation. In my judgment, subsections 426(4) and 426(5) of the 1986 Act are not concerned with enforcement of judgments. Section 426(1)(2), by contrast, deals with enforcement of orders in one part of the United Kingdom in another part, and refer expressly to the enforcement of such orders ("shall be F enforced" in section 426(1)). Section 426(4) deals with assistance not only for foreign designated countries such as Australia but also to intra-United Kingdom assistance. If section 426(4) applied to intra-United Kingdom enforcement of orders, then section 426(1) would be largely redundant, going beyond what the Court of Appeal [2012] Ch 538, para 57 described as "a degree of overlap".

G **153** Section 426(1)(4) has its origin in sections 121 and 123 of the Bankruptcy Act 1914. Section 121 of the 1914 Act provided that orders of bankruptcy courts in one part of the United Kingdom were to be enforced in other parts. Section 122 provided that the courts exercising bankruptcy and insolvency jurisdiction in the United Kingdom and "every British court elsewhere" were to act in aid of, and be auxiliary to, each other; and, upon a H request by the non-English court, could exercise the jurisdiction of either court.

154 The *Report of the Review Committee on the Insolvency Law and Practice* (1982) (Cmnd 8558) (the "Cork Report") said, at paras 1909–1913, that section 122 was the "vital section in this context", and recommended that the section should be extended to winding up. But, despite the

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respondents' arguments, I do not discern any recommendation which would suggest that section 426(4) applies to the enforcement of foreign judgments.

155 Consequently the applicability of section 6 of the 1933 Act does not arise for decision, except in a context which makes little practical difference, and to which I will revert.

VIII Submission

156 If the *Dicey* rule applies the judgments in issue will be enforceable in England if the judgment debtors submitted to the jurisdiction of the foreign court.

New Cap

157 The Australian court granted leave to serve these proceedings out of the jurisdiction on the syndicate: section IV, above. The syndicate did not enter an appearance, but its solicitors commented in writing on evidence presented to the Australian court about New Cap's insolvency and their comments were placed before the Australian judge.

158 More relevant is the fact that from August 1999 the syndicate submitted proofs of debt (in relation to unsettled claims and outstanding premiums for the 1997, 1998, and 1999 years of account, and not to the reinsurance contracts which are the subject of these proceedings) and attended and participated in creditors' meetings. In particular at an adjourned meeting of creditors on 16 September 2009 the syndicate had given a proxy for that meeting to the chairman, and submitted a proof of debt and proxy form for that meeting. The syndicate voted at a meeting of creditors in favour of a scheme of arrangement. The liquidator has admitted claims by the syndicate for the sterling equivalent of more than £650,000, although the liquidator is retaining the dividend in partial settlement of the costs incurred in these proceedings.

159 The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has been actually waived, or if the objection has never been entertained at all": *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).

160 The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: *Adams v Cape Industries plc* [1990] Ch 433, 459 (Scott J) and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96–97 (Thomas J); see also *Desert Sun Loan Corpn v Hill* [1996] 2 All ER 847, 856 (CA); *Akande v Balfour Beatty Construction Ltd* [1998] IL Pr 110; *Starlight International Inc v Bruce* [2002] IL Pr 617, para 14 (cases of foreign judgments) and *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).

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A **161** The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign B proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.

C **162** It is in that context that Scott J said at first instance in *Adams v Cape Industries plc* [1990] Ch 433, 461 (a case in which the submission issue was not before the Court of Appeal):

> "If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not . . . to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication D of procedural steps taken in foreign proceedings must . . . be assessed in the context of the foreign proceedings."

163 I agree with the way it was put by Thomas J in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 97:

> "The court must consider the matter objectively; it must have regard to E the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken. This is because the significance of those steps can only be understood by reference to that law. If a step taken by a person in a foreign jurisdiction, such as making a counterclaim, might well be regarded by English law as amounting to a submission to the jurisdiction, but would not be regarded by that foreign F court as a submission to its jurisdiction, an English court will take into account the position under foreign law."

164 The syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the syndicate in the liquidation a submission for the purposes of the rules relating to foreign G judgments?

165 In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 H after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled

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Scotsman. On appeal from the county court, Bacon CJ held that the court had jurisdiction. He said, at pp 737–738:

> "what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it—that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate . . . can there be any doubt that the appellant in this case has agreed that, as far as he is concerned . . . the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit . . . [The appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England."

166 The syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the syndicate's participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.

167 I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding.

Rubin

168 The position is different in the *Rubin* appeal. It would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court, for these reasons: first, it was Eurofinance SA which applied for the appointment by the High Court of Mr Rubin and Mr Lan as receivers of TCT specifically for the purpose of causing TCT then to obtain protection under Chapter 11; second, it was Eurofinance SA which represented to the English court that office-holders appointed by the United States court would be able to pursue claims against third parties; third, the judgment of the US Bankruptcy Court states that the court had personal jurisdiction over Eurofinance SA not only because it did business in the United States but also (as I have mentioned above) because it had filed a notice of appearance in the Chapter 11 proceedings: order 22 of July 2008, paras 42–43.

169 But the *Rubin* appellants did not appear in the adversary proceedings, and it was not argued in these proceedings that Eurofinance

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A SA (or Mr Adrian Roman, who caused Eurofinance SA to make the application) had submitted to the jurisdiction of the US Bankruptcy Court in any other way and it is not necessary therefore to explore the matter further.

IX New Cap: enforcement at common law or under the 1933 Act

170 In view of my conclusion that the Australian judgment in *New Cap* B is enforceable by reason of the syndicate's submission, a purely technical point arises on the method of enforcement. The point is whether the enforcement is to be under the 1933 Act or at common law. If insolvency proceedings are excluded from the 1933 Act, then enforcement would be at common law. If they are not excluded, then (as I have said) section 6 has the effect of excluding an action at common law on the judgment and making registration under the 1933 Act the only method of enforcement of C judgments within Part I of the Act.

171 Section 11(2) of the 1933 Act provides that the expression "action in personam" shall not be deemed to include (inter alia) proceedings in connection with bankruptcy and winding up of companies. But the effect of section 4(2)(c) is that in the case of a judgment given in an action other than an action in personam or an action in rem, the foreign court shall be deemed D to have jurisdiction if its jurisdiction is recognised by the English court, i e at common law. Accordingly, the question whether insolvency proceedings are wholly excluded from the operation of the 1933 Act still arises. There is no other provision in the 1933 Act which throws any light on the point.

172 The main object of the 1933 Act was to facilitate the enforcement of commercial judgments abroad by making reciprocity easier. The only reference to insolvency proceedings in the *Report of the Foreign Judgments* E *(Reciprocal Enforcement) Committee* (1932) (Cmd 4213) ("the Greer Report"), which recommended the legislation, is the statement (para 4): "It is not necessary for our present purposes to consider the effect in England of foreign judgments in bankruptcy proceedings . . ." The report annexed draft Conventions which had been drawn up in consultation with experts from Belgium, France and Germany. The draft Conventions with Belgium F (article 4(3)(4)) and Germany (article 4(4)) provided that the jurisdictional rules in the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate, but that the jurisdiction of the original court would be recognised where such recognition was in accordance with the rules of private international law observed by the court applied to. That provision paralleled what became sections 4(2)(c) and 11(2) of the 1933 Act. The G draft Convention with France did not apply to judgments in bankruptcy proceedings etc (article 2(3)), but provided that nothing was deemed to preclude the recognition and enforcement of judgments to which the Convention did not apply: article 2(4).

173 The Conventions concluded with countries to which the 1933 Act applied adopted similar techniques. It is unnecessary to set them out in detail. But there is no reason to suppose that bankruptcy proceedings were H not regarded as being "civil and commercial matters". Thus the 1961 Convention with the Federal Republic of Germany of 1961 (set out in the Schedule to the Reciprocal Enforcement of Foreign Judgments (Germany) Order (SI 1961/1199)) provided in article I(6) that the expression "judgments in civil and commercial matters" did not include

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judgments for fines or penalties, and had a separate provision in article II(2) that the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate (although, in accordance with the usual technique, it did not rule out recognition and enforcement: article II(3)). Other Conventions simply excluded bankruptcy proceedings from the specific jurisdictional provisions of the Convention, like the draft Conventions annexed to the Greer Report: article IV(5) of the Schedule to the Reciprocal Enforcement of Foreign Judgments (Austria) Order 1962 (SI 1962/1339), article IV(3) of the Schedule to the Reciprocal Enforcement of Foreign Judgments (Norway) Order 1962 (SI 1962/636), and article IV(3) of Schedule 1 to the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1973 (SI 1973/1894).

174 The Reciprocal Enforcement of Judgments (Australia) Order 1994 (SI 1994/1901) extended the 1933 Act to Australia, implementing the UK-Australia Agreement for the reciprocal enforcement of judgments in civil and commercial matters. The Agreement (set out in the Schedule to the Order) is expressed in article 1(c)(i) to apply to judgments in civil and commercial matters. The Order applies Part I of the Act to judgments in respect of a "civil or commercial matter": article 4(a).

175 There is no reason to conclude that the phrase "civil and commercial matters" does not include insolvency proceedings, and the history of the 1933 Act and the Conventions shows that it does. The fact that insolvency was expressly excluded from the operation of the Brussels Convention, the original and revised Lugano Conventions and the Brussels I Regulation in fact suggests that otherwise they would have been within their scope. The respondents relied on a passage in the ruling of the Court of Justice of the European Union in *Gourdain v Nadler* (Case 133/78) [1979] ECR 733, paras 3–4, as suggesting that the exclusion of bankruptcy in article 1 of the Brussels Convention was an example of a matter excluded from the concept of civil and commercial matters. But it is clear from the context (and from the opinion of Advocate General Reischl) that the court was simply saying that because the expression "civil and commercial matters" in article 1 had to be given an autonomous meaning, so also was the case with the expression "bankruptcy". That the exclusion of bankruptcy proceedings does not affect their character as civil or commercial matters is confirmed by the recent ruling in *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma* (Case C-213/10) 19 April 2012, where the court said that the Brussels I Regulation was "intended to apply to all civil and commercial matters apart from certain well-defined matters" and as a result actions directly deriving from insolvency proceedings and closely connected with them were excluded: para 29.

176 It follows that the 1933 Act applies to the Australian judgment and that enforcement should be by way of registration under the 1933 Act.

X Disposition

177 I would therefore allow the appeal in *Rubin*, but dismiss the appeal in *New Cap* on the ground that the syndicate submitted to the jurisdiction of the Australian court.

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A **LORD MANCE JSC**

178 I agree with Lord Collins of Mapesbury's reasoning and conclusions in his judgment on these appeals, essentially for the reasons he gives, though without subscribing to his incidental observation (para 132) that the Privy Council decision in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 was necessarily wrongly decided. This was not argued before the Supreme Court, and I would wish to reserve my opinion upon it. *Cambridge Gas* is, on any view, distinguishable.

B

179 The common law question central to these appeals is whether the Supreme Court should endorse or introduce a special rule of recognition and enforcement, one falling outside the scope of the *Dicey* rule which Lord Collins has identified (rule 36 in the 14th and rule 43 in the 15th edition) and applicable to judgments in foreign insolvency proceedings setting aside voidable pre-insolvency transactions. For the principal reasons which Lord Collins gives in paras 95–131, I agree that we should not do so.

C

180 Since much weight was placed by the respondents and the Court of Appeal upon the Board's reasoning and decision in *Cambridge Gas*, I add some observations to indicate why, as the present appellants submitted, it concerned circumstances and proceeded upon factual assumptions and a legal analysis which have no parallel in the present case.

D

181 *Cambridge Gas* has attracted both Irish judicial dissent and English academic criticism, to which Lord Collins refers in paras 53 and 111–112. Giving the judgment of the Board in *Pattni v Ali* [2007] 2 AC 85, I said that the purpose of the bankruptcy order with which the Board was concerned in *Cambridge Gas* "was simply to establish a mechanism of collective execution against the property of the debtor [Navigator] by creditors whose rights were admitted or established": para 23.

E

182 This analysis, admittedly, involved treating the vesting in creditors of shares *in* Navigator as no different in substance from the vesting in creditors of Navigator's shares in its ship-owning subsidiaries. But it is clear from paras 8 and 9 and again 24–26 of the Board's advice in *Cambridge Gas* that the Board saw no difference. It did not regard Cambridge Gas as having any interest of value to advance or protect in the shares still held nominally in its name. Their vesting in Navigator's creditors was no more than a mechanism for disposing of Navigator's assets, which did not affect or concern Cambridge Gas. The Board was therefore, in its view (and rightly or wrongly), concerned with distribution of the insolvent company's assets in a narrow and traditional sense.

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G 183 Amplifying this, the Board approached the situation in *Cambridge Gas* as follows. The New York court had jurisdiction over Navigator's assets, since Navigator had submitted to the New York proceedings. Cambridge Gas's shares in Navigator (located in the Isle of Man, Navigator's place of incorporation) were "completely and utterly worthless" [2007] 1 AC 508, para 9. The transfer to Navigator's creditors of Cambridge Gas's shares in Navigator had the like effect to a transfer of Navigator's assets, since Navigator was "an insolvent company, in which the shareholders ha[d] no interest of any value": para 26. Cambridge Gas's shares in Navigator were vulnerable in the Isle of Man, under section 152 of the Companies Act 1931, to a similar scheme of arrangement to that which the New York Court intended by its Chapter 11 order. More generally, as

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I noted in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, paras 236–238, in insolvency shareholders' interests yield to those of creditors.

184 It was in this limited context that the Board concluded that the New York and Manx courts' orders could be regarded as doing no more than facilitating or enabling collective execution against Navigator's property.

185 The Court of Appeal believed on the contrary that the answer to the present cases lay in the Board's general statements in *Cambridge Gas* [2007] 1 AC 508, paras 19–21 regarding the nature of insolvency proceedings. It is true that proceedings to avoid pre-insolvency transactions can be related to the process of collection of assets. That is, their general purpose and effect is to ensure a fair allocation of assets between all who are and were within some specified pre-insolvency period creditors. A dictum of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 19, quoted by Lord Collins in paras 15 and 52, is to that effect, though again uttered in a different context to the present.

186 However, the Board did not see these considerations as answering or eliminating all questions regarding the existence of jurisdiction or at least its exercise in *Cambridge Gas*. On the contrary, it went on to examine in close detail in paras 22–26 the limits of the assistance that a court could properly give. In rejecting the argument that the interference with the shareholding held in Cambridge Gas's name was beyond the Manx court's jurisdiction (para 26), the only reason it gave related to the nature of shares in an insolvent company. This meant, according to its advice, that Cambridge Gas had no interest of any value to protect and that registration of the shares in Navigator's creditors' name was no more than a mechanism for giving creditors access to Navigator's assets.

187 On this basis, the decision in *Cambridge Gas* is, as Professor Adrian Briggs noted in a penetrating case-note in *The British Year Book of International Law 2006*, pp 575–581, less remarkable (although, as Professor Briggs also notes, it perhaps still poses problems of reconciliation with the House's decision in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] AC 260). But, because the actual decision in *Cambridge Gas* was so narrowly focused on the nature of a shareholder's rights in an insolvent company and was not directly challenged, I prefer to leave open its correctness.

188 Whatever view may be taken as to the validity of the Board's reasoning in *Cambridge Gas*, it is clear that it does not cover or control the present appeal. The present cases are not concerned with shares, with situations in which shares are, or are treated by the court as, no more than a key to the insolvent company's assets or even with situations in which it is clear that those objecting to recognition and enforcement of the foreign courts' orders have no interests to protect. There are, on the contrary, substantial issues as to whether there were fraudulent preferences giving rise to in personam liability in large amounts. The persons allegedly benefitting by fraudulent preferences did not appear in the relevant foreign insolvency proceedings in which judgment was given against them. They were (leaving aside any question of submission) outside the international jurisdiction of the relevant foreign courts.

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A 189 Lord Clarke of Stone-cum-Ebony JSC takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having "jurisdiction to entertain" bankruptcy proceedings or, if one were (wrongly in my view) to treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings: see paras 193, 200 and 201 of Lord Clarke JSC's judgment. The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in *Dicey* (in para 31-064 in the 14th and 15th editions) as a "vexed and controversial" question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction. On Lord Clarke JSC's analysis, in such a case (of which *Rubin v Eurofinance* is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law.

D 190 In the light of the above, the Court of Appeal was, in my view, in error in seeing the solution to the present appeals as lying in the advice given by the Board in *Cambridge Gas*. Even on an assumption that the actual decision in *Cambridge Gas* can be supported, it cannot and should not be treated as supporting the respondents' case that fraudulent preference claims and avoidance orders in insolvency proceedings generally escape the common law rules requiring personal or in rem jurisdiction.

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LORD CLARKE OF STONE-CUM-EBONY JSC

191 I would like to pay tribute to the learning in Lord Collins of Mapesbury's comprehensive judgment. However, left to myself, I would dismiss the appeal in the *Rubin* case. Since I am in a minority of one, little is to be gained by my writing a long dissent. I will therefore try to explain my reasons shortly. In doing so, I adopt the terminology and abbreviations used by Lord Collins.

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192 I agree with Lord Collins and Lord Mance JSC that the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 is distinguishable. The facts there were quite different from those here. However, in so far as it is suggested that *Cambridge Gas* was wrongly decided, I do not agree. Moreover, I do not think that it would be appropriate so to hold because it was not submitted to be wrong in the course of the argument. To my mind the approach which should be adopted is presaged in the speech of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and in his judgment in *Cambridge Gas*.

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H 193 As I see it, the issue is simply whether an avoidance order made by a foreign bankruptcy court made in the course of the bankruptcy proceedings, whether personal or corporate, which the court has jurisdiction to entertain, is unenforceable if it can fairly be said to be an order made either in personam or in rem. I would answer that question in the negative. Put another way, the question is whether the English court has jurisdiction under

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English rules of private international law to enforce an avoidance order made in foreign bankruptcy proceedings in circumstances where, under those rules, the foreign court has jurisdiction to entertain the bankruptcy proceedings themselves. I would answer that question in the affirmative. It is not, as I understand it, suggested here that the US court did not have jurisdiction to entertain the bankruptcy proceedings themselves.

194 The relevant paragraphs of Lord Hoffmann's judgment in *Cambridge Gas* are in these terms (as quoted by Lord Collins at para 43 above):

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established . . .
>
> "15. . . . bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

195 The critical paragraph is para 15, which seems to me to make it clear that it is possible to have an order which is both in personam or in rem and an order of the kind referred to by Lord Hoffmann in para 14. Thus it may be incidentally necessary to establish substantive rights in the course of the bankruptcy proceedings as part of a collective proceeding to enforce rights. In such a case the order will be doing two things. It will be both establishing the right and enforcing it. This can be seen from the examples given in para 15. Proofs of debt may be rejected, which is a process which may involve determining, for example, the substantive rights of the creditor against the debtor. Or it may be necessary to determine whether or not a particular item of property belongs to the debtor and is available for distribution. As para 15 contemplates, such procedures may be tried either summarily within the bankruptcy proceedings or by ordinary action. In either such case Lord Hoffmann describes them as incidental procedures which are not central to the purpose of the bankruptcy proceedings. As I see it, in such a case, an avoidance order may be both an order in personam or in rem and an order in the bankruptcy proceedings.

196 I agree with Lord Collins at para 103 that it is not easy to see why the order of the US Bankruptcy Court in *Cambridge Gas* was not an order in

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rem. However, that does not to my mind show that *Cambridge Gas* was wrongly decided but demonstrates that it is possible to have an in rem order which is made as incidental to bankruptcy proceedings but which is enforceable at common law, provided that the bankruptcy court has jurisdiction in the bankruptcy.

197 The approach is explained by Lord Hoffmann in *HIH* [2008] 1 WLR 852, para 30 and in *Cambridge Gas* [2007] 1 AC 508, para 16, both of which are quoted by Lord Collins at para 19 above. In *HIH* he said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

In *Cambridge Gas* he said:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

198 At paras 94–98 above Lord Collins discusses the nature of avoidance proceedings. I entirely agree with his analysis. Avoidance provisions requiring the adjustment of prior transactions and the recovery of previous dispositions of property so as to constitute the estate available for distribution are necessary in order to maintain the principle of equality among creditors. At para 15 Lord Collins notes that Lord Hoffmann said at para 19 of *HIH* that "the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme". In short, avoidance proceedings, and therefore avoidance orders, are central to the bankruptcy proceedings. As Lord Collins puts it at para 99, avoidance proceedings are peculiarly the subject of insolvency law.

199 I accept that to permit the enforcement of an avoidance order in circumstances of this kind would be a development of the common law. However, it seems to me that it would be a principled development. It would in essence be an application of the principle identified by Lord Hoffmann in the passage quoted above from para 30 of *HIH* that the principle of modified universalism requires that English courts should, so far as is consistent with justice and United Kingdom public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

200 The position of the judgment debtor in such a case would be protected by the principle that the English court would only enforce a judgment in a case like this where to do so was consistent with justice and United Kingdom public policy. All would depend upon the facts of the

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particular case. In the case of *Rubin*, there would be no injustice in enforcing the judgment against the appellants.

201 Lord Mance JSC notes at para 189 that I do not define either the circumstances in which a foreign court should be recognised as having jurisdiction to entertain bankruptcy proceedings or the factors which would make it unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings. As I see it, these are matters which would be worked out on a case by case basis in (as Lord Hoffmann put it in *HIH* [2008] 1 WLR 852, para 30) co-operating with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. It would not be irrelevant that the debtor under the avoidance order had not submitted. All would depend upon the particular circumstances of the case, including the reasons why the debtor had not submitted.

202 In essence, on the critical question, I prefer the reasoning of the Court of Appeal, which is contained in the judgment of Ward LJ [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61–62, 64, with whom Wilson LJ and Henderson J agreed. Lord Collins has concisely summarised their reasoning in paras 88–90, substantially as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not present when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, i e part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active

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A assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61–62, 64.

203 That seems to me to be a correct summary of the views of the Court of Appeal. I agree with those views subject to this comment on point (c). I am not B sure that in *Cambridge Gas* the Privy Council decided that the bankruptcy order with which it was concerned was neither in personam nor in rem. It held that the purpose of the order was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. As discussed above, it may well have appreciated that it was also an order in rem. However that may be, I agree with Lord Collins at C para 90 that, in short, the Court of Appeal accepted that the judgment sought to be enforced in the instant cases was an in personam judgment, but decided that the *Dicey* rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules. I agree with the reasoning of the Court of Appeal. Put another way, the *Dicey* rule should in my opinion be modified to include a fifth case in which a foreign court has jurisdiction to give D a judgment in personam capable of enforcement or recognition as against the person against whom it is given. That fifth case would be if the judgment was given in avoidance proceedings as part of foreign bankruptcy proceedings which the foreign court had jurisdiction to entertain.

204 I recognise that there are other ways of achieving such a result, as for example by an equivalent provision to the EC Insolvency Regulation: per E Lord Collins at paras 99–101. I also recognise that it would be possible to adopt a more radical approach not limited to avoidance proceedings. However, so limited, I respectfully disagree with the view expressed by Lord Collins at para 128 that this development would not be an incremental development of existing principles but a radical departure from substantially settled law. For the reasons given in para 199, it would in essence be an application of the principle of modified universalism. It seems to me that in F these days of global commerce, the step taken by the Court of Appeal was but a small step forward. Judgment debtors are protected by the principle that no order would be made if it were contrary to justice or United Kingdom public policy. Moreover, on the facts here, I can see no basis upon which the order made by the Court of Appeal would be either unjust or contrary to public policy. Finally, I do not think that that conclusion is undermined by any absence of reciprocity.

G **205** For these reasons, I would dismiss the appeal in the *Rubin* case on the common law point. On all other issues I agree with the judgment of Lord Collins.

Appeal in first case allowed.
Appeal in second case dismissed.

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COLIN BERESFORD, Barrister

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Exhibit 24

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Privy Council

Singularis Holdings Ltd *v* PricewaterhouseCoopers

[2014] UKPC 36

[on appeal from the Court of Appeal for Bermuda]

2014 April 29, 30; Nov 10

Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption JJSC, Lord Collins of Mapesbury

Bermuda — Insolvency — Jurisdiction — Company wound up in Cayman Islands — Liquidators seeking order in Bermuda requiring auditors to produce information relating to company's affairs — Judge purporting to exercise common law power to order production of information which could have been ordered under statute in domestic insolvency — Whether power at common law to assist foreign court of insolvency jurisdiction by making order — Whether order appropriate in circumstances where foreign court could not make equivalent order — Whether court able to exercise powers analogous to statutory powers which were exercisable in domestic insolvency but did not apply to foreign insolvency — Companies Act 1981 (No 59 of 1981), s 195

A Cayman Islands company was wound up in the Cayman Islands and liquidators were appointed. In order to trace the company's assets, the liquidators wished to obtain information relating to the company's affairs from the company's auditors, a Bermuda registered partnership. They obtained from the Cayman Islands court an order requiring the auditors to transfer or deliver up certain documents but, under Cayman Islands law, that order only extended to material belonging to the company. In order to obtain material belonging to the auditors themselves, the liquidators made an application in Bermuda for an order requiring the auditors to produce all documents in their possession relating to the affairs of the company. Under section 195 of the Bermudan Companies Act 1981[1], the Supreme Court of Bermuda had power to make such an order but only in relation to a company which that court had ordered to be wound up. However, the Chief Justice, sitting in the Supreme Court of Bermuda, exercised what he termed a common law power to order the auditors to produce information which they could have been ordered to produce under section 195 if the company had been wound up in Bermuda. On the auditors' appeal, the Court of Appeal for Bermuda doubted whether there was jurisdiction to make such an order in circumstances where section 195 did not apply but set aside the order on the basis that, in any event, it was not an appropriate exercise of discretion because it was an order made in support of a Cayman Islands liquidation which could not have been made by the Cayman Islands court.

On the liquidators' appeal—

Held, advising that the appeal be dismissed, (1) (Lord Neuberger of Abbotsbury PSC and Lord Mance JSC dissenting) that there was a power at common law to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers by ordering the production of information in oral or documentary form which was necessary for the administration of a foreign winding up, but the power was not available to enable them to do something which they could not do under the law by which they had been appointed; and that, although the fact that express provision was made in Bermuda for the powers exercisable on the winding up of companies to which the Companies Act 1981 applied did not exclude the use of

[1] Companies Act 1981, s 195: see post, para 4.

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common law powers in relation to other companies which lay outside the scope of the statute altogether, it was not a proper exercise of the power of assistance for the Bermudan court to make the order sought by the liquidators since the material which they sought in Bermuda was not obtainable under the domestic law of the court which had appointed them (post, paras 19, 25, 28–29, 31, 33, 109–115).

Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133, HL(E), *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, HL(E) and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, SC(E) applied.

(2) That the common law power of the court to recognise and grant assistance to foreign insolvency proceedings was primarily exercised through the existing powers of the court; that, although those powers could be extended or developed through the traditional judicial law-making techniques of the common law, the judiciary could not, by analogy, extend the scope of insolvency legislation to cases where it did not apply, and a domestic court did not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency and could not acquire jurisdiction by virtue of any such power; and that, accordingly, the Bermudan court could not, by analogy, apply the statutory powers under the Companies Act 1981 as if the foreign insolvency were a domestic insolvency (post, paras 18, 32, 36, 38, 64, 82–83, 94, 108, 109, 122, 134, 149, 162).

Dicta of Lord Walker of Gestingthorpe in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 35, PC applied.

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, PC and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61 not followed.

Quaere. Whether information which the auditors acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property (post, para 30).

Decision of the Court of Appeal for Bermuda [2013] CA (Bda) 7 Civ affirmed.

The following cases are referred to in the judgments:

African Farms, In re [1906] TS 373
Al Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC
Arab Monetary Fund v Hashim (No 5) [1992] 2 All ER 911
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)
Banco Nacional de Cuba v Cosmos Trading Corpn [2000] 1 BCLC 813, CA
Bank of Credit and Commerce International SA (No 10), In re [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796
Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112
Bent v Young (1838) 9 Sim 180
CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589
Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829; [2006] 2 All ER (Comm) 695, PC
Colonial Government v Tatham (1902) 23 Natal LR 153
Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA
Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2006] UKHL 49; [2007] 1 AC 558; [2006] 3 WLR 781; [2007] 1 All ER 449, HL(E)
Dreyfus v Peruvian Guano Co (1889) 41 Ch D 151
England v Smith [2001] Ch 419; [2000] 2 WLR 1141, CA

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A *Gurr v Zambia Airways Corpn Ltd* [1998] ZASCA 16; [1998] 2 All SA 479 (A)
HIH Casualty and General Insurance Ltd, In re [2008] UKHL 21; [2008] 1 WLR 852; [2008] Bus LR 905; [2008] 3 All ER 869, HL(E)
Impex Services Worldwide Ltd, In re [2004] BPIR 564
Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch 73; [1971] 3 WLR 853; [1971] 3 All ER 1029, CA
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER
B 890
Jones v Kaney [2011] UKSC 13; [2011] 2 AC 398; [2011] 2 WLR 823; [2011] 2 All ER 671, SC(E)
Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL(E)
McKerr, In re [2004] UKHL 12; [2004] 1 WLR 807; [2004] 2 All ER 409, HL(NI)
Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43;
C [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2010] 1 All ER (Comm) 220; [2009] 2 Lloyd's Rep 473, HL(E)
Matheson Bros Ltd, In re (1884) 27 Ch D 225
Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512
Moolman v Builders & Developers (Pty) Ltd [1989] ZASCA 171; [1990] 2 All SA 77 (A)
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
D *Orr v Diaper* (1876) 4 Ch D 92; 25 WR 23
P & O Nedlloyd BV v Arab Metals Co (No 2) (The UB Tiger) [2006] EWCA Civ 1717; [2007] 1 WLR 2288; [2007] 2 All ER (Comm) 401; [2007] 2 Lloyd's Rep 231, CA
Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWHC 1912 (Ch); [2009] 2 BCLC 400; *(Revenue and Customs Comrs intervening)* [2011]
E UKSC 38; [2012] 1 AC 383; [2011] 3 WLR 521; [2011] Bus LR 1266; [2012] 1 All ER 505, SC(E)
Phoenix Kapitaldienst GmbH, In re [2012] EWHC 62 (Ch); [2013] Ch 61; [2012] 3 WLR 681; [2012] 2 All ER 1217
Picard v Primeo Fund 2013 (1) CILR 164, Grand Ct (Jones J); 2014 (1) CILR 379, CA (Cayman Islands)
Prest v Prest [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1; [2013] 4 All ER 673, SC(E)
F *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] UKPC 35; [2014] 1 WLR 4482, PC
R v Bourne [1939] 1 KB 687; [1938] 3 All ER 615, CCA
R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2010] UKSC 54; [2011] 2 AC 15; [2011] 2 WLR 1; [2011] PTSR 185; [2011] 1 All ER 729, SC(E)
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)
G [2008] EWHC 2048 (Admin); [2009] 1 WLR 2579, DC
R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC 38; [2015] AC 657; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)
R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2011] EWCA Civ 1587, CA
R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 1737 (Admin); [2013] 1 All ER 161, DC; [2013] EWCA Civ 118; [2014] QB 112;
H [2013] 3 WLR 439; [2013] 3 All ER 95, CA
Rubin v Eurofinance SA (Picard intervening) [2012] UKSC 46; [2013] 1 AC 236; [2012] 3 WLR 1019; [2013] Bus LR 1; [2013] 1 All ER 521; [2013] 1 All ER (Comm) 513; [2012] 2 Lloyd's Rep 615, SC(E)
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980, CA

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Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd [1986] RPC 394, CA

Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2012] UKSC 19; [2012] 2 AC 337; [2012] 2 WLR 1149; [2012] Bus LR 1033; [2012] 3 All ER 909, SC(E)

Tucker (RC) (A Bankrupt), In re, Ex p Tucker (KR) [1990] Ch 148; [1988] 2 WLR 748; [1988] 1 All ER 603, CA

Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme" [1997] 2 NZLR 110

Upmann v Elkan (1871) LR 12 Eq 140; LR 7 Ch App 130

Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] AC 1189; [2014] 2 WLR 355; [2014] 2 All ER 489, SC(E)

The following additional case was cited in argument:

Atlas Bulk Shipping A/S, In re; Larsen v Navios International Inc [2011] EWHC 878 (Ch); [2012] Bus LR 1124

APPEAL from Court of Appeal for Bermuda

On 4 March 2013 Kawaley CJ in the Supreme Court of Bermuda made an order (i) recognising the status of the joint official liquidators of Singularis Holdings Ltd, a Cayman Islands company ordered by the Grand Court of the Cayman Islands to be wound up, and (ii) requiring the company's auditors, PricewaterhouseCoopers, a Bermuda registered partnership, to produce all documents in their possession relating to their affairs.

The auditors appealed against the production order. On 18 November 2013 the Court of Appeal for Bermuda (Zacca P, Auld JA and Bell AJA) [2013] CA (Bda) 7 Civ allowed the appeal against the production order.

The liquidators appealed pursuant to permission granted on 21 March 2014 by the Court of Appeal for Bermuda (Zacca P, Evans and Scott Baker JJA). The issues for the Privy Council, as set out in the parties' statement of agreed facts and issues, were (1) whether the court had power at common law to make an order by way of judicial assistance under or in terms analogous to section 195 of the Bermudan Companies Act 1981 in respect of a company in liquidation in the Cayman Islands; (2), if so, whether assistance should be granted or refused, as a matter of discretion; and (3) in particular, whether the liquidators were entitled to relief which would not be available to them in the Cayman Islands under Cayman Islands law.

The facts are stated in the judgment of Lord Sumption JSC.

Gabriel Moss QC, *Felicity Toube QC*, *Stephen Robins* and *Rod Attride-Stirling* (of the Bermudan Bar) (instructed by *Blake Morgan LLP*) for the liquidators.

The Supreme Court of Bermuda's common law power to grant judicial assistance in cross-border insolvencies supplies the jurisdiction to require the auditors to disclose documents relating to the company. The fact that the liquidators cannot obtain the relevant documents from the auditors in the Cayman Islands is no basis for refusing to provide such assistance as a matter of discretion. It is necessary to distinguish between (1) "recognition" and "judicial assistance" and (2) "recognition of insolvency proceedings" and "recognition of judgments". In its strict narrow sense, "recognition" refers to mandatory rules by which one jurisdiction gives direct effect in its

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own jurisdiction to a legal act in another. Thus if a winding up order is made in the Cayman Islands as the place of the company's registration, Bermuda in accordance with its common law conflicts rules gives effect to that to the extent of recognising the Cayman Islands liquidators as the sole authorised agents of the company under Cayman Islands law, able to act on behalf of the company in Bermuda: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 2, rule 179. Bermudan conflicts rules do not however recognise mandatory "effects" of the Cayman Islands winding up proceedings, such as the statutory stay: see *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117. Beyond mandatory common law recognition rules, the case law has developed discretionary judicial assistance: see *Dicey, Morris & Collins*, 15th ed, paras 30-107, 30-108. Common law judicial assistance has two key differences from recognition: (1) recognition is mandatory, whereas judicial assistance is discretionary; (2) recognition gives effect to foreign law, whereas judicial assistance applies domestic law: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. It is also important to distinguish between recognising foreign insolvency proceedings and recognising judgments arising from foreign insolvency proceedings. Common law mandatory conflicts rules make entirely different provision for each. Thus a winding up proceeding in the Cayman Islands for a company registered there must be recognised in Bermuda to the extent of the appointment and authority of the liquidators. However, a judgment in personam is only recognised if certain criteria such as submission to jurisdiction are met: see *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. Where a foreign winding up proceeding is recognised, in the sense that the authority of the liquidators is accepted, the recognising court is not obliged to offer any assistance. However, absent good reason not to assist, such as the need to protect local creditors, such assistance should be given: see *Rubin v Eurofinance SA*, para 29.

Outside the European Union and in countries where the UNCITRAL Model Law has not been enacted, judicial assistance in cross-border insolvencies may be classed as of two different types. Model 1 involves the provision of assistance through the commencement of an ancillary insolvency proceeding such as liquidation. The doctrine of ancillary liquidations is one by which the court has a common law power to assist a foreign liquidator by granting relief governed by the local law alone, even if that local law gives rise to the right to obtain relief of a type or character not available in the primary liquidation; conversely, there may be relief available under the law of the main proceedings which is not available under the law of the ancillary winding up: see *In re Matheson Bros Ltd* (1884) 27 Ch D 225 and *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213. Model 2 involves the provision of assistance without the commencement of an ancillary liquidation. Relief of this type is available where the relief sought is the examination of individuals and the production of documents: see *Rubin v Eurofinance SA* [2013] 1 AC 236, paras 29, 31, 33. Two alternative conceptual foundations for the model 2 power emerge from the authorities. Route A involves a common law hypothesis by which the court may grant assistance as if the foreign company were being wound up locally—on that basis, the foreign company is treated as if it were a company to which the local winding up legislation applies, even if it could

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not in fact fall within the definitions required to make it such a company: see *In re African Farms* [1906] TS 373; *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 (A) and *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 22. Route B involves the provision of assistance through the exercise of the assisting court's general, non-statutory powers, including inherent equitable and common law powers, or non-insolvency statutory powers, without any reliance on any particular provision of the local winding up legislation. On either basis, in the present case, the liquidators were able to obtain the assistance of the Bermudan Supreme Court, and it is right for them to have that assistance.

The most authoritative statement of the common law assumption in route A continues to be the *Cambridge Gas* case, para 22. The judgment has two distinct limbs. Firstly, the ordinary rules of private international law relating to the enforcement of foreign judgments do not apply to insolvency—this limb of the judgment was disapproved in *Rubin v Eurofinance SA* [2013] 1 AC 236 but it is of no relevance to the present appeal, which is not concerned with recognition of a judgment. Secondly, route A means that a domestic court can provide assistance by doing whatever it could have done in the case of a domestic insolvency. This second limb has been followed widely: see *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, para 62; *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] 2 BCLC 400, para 48; *In re Atlas Bulk Shipping A/S* [2012] Bus LR 1124, paras 30–32 and *Picard v Primeo Fund* 2013 (1) CILR 164, para 41. The development of this common law jurisdiction is a legitimate and typical example of the necessary evolution of the common law to meet the changing needs of the times: see *Jones v Kaney* [2011] 2 AC 398, para 112. The ability of the common law to adapt itself to new circumstances and changing needs is one of its strengths. Such changes are not necessarily incremental but may be radical: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 377–379. The role of the common law is to cover those areas which are not governed by statute. Those considerations are particularly relevant in the field of cross-border insolvency. Commercial necessity in the modern globalised world requires judicial assistance to be given to foreign insolvency proceedings, particularly where large sums are involved and assets or documents are missing: see *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827, and *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110, 126. It is also essential for offshore jurisdictions to be able to ensure that they can apply their laws and procedures to make sure that the use of their jurisdiction in cross-border business does not facilitate fraud or the hiding of assets or documents. Such policies have led to the development of the principle of modified universalism: see the *Cambridge Gas* case [2007] 1 AC 508; *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and *Rubin v Eurofinance SA* [2013] 1 AC 236. Where there is a local proceeding, such as ancillary liquidation, the court having control over that local proceeding is required to assist the main proceeding. Where there is no local proceeding, the argument for judicial assistance is even more compelling, since there is no alternative insolvency proceeding. Whatever needs to be done in the local jurisdiction can only be done by way of judicial assistance. Common law judicial assistance does not require reciprocity. Local creditors and policies

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A are protected by the fact that the giving of judicial assistance is discretionary. The provision of such assistance at common law is not inconsistent with *Al Sabah v Grupo Torras SA* [2005] 2 AC 333. The observations, at para 35, in relation to the position at common law are obiter. Further and in any event, the views expressed are not persuasive, since the point was not fully developed in argument. Moreover, para 35 was superseded by the *Cambridge Gas* case [2007] 1 AC 508, in which the Privy Council set out B detailed views on the question of common law assistance having heard full argument. There is nothing in the local legislation in the present case to forbid the court from granting assistance in this way in cross-border insolvencies. Accordingly, as a matter of jurisdiction, route A enables the court to make an order under section 195 of the Bermudan Companies Act 1981 on the basis of the common law hypothesis identified in the *Cambridge* C *Gas* case [2007] 1 AC 508, para 22, as if the company were in ancillary liquidation in Bermuda.

Alternatively, route B involves the provision of assistance through the exercise of the assisting court's general and non-statutory powers (including inherent and common law powers), without any reliance on any specific provisions of the local winding up legislation: see *In re Impex Services Worldwide Ltd* [2004] BPIR 564 and *Perpetual Trustee Co Ltd v BNY* D *Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2012] 1 AC 383. Those powers are present in the instant case. There is an inherent and/or common law and/or equitable power to compel discovery or a power in a statutory provision which is not limited in application to local liquidations. The inherent powers of a court of equity are vested in the Supreme Court of Bermuda: see section 12 of the Supreme Court Act 1905. E As a consequence, the equitable jurisdiction to compel discovery in aid of proceedings in some other court remains exercisable by the Supreme Court of Bermuda. A non-statutory power to compel discovery can be exercised by way of judicial assistance in a cross-border insolvency case: see *In re Impex Services Worldwide Ltd* [2004] BPIR 564 and *Rubin v Eurofinance SA* [2013] 1 AC 236. The power to order discovery under Ord 24, r 12 of the F Bermudan Rules of the Supreme Court 1985 applies only to cases falling within that rule, outside its scope the court's general equitable power to compel discovery continues to apply. Accordingly, route B enables the court to make an order under Ord 24, r 12, if it is applicable, or, if it is not, under the court's general equitable jurisdiction to compel discovery, which is preserved by section 12 of the Supreme Court Act 1905. [Reference was made to *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151 and *In re Atlas* G *Bulk Shipping A/S; Larsen v Navios International Inc* [2012] Bus LR 1124.]

As a matter of discretion, such assistance should be provided to the liquidators. The documents sought are in the possession of the auditors, are not available from any other source and will be crucial to the recovery of assets for the benefit of the company's creditors and to the ascertainment of the company's liabilities. The fact that the Cayman Islands court could not itself make an order for production of the documents provides no basis for H refusing assistance. First, the objection does not apply to assistance through the commencement of an ancillary liquidation in which local statutory provisions are applied without any such restriction and there is no principled reason why it should apply to assistance without an ancillary liquidation, which will apply only domestic law. Secondly, to withhold assistance on

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that basis would largely undermine the concept of assistance. If the Grand Court of the Cayman Islands were able to make an effective order in those terms, the liquidators would not require assistance from the Supreme Court of Bermuda. The requested court providing common law judicial assistance can only apply its own law. That law will invariably differ in some respects from the courts having jurisdiction over the applicant who seeks judicial assistance. It cannot be unfair or unreasonable vis-à-vis the auditors to apply the law of its own country of incorporation in requiring disclosure. Accordingly, the court has jurisdiction at common law to assist the liquidators by requiring the auditors to disclose relevant documents and there is no reason for declining to assist as a matter of discretion.

David Chivers QC, *Paul Smith* and *Scott Pearman* (of the Bermudan and English Bars) (instructed by *Herbert Smith Freehills LLP*) for the auditors.

The Bermudan court has no jurisdiction at common law to grant assistance to a foreign liquidator by ordering the disclosure of documents or the examination of witnesses. Developments in the common law of Bermuda may be modelled upon equivalent developments in England or in other common law jurisdictions but it is essential to understand why any particular development is necessarily to be incorporated as part of the common law of Bermuda and special care must be taken where the statutory landscape is different. The common law principle identified in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 was that there had developed a practice whereby the English court permitted an English liquidator to transmit to a foreign liquidator funds to enable a pari passu distribution to worldwide creditors to be made. Subject to that principle, an English liquidator was bound by English law, including English insolvency law. Indeed, an English ancillary liquidation might, due to the overriding requirement of English rules of set-off, prevent rather than promote the worldwide parri passu distribution of assets. Where there is an English liquidation of a foreign company there is no additional "assistance" given to a foreign liquidator. Any remedies sought in the winding up will have to be through the actions of the English liquidator. Further, the common law consequence of the English winding up may either assist or not assist the foreign liquidator depending upon the provisions under consideration. The "long arm" reach of the English winding up jurisdiction has meant that English courts have considered assistance from the perspective of an English liquidation. The only common law intervention was to suspend the operation of the English statutory scheme in favour of the foreign liquidation by "disapplying" the statutory scheme and directing the remission of assets: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 9. Beyond that, English law has not developed a general common law power of assistance. The analysis of common law powers in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 was undertaken in the context of an English jurisprudence based upon the disapplication of English statutory law in the context of a "long arm" jurisdiction to wind up. In countries which have not adopted that model of winding up the question of assistance is very different. The issue is the source—indeed the very existence—of a power which a foreign liquidator seeks to be exercised by a local court. That cannot be resolved by reference

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to the existence of a very different English common law power in the context of a very different English juridical position, but if anything can be taken from the English common law position it is that the common law is recognising a single system of distribution under the principles of universalism.

The principles of universalism, modified or not, provide no juridical basis to credit the Bermudan court with the power to make an order in terms of section 195 of the Companies Act 1981 in respect of a foreign entity not the subject of its winding up jurisdiction. The principle is concerned with the collection and distribution of assets: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 6 and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, paras 11–20. However, it says nothing, and can say nothing, about the powers of different local courts around the world to make collateral orders as regards how assets are to be collected, let alone what coercive powers of the local court may be exercised in favour of the foreign liquidator. The principle can provide no justification for recognising common law powers to provide assistance to foreign liquidators beyond those which are necessary to give effect to the principle, viz, the powers to ensure that there is a unitary system for the collection and distribution of assets. Neither *In re African Farms* [1906] TS 373 nor the principle of modified universalism leads to the conclusion that the assisting court has common law powers to treat a foreign liquidator as if he were a domestic liquidator of a domestic company. *In re African Farms* was concerned with enforcing foreign rights as a matter of comity. It was no part of its ratio that the court had common law powers beyond those involving the collection and distribution of assets. There is no principle brought into play by *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 (A) which requires local powers to be given to a foreign liquidator where those powers do not exist in the liquidator's home jurisdiction. The case is not authority for the proposition that assistance at common law may include making orders for examination which could not be ordered in a foreign jurisdiction. *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 concerns the enforcement of a foreign judgment. The question of what would happen if the foreign liquidation involved a company which could not be wound up in the domestic court was not addressed. It does not stand as authority for the proposition that a domestic court has a common law power to make orders in favour of a foreign liquidator simply because had the company been a domestic company such an order could have been made in favour of a domestic liquidator. It did not directly address the application of a statutory provision at all. *Al Sabah v Grupo Torras SA* [2005] 2 AC 333 was cited in the *Cambridge Gas* case [2007] 1 AC 508 but the analysis at para 35 of the *Al Sabah* case of the limits on the power of the courts to give assistance was not questioned. The Board should follow its own decision in the *Al Sabah* case since para 35 is directly on point and should be determinative of the appeal. *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61 was wrongly decided and was in any case prior to the decision in *Rubin v Eurofinance SA* [2013] 1 AC 236. Accordingly, the court has no jurisdiction at common law to grant assistance to a foreign liquidator by ordering the disclosure of documents or the examination of witnesses. The court has no inherent power or equitable power or power under its rules of court to give such

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disclosure. There are no grounds for extending the common law to give such powers to a foreign liquidator. The application of Cayman law in Bermuda was a universalist principle, but the liquidators' claim to the application of a law which went beyond Cayman law was not. Principles of universalism do not require or justify such an extension and any such extension and the circumstances in which such powers may be exercised are matters to be considered by the legislature of Bermuda. [Reference was made to *Bent v Young* (1838) 9 Sim 180.]

Moss QC replied

The Board took time for consideration.

10 November 2014. The following judgments were handed down.

LORD SUMPTION JSC

Introduction

1 This appeal is closely connected with the concurrent appeal in *PricewaterhouseCoopers v Saad Investments Co Ltd* ("SICL") [2014] 1 WLR 4482. The two appeals concern related companies incorporated in the Cayman Islands, both of which have been ordered by the Grand Court of the Cayman Islands to be wound up. Hugh Dickson, Stephen Akers and Mark Byers of Grant Thornton Special Services (Cayman) Ltd were appointed by that court as the joint official liquidators of both companies. The background to both appeals is set out in the advice of the Board on that appeal, delivered by Lord Neuberger of Abbotsbury PSC, and it need not be repeated here.

2 The common feature of both appeals is that they concern attempts on the part of the liquidators to obtain from the companies' former auditors PricewaterhouseCoopers ("PwC"), information, whether in oral or documentary form, relating to the companies' affairs. The evidence is that the liquidators have been unable to trace certain assets which they consider must have existed, and that relevant information about those assets is likely to be in the possession of PwC. This has not been accepted in terms, but neither has it been disputed. The Board will proceed on the footing that it is correct.

3 The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company." The Grand Court has made such an order against PwC, and the Board was told that PwC has complied with it. Consistently with the provision conferring the power, it extends only to material belonging to the companies.

4 Both the SICL and the Singularis appeals concern attempts by the liquidators to obtain material belonging to the auditors themselves, principally their working papers, by invoking the corresponding powers conferred on the Supreme Court of Bermuda. They are in wider terms, which are not limited to information belonging to the company. Section 195 of the Companies Act 1981 of Bermuda provides:

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A "*Power to summon persons suspected of having property of company etc*

"(1) The court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the
B company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.

"(2) The court may examine such person on oath, concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

"(3) The court may require such person to produce any books and
C papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the court shall have jurisdiction in the winding up to determine all questions relating to that lien."

5 The power of the Bermuda court under section 195 is exercisable only in respect of a company which that court has ordered to be wound up. It was
D therefore dependent in this case on the existence of a power to wind up a company incorporated outside Bermuda. In the case of SICL the Supreme Court of Bermuda made a winding up order, and then made an order for production and oral examination against PwC in the winding up. However, in the SICL appeal the Board has advised Her Majesty [2014] 1 WLR 4482 that the winding up order must be stayed because (with immaterial
E exceptions) the court had no jurisdiction to wind up a company incorporated outside Bermuda. The consequence is that all proceedings in the winding up of SICL have ceased to be effective, including the order made under section 195.

6 In the case of Singularis a different procedure was adopted. No winding up order was ever sought or made in Bermuda. Instead, Kawaley CJ made an order recognising in Bermuda the status of the liquidators by virtue
F of their appointment by the Grand Court of the Cayman Islands, and exercising what he termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC and Paul Suddaby (an officer of PwC) to produce the same documents which they could have been ordered to produce under section 195. PwC were also ordered to have a partner, employee or agent acceptable to the
G liquidators available to answer oral or written interrogatories. The liquidators were given leave to serve the proceedings on Mr Suddaby and any other "partners or officers" of PwC out of the jurisdiction.

7 The Court of Appeal (Bell AJA, Zacca P and Auld JA) [2013] CA (Bda) 7 Civ set aside the Chief Justice's order. Bell AJA and Zacca P doubted whether there was jurisdiction to make a section 195 order at common law in circumstances where section 195 did not apply. But the ground of their
H decision was that it was not in any event an appropriate exercise of discretion, because the court should not make an order in support of a Cayman liquidation which could not have been made by the Cayman court itself. They regarded the liquidators' claim as "unjustifiable forum shopping". Auld JA agreed with this, but went further. In his view, there

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was no jurisdiction because the Bermuda court could not disregard the limitation of section 195 of the Bermuda Act to cases where a winding up order could be and had been made.

8 Accordingly two issues arise on the present appeal. The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

A common law power?

9 The common law of Bermuda is the same, in every relevant respect, as that of England. The difficulty is that in England the common law concerning cross-border insolvencies has developed to fill the interstices in what is essentially a statutory framework, and the statutory framework differs in significant respects in Bermuda. The main difference is that the English courts have jurisdiction to wind up unregistered companies, including those incorporated outside the United Kingdom. This jurisdiction has existed since it was first conferred by section 199 of the Companies Act 1862 (25 & 26 Vict c 89). It is currently conferred by section 221 of the Insolvency Act 1986. The Bermuda courts have no equivalent power.

10 The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up order was to create a statutory trust of the worldwide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C & K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813, 819–820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446–447, "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation." The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in the English assets and to dealing with them in such a way as to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was

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recognised is the decision of Kay J in *In re Matheson Bros Ltd* (1884) 27 Ch D 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in the winding up of an English company. To that extent only, the English courts were exercising a common law power.

11 In Bermuda, the court has no jurisdiction to conduct an ancillary liquidation, except in the (irrelevant) case of a company to which Part XIII of the Companies Act is expressly applied. The question what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First, the proceedings are a "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established", to use the expression of Lord Hoffmann in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 14. Inherent in this function of a winding up is the statutory trust of the company's assets, to which I have already referred, and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction. These powers are less extensive in Bermuda than they are in England, but include the avoidance of dispositions after the commencement of the winding up and fraudulent preferences. Fourth, it brings into play procedural powers, generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities. In Bermuda these include the power under section 195 of the Companies Act to order the production of information. In England, the corresponding statutory powers would all be exercisable in an ancillary liquidation.

12 The main purpose of the winding up order in England is usually to enable the court to take control of the English assets of the company, so as to remove them from the free-for-all which would have resulted if creditors were entitled to gain priority by levying execution on them. But, even without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 2, rules 216 and 217. The more difficult question in such cases was whether the court, in the absence of winding up proceedings, could impose a

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stay on creditors trying to levy execution against the English assets equivalent to the automatic stay that would by statute have followed the initiation of winding up proceedings.

13 That question appears to have been first addressed in the common law world in the important decision of the full court of the Supreme Court of the Transvaal in *In re African Farms Ltd* [1906] TS 373. African Farms Ltd was an English company with substantial assets in the Transvaal. It was in liquidation in England. There was no power to wind it up in the Transvaal because the number of members had fallen below the minimum required to qualify it as a "company" for the purpose of the statutory power of winding up. The leading judgment was given by the great South African judge Sir James Rose Innes, then Chief Justice of the Transvaal. Having recognised the absence of a statutory power to wind up the company, he continued, at p 377:

> "It only remains to consider whether we are justified in recognising the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgment of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws. If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims."

Innes CJ then considered (p 378) the objection that "the grant of assistance to the English liquidator, in a case where the court could not wind up itself, may possibly be open to the objection that we are doing by indirect means what the law has given us no power to do directly." He rejected the submission because its acceptance would have prevented the court from recognising the power of the liquidator to dispose of property or rights of the company under the law of its incorporation, contrary to ordinary principles of private international law: see pp 378–380. He went on, at pp 381–382:

> "The true test appears to me to be not whether we have the power to order a similar liquidation here, but whether our recognising the foreign liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable . . . So far from such circumstances being present here, the case before us is one in which every consideration of equity and convenience demands that the position of the English liquidator should be recognised. Unless that can be done then, as

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already pointed out, the Transvaal assets are at the mercy of the first creditor who can manage to secure a writ of execution."

In the result, the court recognised the liquidator by virtue of his appointment in England as being entitled to the sole administration of the company's assets in the Transvaal, on terms that the liquidator:

> "recognise the right of all creditors in this colony to prove their claims against the company before the master; and that the admission or rejection of such claims, the liability of the company therefor to the extent of its assets in the Transvaal, and all questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony, as if the company had been placed in liquidation here."

The proved claims of local creditors were ordered to be satisfied rateably from the local assets and the balance made available for distribution to other creditors. Execution of the local judgment creditor's judgment was stayed to enable this to be done.

14 It is right to point out (i) that the recognition of the English liquidator's power of disposition over the company's assets in the Transvaal was no more than what he was entitled to as a matter of private international law; (ii) that the conduct of what amounted to an ancillary liquidation in the Transvaal was expressed as a discretionary condition of the court's recognition order; and (iii) that the Transvaal court no doubt had the same inherent power as the English court to stay enforcement of its own judgments. But the decision is nevertheless a significant one, because in substance what the court was doing was to direct the assets of the company to be dealt with as if it was in liquidation in the Transvaal, when there was no power to conduct a liquidation there. It also deprived an existing judgment creditor of what was on the face of it an accrued and absolute right under his judgment and exposed him to having his debt written down to a figure consistent with the rateable distribution of assets in the Transvaal. The court therefore unquestionably modified the rights of the company and its creditors. Moreover, the sole basis on which it did so was the inherent power of the court to assist the orderly liquidation of the company's affairs pursuant to a foreign winding up order. As Innes CJ put it, at p 377, "recognition . . . carries with it the active assistance of the court." Or, in the words of the concurring judgment of Smith J (at p 390), the basis of the order was the recognition and enforcement of rights and the recognition of a status acquired under a foreign law, unless they conflict with the law or policy of the jurisdiction in which they were sought to be enforced.

15 The flexibility and breadth of the English court's powers in an ancillary liquidation, together in more recent times with the incorporation into English law of a number of international schemes of judicial co-operation, have had the effect of arresting the development of the common law in England in this area. However, the issue returned in 2006 with the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. In this case the Privy Council, affirming the decision of the Staff of Government Division in the Isle of Man, held that effect should be given in the Isle of Man to the judicial reorganisation by a Federal Bankruptcy Court in the United States of a group of Liberian ship-owning

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companies. The effect of the reorganisation was to vest the shares of an Isle of Man company in the committee of creditors, in circumstances where the US court had neither jurisdiction in rem over the shares (because they were rights situated outside its territorial jurisdiction) nor jurisdiction in personam over the shareholders (because they were not present in the US and took no part in the US proceedings). The principal shareholder, Cambridge Gas, objected on the ground that it was not bound by the decision of the US court. The advice of the Board was given by Lord Hoffmann. He discerned in the English case law a consistent "aspiration" to produce a result equivalent to that which would obtain if there were a single universal bankruptcy jurisdiction. He regarded this "principle of universality" as having been the foundation of the decision in *In re African Farms* [1906] TS 373, and considered that it justified the Isle of Man courts in giving effect to the US reorganisation plan [2007] 1 AC 508, paras 16–21. In his view, and that of the Board, the absence of jurisdiction in rem or in personam in the US court was irrelevant, because the jurisdiction was founded not on any obligation on the part of Cambridge Gas to comply with the judgments of the Federal Bankruptcy Court but on the duty of the Isle of Man court to assist a foreign principal liquidation so as to achieve a universal distribution of the assets on, as far as possible, a common basis. At paras 13–14, he said:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds on which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

The essence of the decision and the reasoning which supported it is to be found, at paras 20–22:

> "20. . . . But the underlying principle of universality . . . is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case *In re African Farms Ltd* [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, 'recognition which carries with it the active assistance of the court' . . .
>
> "21. Their Lordships consider that these principles are sufficient to confer on the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan . . .
>
> "22. . . . At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing

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A whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

The provisions of the domestic system of insolvency of the Isle of Man, B which were relevant in *Cambridge Gas*, were the statutory provisions for sanctioning a scheme of arrangement in the course of a winding up. Because the Isle of Man courts would have had power to wind up Navigator and sanction a scheme of arrangement on terms substantially the same as those of the judicial reorganisation approved by the Federal Bankruptcy Court, it could give effect to the reorganisation plan at common law. "Why C therefore," asked Lord Hoffmann (para 25), "should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man?" *Cambridge Gas* is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could D properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant.

16 The first and second propositions were revisited by Lord Hoffmann E in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. HIH was an Australian insurance company in liquidation in Australia. A winding up petition had been presented in England and provisional liquidators appointed to conduct an ancillary liquidation. The question at issue was whether the English court should accede to a letter of request from the Australian court inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators, in circumstances F where they would be distributed there in accordance with statutory priorities which differed from those applicable in a domestic winding up in England. At paras 6–7, Lord Hoffmann said:

"6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based on what English judges have for many G years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.

"7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described H it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher, Insolvency in Private*

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International Law, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

Reviewing the English case law, Lord Hoffmann discerned in it a "golden thread running through English cross-border insolvency law since the 18th century" which, adopting a label devised by Professor Jay Westbrook, he called the "principle of (modified) universalism" (para 30):

> "That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

17 The Committee in *HIH* was unanimous in holding that the assets should be remitted to Australia, but they were divided in some aspects of their reasoning. Lord Hoffmann, with whom Lord Walker of Gestingthorpe agreed, considered that the court had an inherent power to direct the remittal of the assets at common law. However, that view was not adopted by the rest of the Committee. Lord Scott of Foscote and Lord Neuberger of Abbotsbury considered that the power was wholly derived from section 426 of the Insolvency Act 1986. Lord Phillips of Worth Matravers held that the statutory power was a sufficient jurisdictional basis for the proposed direction, and declined to decide whether jurisdiction could have been established at common law. It is, however, important to appreciate that this difference of opinion related not to the principle of universalism itself, nor to the juridical basis of the power to assist a foreign liquidation in general. The difference was about whether that power could be exercised in a manner which would deprive creditors proving in England of their statutory right under section 107 of the Insolvency Act 1986 to a pari passu distribution according to English rules of priority. The principle justifying judicial assistance in a foreign insolvency which was stated in *In re African Farms* [1906] TS 373 and affirmed in *Cambridge Gas* was [1906] TS 373, 377 subject to "such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws" or, as it was put more broadly in *HIH* itself [2008] 1 WLR 852, para 30, "justice and UK public policy". The division in the Committee in *HIH* was about whether this meant that it was subject to the mandatory requirements of section 107 of the Insolvency Act 1986. The relevance of section 426 in the view of Lord Scott and Lord Neuberger was that on their construction of that section it authorised the treatment of the assets in accordance with the law of the foreign jurisdiction notwithstanding its inconsistency with mandatory rules of English law: see Lord Scott, at para 61, and Lord Neuberger, at para 68. Absent that provision, the remittal of the assets to Australia would have been contrary to English law. Lord Phillips did not, any more than Lord Scott and Lord Neuberger, question the principle of modified universalism. Indeed, he regarded it as determinative of the manner in which the discretion should be exercised, albeit leaving open the question of its juridical source: see para 44.

18 *Cambridge Gas* [2007] 1 AC 508 marks the furthest that the common law courts have gone in developing the common law powers of the

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court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no inherent power to set aside Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more that there is such a power. It follows that the second and third propositions for which *Cambridge Gas* [2007] 1 AC 508 is authority cannot be supported.

19 However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH* [2008] 1 WLR 852, and by Lord Collins of Mapesbury (with whom Lord Walker and Lord Sumption JJSC agreed) in *Rubin v Eurofinance SA* [2013] 1 AC 236. Nothing in the concurring judgment of Lord Mance JSC in that case casts doubt on it. At paras 29–33, Lord Collins summarised the position in this way:

> "29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: 'recognition . . . carries with it the active assistance of the court': *In re African Farms Ltd* [1906] TS 373, 377; 'This court . . . will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter 11': *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.
>
> "30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said: 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely

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accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'

"31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there . . .

"33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company."

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.

20 The fundamental question is whether a power of compulsion of this kind requires a statutory basis. For this purpose, it is important to distinguish between evidence and information. By evidence, the Board

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means evidence to prove facts in legal proceedings. The power to compel a person to give evidence in legal proceedings was not originally statutory. Like the power to order discovery, it was an inherent power of the Court of Chancery, devised by judges to remedy the technical and procedural limitations associated with the proof of fact in courts of common law. In England, it was first put on a statutory basis by the Perjury Act 1563 (5 Eliz 1, c 9), which extended the power to issue a subpoena ad testificandum to all courts of record. In Bermuda, its basis is now section 4 of the Evidence Act 1905. The origins of these powers in the procedural history of the English courts go some way to explain why those courts have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings: see *Bent v Young* (1838) 9 Sim 180, 192 (Shadwell V-C); *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151; *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 All ER 161 (Divisional Court), paras 58–63. No such power existed in England until it was created by statute, initially by the Foreign Tribunals Evidence Act 1856 (19 & 20 Vict c 113).

21 What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the liquidators' ordinary duty of identifying and taking possession of assets of the company. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112, para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.

22 The classic modern illustration is the jurisdiction recognised by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133. The House, drawing mainly on the earlier decisions in *Orr v Diaper* (1876) 4 Ch D 92; 25 WR 23 and *Upmann v Elkan* (1871) LR 12 Eq 140; LR 7 Ch App 130, recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173–174 (Lord Reid). In *Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd* [1986] RPC 394 the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a person who had become involved in another's wrongdoing was held [1974] AC 133, 175 (Lord Reid) to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers"; cf p 195 (Lord Cross of Chelsea). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give

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rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181–182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross: p 198. Lord Kilbrandon, citing with apparent approval the South African decision in *Colonial Government v Tatham* (1902) 23 Natal LR 153, observed (p 205) that the duty lay "rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff."

23 The present case is not a *Norwich Pharmacal* case. The significance of *Norwich Pharmacal* in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company's worldwide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way. None of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question. The right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

24 There are two reported cases in which an order for the production of documents or information has been made by way of common law assistance to a foreign court. The first is *Moolman v Builders & Developers (Pty) Ltd*

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A [1990] 2 All SA 77 (A), a decision of the Supreme Court of South Africa. The appeal arose out of the winding up in the Transkei of a company incorporated there, at a period of South African history when the Transkei was in law a foreign country. The liquidator sought an order of the South African court for the examination of certain persons in South Africa with a view to locating assets of the company. Such an order would have been available to him by statute if there had been an ancillary liquidation in South B Africa, but there was no statutory power to wind up this particular company in South Africa. The court held that a power to make such an order at common law was within the principle of *In re African Farms Ltd* [1906] TS 373. The second case is *In re Impex Services Worldwide Ltd* [2004] BPIR 564, a decision of the High Court of the Isle of Man. Section 206 of the Isle of Man Companies Act 1931 conferred a power to order an examination but C only in relation to a Manx company. Deemster Doyle nevertheless gave effect by way of common law judicial assistance to a letter of request of the High Court in England seeking the examination of persons in the Isle of Man on behalf of the liquidator of an English company. The Board would not wish to endorse all of the reasoning given in these judgments, in particular those parts which appear to support the concept of applying statutory powers by mere analogy in cases outside their scope. But the Board D considers that the decisions themselves were correct in principle.

25 In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation E of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power F of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is G subject to the limitation in *In re African Farms Ltd* [1906] TS 373 and in *HIH* [2008] 1 WLR 852 and *Rubin* [2013] 1 AC 236, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* [1974] AC 133 and *R (Omar) v Secretary of State for Foreign and* H *Commonwealth Affairs* [2013] 1 All ER 161; [2014] QB 112 (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or

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potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

26 Order 11, rule 1(2) of the Rules of the Bermuda Supreme Court (as applied by order 11, rule 9(1)) authorises the service of an originating summons, petition, notice of motion or similar originating process out of the jurisdiction without leave in respect of any "claim which by virtue of any enactment the court has power to hear and determine". Because the common law power of the court to compel the production of information in aid of a foreign liquidation is not statutory nor derived from any analogy with the statute, this rule had no application to it. There is a more general power to serve originating process (other than a writ) out of the jurisdiction with the leave of the court under Order 11, rule 9(4), but it is not exercisable against persons whose engagement in the affairs of a foreign company has no connection with Bermuda and there is no implicit statutory authority for such a course: see *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. It follows that on any view the Chief Justice had no power to authorise the service out of the jurisdiction on Mr Suddaby or other partners or officers of PwC who were not within the jurisdiction of the court. The most that he could do, in a case within the ambit of the power, was order PwC, as the only party present within the jurisdiction, to comply for their own part and to take reasonable steps to procure the co-operation of others.

Application to the present case

27 The Board has summarised the limitations on the common law power to compel the production of information. Of these limitations, two are potentially relevant in the case of Singularis.

28 The first arises from PwC's argument that the order sought against them is not consistent with the law or public policy of Bermuda, because the statutory power to compel the production of information under section 195 of the Bermuda Companies Act impliedly excludes the possibility of an equivalent power at common law. The argument is that because section 195 is limited to cases where the company is being wound up in Bermuda, it would be inconsistent with the statutory scheme to recognise a common law power which, if it existed, would be subject to no such limitation. The Board is not persuaded by this. The existence of a statutory power covering part of the same ground may impliedly exclude a common law power covering the whole of it. But it does not necessarily do so. An implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field. This will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy: see *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2007] 1 AC 558, para 19 (Lord Hoffmann); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, paras 27–34 (Lord Dyson JSC). There is, however, no reason to suppose that the limitation of the power under section 195 of the Companies Act to

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companies in the course of winding up in Bermuda reflects a legislative policy adverse to assisting foreign courts of insolvency jurisdiction. It simply reflects the limits of the ambit of the Act. The relevant provisions of the Act have been analysed in the advice of the Board in *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] 1 WLR 4482. In summary, the effect of section 4 is that it applies to companies incorporated in Bermuda or authorised to carry on business there. However, the fact that express provision is made for the powers exercisable on the winding up of companies to which the Act applies, does not in the Board's opinion exclude the use of common law powers in relation to other companies which lie outside the scope of the statute altogether.

29 The second limitation which is relevant presents more formidable problems for the joint liquidators. The material which they seek in Bermuda would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there. Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. Thus in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, the English court made a worldwide *Mareva* injunction in support of Swiss proceedings against Mr Cuoghi in circumstances where the Swiss court could not have made such an order. But that decision cannot be taken to reflect a universal principle. The critical factors which justified the order in that case were that there was an unqualified statutory power to give ancillary relief and that the Swiss court's inability to make the order was due to the fact that Mr Cuoghi was not resident in Switzerland whereas he was resident in England. Rather different considerations apply to the common law power with which the Board is presently concerned. Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum shopping". In the opinion of the Board it is correct.

30 The liquidators have not contended at any stage of this litigation that the order which they seek can be justified at common law independently of the power of the Bermuda court to assist a foreign court of insolvency jurisdiction. Moreover, they have accepted before the Board that the information which they seek belongs to PwC and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. None the less, the Board would not wish to part with this case without

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expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property.

Conclusion

31 The Board will humbly advise Her Majesty that this appeal should be dismissed.

LORD COLLINS OF MAPESBURY

Introduction

32 In my opinion the appeal should be dismissed because the ground on which the joint liquidators based their appeal is unsupportable, namely that the court has at common law the ability to exercise powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but which do not apply in the international context. This opinion is intended to explain why that conclusion is inescapable in the light of the relationship between the judiciary and the legislature.

33 As the Supreme Court confirmed in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236 the court has a common law power to assist foreign winding up proceedings so far as it properly can. In my view, in common with Lord Sumption JSC and despite Lord Mance JSC's powerful opinion to the contrary, the Bermuda court has the power to make an order against persons subject to its personal jurisdiction in favour of foreign liquidators for production of information for the purpose of identifying and locating assets of the company, provided they have a similar right under the domestic law of the court which appointed them. I therefore agree with Lord Sumption JSC that this was not a proper case for exercise of that power.

34 The existence of a common law power to order information (otherwise than by analogy with local statutory powers) was not pursued by the liquidators on the appeal, and it was virtually disclaimed by them until questioning by the Board (quoted in Lord Mance JSC's opinion at para 128) may have led them to adopt it as a subsidiary basis for their appeal.

35 Consequently the parties are entitled to have the views of the Board on the argument which was actually put before it, in essence whether *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 ("*Cambridge Gas*") correctly decided that the court has a common law power to assist foreign winding up proceedings by exercising powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but do not apply to the international insolvency.

36 The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign office holder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency.

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A This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered.

37 A second reason for dealing with the main point of the liquidators' appeal was that the question whether local legislation could be applied by analogy arose in an appeal in the Cayman Islands Court of Appeal, and that court gave only an interim judgment pending the decision of this Board on
B this appeal: *Picard v Primeo Fund* 2013 (1) CILR 164. That case, as will appear below, involved anti-avoidance proceedings for the recovery of assets, and not (as in the present case) proceedings to obtain information to recover assets. On the principal argument of the liquidators, there is no material difference between this case and the Cayman Islands case. In each case the argument was that the local legislation should, if it does not apply
C according to its terms (and there is a question about this in the Cayman Islands case), be applied by analogy or on an "as if" basis. The Board took the view that it would be failing in its duty if it did not reach this question on this appeal, and simply left the Cayman Islands Court of Appeal to decide the matter with a possible further appeal to the Privy Council. That appeal has recently been settled, but the point of principle may still arise.

D 38 In my judgment the answer to the present appeal is to be found in the following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by
E analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy "as if" the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.

The practical issue

F 39 Both the Cayman Islands and Bermuda have statutory provisions for the examination of persons connected with an insolvent company. In England the statutory power is contained in the Insolvency Act 1986, section 236.

40 This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542 (34 & 35 Hen 8, c 4), the
G authorities (including, among others, the lord chancellor and the chief justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 (7 & 8 Vict c 110) gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day.

H 41 The provisions of neither the Cayman Islands nor Bermuda statutes apply to the material sought by the liquidators in this case. That is because: (1) the power in section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Cayman Islands, who has a relevant connection with a company in liquidation (including its former

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auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company" extends only to material belonging to the companies (subject to what Lord Sumption JSC says at para 29); and (2) the "power to summon persons suspected of having property of company etc" in section 195 of the Companies Act 1981 of Bermuda does not apply because the power is exercisable only in respect of a company which that court has ordered to be wound up, and in the SICL appeal the Board has advised that the winding up order must be stayed because the court has no jurisdiction to wind up a company incorporated outside Bermuda, to which Part XIII of the Companies Act is not expressly applied: *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] 1 WLR 4482.

42 The problem in this and other similar or analogous cases has arisen largely in relation to those British colonies, dependencies, and overseas territories, such as Bermuda, and the Isle of Man, which do not have the statutory powers to assist foreign office-holders which exist under United Kingdom law. Consequently, except in a rare situation to which I will revert, the practical result of this appeal is largely confined to such countries, or those countries (such as the Cayman Islands) where the extent of the statutory powers is controversial.

43 Some of these territories do have such powers. The British Virgin Islands has given effect to the UNCITRAL Model Law in the Insolvency Act 2003, Part XIX, which contains powers to assist foreign office-holders, but only from countries or territories which are designated by the Financial Services Commission. There are nine such countries or territories, including the United States and the United Kingdom. Section 470 of the Insolvency Act 2003 preserves the power of the court to provide assistance under any other rule of law.

44 The Cayman Islands Companies Law, section 241, gives the court power to make orders ancillary to a foreign bankruptcy proceeding (including the power to require a person in possession of information relating to the business or affairs of a bankrupt: section 241(1)(d)). But the application of these powers to anti-avoidance proceedings has been controversial. The Cayman Islands Court of Appeal reserved pending the outcome of this appeal the question whether the anti-avoidance provisions of its law can be used at common law (in addition to, or alternatively to, its statutory power to do so) in aid of a US bankruptcy proceeding: *Picard v Primeo Fund* 2014 (1) CILR 379. As mentioned above, the appeal has recently been settled.

45 In the United Kingdom, except where the EU Insolvency Regulation (Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1)) applies, the English court has a very wide power to wind up foreign companies, and where a foreign company is being wound up in England the liquidator is generally free to invoke the relevant provisions of the Insolvency Act 1986 in discharge of his functions, which would include the power to ask for examination under the Insolvency Act 1986, section 236.

46 Where the foreign company is not being wound up in England, under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which give effect to the UNCITRAL Model Law, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives: article 25(1). By article 21(1) of the 2006 Regulations, on recognition of a

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A foreign proceeding, the English court may grant appropriate relief, including the examination of witnesses, and the taking of evidence or the delivery of information concerning (inter alia) the debtor's assets. Secondary proceedings may be opened in the United Kingdom, but only where the debtor has an establishment in the United Kingdom and only as regards assets in the United Kingdom.

B 47 Under section 426 of the Insolvency Act 1986 the English court with jurisdiction in relation to insolvency is to assist the courts having the corresponding jurisdiction in any other part of the United Kingdom "or any relevant country or territory" (section 426(4)) by applying the law of either jurisdiction (section 426(5), a very difficult section: see *Dicey, Morris & Collins, Conflict of Laws*, 15th ed (2012), vol 2, para 30-110 et seq). These powers apply to only a limited numbers of countries (including Australia, C the Bahamas, and the Isle of Man).

48 An order for examination may be made under this section in aid of a foreign liquidation. In *England v Smith* [2001] Ch 419 it was held, in a case of an order for examination under Australian law of a person concerned with the affairs of a company, that application of the law of the requesting state should not be circumscribed by limitations to be found in the corresponding provisions of section 236 of the 1986 Act unless some D principle of English public policy were infringed.

49 Where the EU Insolvency Regulation applies, a foreign officeholder may exercise all the powers conferred on him by the law of the state of the opening of proceedings: article 18(1).

50 Accordingly the statutory powers of the UK courts to assist foreign office-holders to trace assets are very extensive. It follows that the existence E of a common law power to order examination will almost certainly never arise in England, and the same is true of the other statutory powers of which foreign office-holders may wish to take advantage. This is subject to what is said below about *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, where clawback under the Insolvency Act 1986, section 423 (transactions at an undervalue) was sought and granted, in a case where the EU Insolvency F Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

Assistance at common law in international insolvency

G 51 The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2013] 1 AC 236 that at common law the court has power to recognise and grant assistance to foreign insolvency proceedings: para 29.

52 In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:

H "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not

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inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

53 The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.

54 Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) *In re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

55 In my judgment too much has been read into *In re African Farms Ltd* [1906] TS 373. It was not mentioned in any English case until it was cited in argument in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 219, for the proposition that the English court will not allow funds to be transmitted to the jurisdiction of the foreign court of the principal winding up without first making provision for the local secured, preferential and statutory creditors, and then subsequently approved in *Cambridge Gas*. It had never been mentioned in the classic company law texts, *Buckley*, *Gore-Browne*, and *Palmer* (nor in *Williams on Bankruptcy*), nor in *Fletcher, Insolvency in Private International Law*, 2nd ed (2005). It received only a passing mention in the successive editions of *Forsyth* on South African private international law now called *Private International Law: The Modern Roman-Dutch Law* (now 5th ed (2012), p 456), although it has been mentioned (obiter) with approval by the Supreme Court of Appeal of South Africa: *Gurr v Zambia Airways Corpn Ltd* [1998] 2 All SA 479 (A).

56 Apart from the stay of execution ordered against a secured creditor (Standard Bank) which had obtained a judgment, the only part of the order in *In re African Farms Ltd* [1906] TS 373 which is relevant for present purposes is the order that all questions of mortgage or preference be regulated by Transvaal law as if the company had been placed in liquidation in the Transvaal. It is not stated how that was to be achieved, but it is significant that Innes CJ said, at p 382: "Such conditions are not easy to devise; and it is possible that to place the foreign liquidator in such a position as to ensure beyond doubt a distribution such as I have indicated would require reciprocal legislation in the two countries". Even though the company could not have been wound up in the Transvaal, the decision is

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certainly not authority for the proposition that local statutory law may be applied by analogy.

57 *In re Impex Services Worldwide Ltd* [2004] BPIR 564 also falls into the category of the use or extension of the existing powers of the court. In that case a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company. That was referred to in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33 as a case of judicial assistance in the traditional sense because the order was based on a request by the English court, but the decision was not the subject of examination before the Supreme Court and cannot be said to have been approved by it. The request could not be accommodated under the Manx Companies Act 1931, or under the inherent jurisdiction of the court, but the order was made at common law without articulation of its basis.

58 A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would be ancillary in the sense that it would not be within the power of the English liquidators to get in and realise all the assets of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court.

59 *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 also falls within this category because the majority in the House of Lords decided that the power of the English court to accede to the letter of request from the Australian court, inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators derives from section 426 of the Insolvency Act 1986.

60 As part of the majority in *HIH* Lord Scott of Foscote (at para 59) re-affirmed what he had said in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213:

> "The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord

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Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme."

See also Lord Neuberger of Abbotsbury at para 72.

The liquidators' argument and the Chief Justice's decision

61 The primary argument of the liquidators before the Board, which had found favour with the Chief Justice as the principal ground of his decision (which he described as "more principled" at para 49), was that the Bermuda court should apply directly the examination provisions of section 195 of the Companies Act 1981 by analogy.

62 That was said to be based on what Lord Hoffmann had said in *Cambridge Gas* [2007] 1 AC 508, para 22:

"What are the limits of the assistance which the court can give? . . . At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

63 In the Court of Appeal in the present case Auld JA had described the development of the common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally as amounting to impermissible "legislation from the bench." In answer, the liquidators in their argument to the Board relied on many dicta to the effect that the common law develops to meet changing circumstances.

64 In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.

Judicial law-making

65 The liquidators are plainly right to say that the common law develops, sometimes radically, to meet changing circumstances. It hardly requires citation of authority to make that point. No one now doubts that judges make law, although English and Scottish judges were slow to acknowledge it until the seminal writings by Lords Reid, Denning and Devlin, citation of which is unnecessary. But there are limits to their power to make law. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378 Lord Goff of Chieveley said:

"When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions. Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of

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judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this 'only interstitially,' to use the expression of OW Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole. In this process, what Maitland has called the 'seamless web,' and I myself (*The Search for Principle*, Proc Brit Acad vol LXIX (1983) 170, 186) have called the 'mosaic,' of the common law, is kept in a constant state of adaptation and repair . . ."

66 What Justice Holmes said in the passage to which Lord Goff referred was: ". . . I recognise without hesitation that judges do and must legislate, but they can do so only interstitially." The point was developed by Justice Cardozo in *The Nature of the Judicial Process* (1921), at pp 103, 113:

> "We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations . . . We do not pick our rules of law full-blossomed from the trees . . . [The judge] legislates only between gaps. He fills the open spaces in the law . . ."

67 More recently similar points have been made by eminent judges of our time. Judge Richard Posner said in *How Judges Think* (2008), p 86: "The amount of legislating that a judge does depends on the breadth of his 'zone of reasonableness'—the area within which he has discretion to decide a case either way without disgracing himself."

68 And Lord Bingham of Cornhill said, in *The Business of Judging* (2000), p 32: "On the whole, the law advances in small steps, not by giant bounds."

69 The approach which is articulated by Lord Sumption JSC is itself an example of the development of the common law since, as Lord Mance JSC's opinion clearly shows, it goes beyond what has previously been understood to be the power of the court to order information.

The judiciary and legislation

70 But that is not the issue on this part of the appeal, which is whether, as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament.

71 The latter question arises frequently and yields different answers. In the human rights context, it was the subject of intense debate in the recent case on assisted suicide: *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657. In the private law area, for example, the majority in *Jones v Kaney* [2011] 2 AC 398 decided to remove immunity from expert witnesses. The minority thought that that was a question which should be left to consideration by the Law Commission and reform by Parliament.

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72 By contrast, in *Rubin v Eurofinance SA* [2013] 1 AC 236 the majority considered that a change in the law relating to foreign judgments to apply a different rule (removing the need for a jurisdictional basis) in the context of insolvency was a matter for the legislature. Similarly members of the present Board have at various times made the same point in other contexts: *Prest v Prest* [2013] 2 AC 415, para 83 (Lord Neuberger of Abbotsbury PSC); *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2012] 2 AC 337, para 200 (Lord Sumption JSC); *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2012] 1 AC 383, para 174 (Lord Mance JSC).

73 But I emphasise that that is not the issue here. Nor is the issue the question whether legislation may influence the development of a common law rule. A famous early example where that was regarded as legitimate was *R v Bourne* [1939] 1 KB 687, where a direction was given that the eminent obstetrician Aleck Bourne was entitled as a defence to an abortion charge to rely by analogy on the provision of the Infant Life (Preservation) Act 1929 that infanticide could be justified to preserve the life of the mother.

74 The question of the extent to which statutes may influence the development of the common law is a well known and controversial one. Professor Atiyah addressed the questions in this way ("Common Law and Statute Law" (1985) 48 MLR 1, 6):

> "is [it] possible for the courts to take account of statute law, in the very development of the common law itself? Can the courts, for instance, use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law?"

75 In each of those situations it is not difficult to find cases which justify the forms of reasoning which Professor Atiyah identifies. But none of them comes anywhere near what the Board is asked to do in this case.

76 Nor is the issue whether a statutory rule may be taken into account in the exercise of a discretion. An example is the use of statutory limitation periods in the exercise of the equitable doctrine of laches: *P & O Nedlloyd BV v Arab Metals Co (No 2)* [2007] 1 WLR 2288; *Williams v Central Bank of Nigeria* [2014] AC 1189, para 12.

77 Nor is the issue whether the courts may develop the common law by entering or re-entering a field regulated by legislation. As Lord Nicholls of Birkenhead said in *In re McKerr* [2004] 1 WLR 807, para 30, the courts have been slow to do that because "otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament."

The equity of a statute

78 What the liquidators propose is very much more radical. It is that the court should apply legislation, which ex hypothesi does not apply, "as if" it applied.

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A 79 That proposition is reminiscent of the concept of the "equity of a statute". When used properly today, it means no more than interpreting a statute by reference to its purpose or the mischief which it was designed to cure: e g *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1972] Ch 73, 88.

80 But it once meant something which "has been relegated to the limbo of legal antiquities" (Loyd, "The Equity of a Statute" (1909) 58 U Pa L Rev B 76), and had been formulated in this way: "Equitie is a construction made by the judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth . . ." (Co Litt Lib I, Ch II, para 21, quoting Bracton).

81 Under that doctrine the courts felt themselves free to enlarge a C statute so as to apply it to situations which were not covered by the words of the statute but were regarded by the courts as within its spirit and analogous: Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232, 241; Atiyah, "Common Law and Statute Law" (1985) 48 MLR 1, 7–8. That concept of the "equity of a statute" fell into disfavour in the 18th century and was abandoned by the D beginning of the 19th century, and the judges were no longer able in effect to exercise a direct legislative function.

82 The liquidators' argument is that the common law rule of assistance in insolvency matters extends to the application of local legislation even though as a matter of its legislative scope it does not apply to the case in hand. In the present case the argument is that, even if section 195 of the Companies Act 1981 does not apply to foreign companies, it should be E applied by analogy or "as if" the Cayman Islands company were a Bermuda company.

83 In my judgment, that argument is not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that it depends on some part of the opinion in *Cambridge Gas* [2007] 1 AC 508, that decision was not only F wrong in its recognition of the New York order regulating the title to Manx shares, as decided in *Rubin v Eurofinance SA* [2013] 1 AC 236, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or "as if" they applied.

Cambridge Gas

G 84 The essence of the decision in *Cambridge Gas* [2007] 1 AC 508 was that the New York order would be recognised, and would be given effect because a similar scheme could have been sanctioned as a scheme of arrangement under the Isle of Man law.

85 The facts of *Cambridge Gas* are set out in *Rubin* [2013] 1 AC 236, paras 36 et seq. For present purposes it is only necessary to recall that a gas transport shipping business venture ended in failure, and resulted in a H Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man. The New York court had rejected the investors' plan and accepted the bondholders' plan.

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86 The corporate structure of the business was that the investors owned, directly or indirectly, a Bahaman company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahaman holding company) Cambridge Gas, a Cayman Islands company. Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

87 The New York order vested the shares in Navigator (the Isle of Man company) in the creditors' committee, which subsequently petitioned the Manx court for an order vesting the shares in their representatives. The Manx Staff of Government Division acceded to this petition by making an order under the Manx Companies Act 1931, section 101, rectifying the share register by entering the creditors' committee as shareholders. In the Privy Council [2007] 1 AC 508, para 23, Lord Hoffmann rejected this solution on this basis: the power was exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". But for that purpose it was necessary to show that by the law of the Isle of Man the company was obliged to do so. The source of such an obligation could be found only in an order of the court, pursuant to its common law power of assistance, which required the company to make such an entry. Consequently, the argument based on section 101 was therefore circular. The prior question was whether the court has power to declare that the Chapter 11 plan should be carried into effect.

88 The Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows. First, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category. Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency. Third, exactly the same result could have been achieved by a scheme of arrangement under the Isle of Man Companies Act 1931, section 152.

89 In *Rubin* [2013] 1 AC 236, a majority of the Supreme Court (Lord Collins of Mapesbury with whom Lords Walker of Gestingthorpe and Sumption JJSC agreed) decided that *Cambridge Gas* was wrongly decided because the shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. Consequently the property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man. Lord Mance JSC, in his concurring judgment, left the correctness of the decision open, and Lord Clarke of Stone-cum-Ebony JSC, dissenting, thought that it was correctly decided.

90 I have already quoted the passage in *Cambridge Gas* [2007] 1 AC 508, para 22 in which Lord Hoffmann said that "the domestic court must at least be able to provide assistance by doing whatever it could have done in

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A the case of a domestic insolvency" and that the purpose of recognition of the foreign office-holders was to "to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

91 The effect of this part of the opinion in *Cambridge Gas* was to make an order equivalent to one which could have been made under a Manx B scheme of arrangement without going through the statutory procedures for approval of a scheme. The passages in the opinion which are relevant are these:

> "24. In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies C Act 1931, could have achieved exactly the same result as the Chapter 11 plan. The Manx statute provides: '(1) Where a compromise or arrangement is proposed between a company and its creditors . . . the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors . . . to be summoned in such manner as the court directs. (2) If a majority in D number representing three-fourths in value of the creditors . . . agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors . . . and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.'
>
> "25. The jurisdiction is extremely wide. All that is necessary is that the E proposed scheme should be a 'compromise or arrangement' and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? . . .
>
> "26. . . . as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms F provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152. As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152. It is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and G shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing . . . The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. H Whatever the scheme, it is, by virtue of section 152, binding on the shareholders when it receives the sanction of the court. The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan

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which has been confirmed in a foreign jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation."

92 It is to be noted that Lord Hoffmann said that the New York creditors *could have achieved* exactly the same result as the Chapter 11 plan by a scheme of arrangement under the Companies Act 1931, section 152, and asked why the Manx court could not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man.

93 Those proceedings required the calling of meetings and the passage of appropriate resolutions. The majority of the UK Supreme Court decided in *Rubin v Eurofinance SA* [2013] 1 AC 236 that *Cambridge Gas* was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company. The question whether there was any lawful basis for applying the legislation on an "as if" basis, or of dispensing with the statutory procedure, did not therefore arise in *Rubin v Eurofinance SA*. But for the reasons I have given, in my judgment there can be no doubt that, unless Manx law allowed the relaxation of the statutory procedures for the approval of schemes of arrangement, the judiciary was not entitled to apply those procedures by analogy at common law.

The application of Cambridge Gas

94 It follows in my view that those courts which have relied on these passages to apply legislation which the legislature had not itself seen fit to apply are wrong, including the decision of the Chief Justice in the present case.

95 That conclusion also applies to the decision in *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61. In that case a company incorporated in Germany for the apparent purpose of investing individuals' funds in futures trading was used as a vehicle for a worldwide fraud. The German administrator applied for relief pursuant to the Insolvency Act 1986, section 423 (transactions at an undervalue) against former investors of the company who were resident in England, claiming back initial investment funds and fictitious profits for the benefit of the company's creditors by setting aside transactions entered into at an undervalue.

96 As I have said, the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

97 Proudman J decided that the court had the power at common law to recognise a foreign administrator and to provide him with the same assistance as it was entitled to provide in a domestic insolvency; and that since proceedings to set aside antecedent transactions were central to the purpose of an insolvency the court therefore had jurisdiction to authorise the administrator to invoke section 423. Applying *Cambridge Gas* Proudman J

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held that the power to use the common law to recognise and assist an administrator appointed overseas "includes doing whatever the English court could have done in the case of a domestic insolvency": para 62.

98 In my judgment that decision is wrong because it involved an impermissible application of legislation by analogy.

99 In *Picard v Primeo Fund* 2013 (1) CILR 164 the US bankruptcy trustee of the principal Bernard Madoff company sought to claw back payments made by the company to a Cayman Islands company. The claims were based on US law (fraudulent transfers and preferential payments) and on Cayman law (preferential payments). The Cayman Islands have mutual assistance provisions (Companies Law (2012 Revision), sections 241–242), but the judge (Jones J) held that they did not apply because the power to make orders "ordering the turnover to a foreign representative of any property belonging to a debtor" did not apply to property which was only recoverable under transaction avoidance provisions.

100 The judge then went on to decide that the Cayman court was able to apply the Cayman voidable preferences provision of its law (section 145) to the payments made by the US company to the Cayman company, by applying *Cambridge Gas* and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61.

101 On 16 April 2014 the Court of Appeal of the Cayman Islands (consisting of Sir John Chadwick P and Mottley and Campbell JJA)2014 (1) CILR 379, reversed Jones J on the first part of the case and held that the Cayman court was entitled to apply the Cayman anti-avoidance provisions under the assistance provisions of Cayman company law, because the making of a transaction avoidance order restores to the debtor the property which is the subject of that order, and so enables the court to order the "turnover" of that restored property to the foreign representative: para 45.

102 The Court of Appeal did not reach the question whether Jones J was entitled to apply the Cayman anti-avoidance provision at common law. The court had been informed that an issue central to that question, namely whether *Cambridge Gas* should be followed, was before the Court of Appeal for Bermuda. Because the matter was before this Board and shortly to be heard, the Court of Appeal was invited to hand down an interim judgment dealing only with the issues on the mutual assistance statutory provisions. The appeal has now been settled. It follows from what I have said that the decision of Jones J on the present aspect of the case was wrong.

Al Sabah v Grupo Torras SA

103 There was also a prior opinion of the Privy Council, in which what was said is directly contrary to the approach in *Cambridge Gas* advocated by the liquidators. In *Al Sabah v Grupo Torras SA* [2005] 2 AC 333 the trustee in bankruptcy of a debtor in The Bahamas obtained from the Bahaman court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. The Grand Court (affirmed by the Court of Appeal of the Cayman Islands) held that it had jurisdiction to provide such assistance under either section 156 of the Bankruptcy Law of the Cayman Islands or section 122 of the Bankruptcy Act 1914 (which provided for mutual assistance between bankruptcy courts throughout the UK and the Empire) or under the court's inherent jurisdiction, and that it should as a

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matter of discretion grant the Bahaman trustee powers under section 107 of the Cayman Bankruptcy Law to enable him to set aside the trusts. The Privy Council held that (i) section 156 of the Cayman Bankruptcy Law did not apply, but that (ii) section 122 had not been repealed in its application to the Cayman Islands and did apply, so that there was jurisdiction to authorise the Bahaman trustee to exercise the statutory power even though it might not have been available to him if the trusts had been governed by Bahaman law.

104 But the Board in an opinion given through Lord Walker of Gestingthorpe said, at para 35:

> "The respondents relied in the alternative . . . on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope [citing what is now *Dicey, Morris & Collins, Conflict of Laws*, 15th ed (2012), vol 2, paras 31R-059 et seq] and the inherent jurisdiction of the Grand Court cannot be wider."

105 The Board plainly considered that the court had no power to apply the Bankruptcy Law "in circumstances not falling within" the Law. In *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, above, Proudman J distinguished this clear statement on the basis that she should follow what she described as "the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker" in the *HIH* case [2008] 1 WLR 852, namely that the court was able, if consistent with justice and UK public policy, to achieve the aim of a unitary and universal bankruptcy law. In *Picard v Primeo Fund* 2013 (1) CILR 164 Jones J explained the dictum in *Al Sabah* as meaning that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside its scope.

106 Neither of these supposed distinctions is valid. There is nothing in *HIH* to support Proudman J's suggestion that Lord Walker had changed his view, and Jones J's suggestion that Lord Walker was only directing his intention to objectives outside the scope of the Bankruptcy Law is wholly inconsistent with Lord Walker's plain words that the court does not have an inherent jurisdiction to exercise the powers conferred by the Bankruptcy Law "in circumstances *not falling within the terms* of that section." (Emphasis added.)

107 In my judgment Lord Walker's dictum in the opinion in *Al Sabah v Grupo Torres* [2005] 2 AC 333, para 35 (in which, among others, Lords Hoffmann and Scott concurred) was plainly right, and, to the extent it is inconsistent with the passage in *Cambridge Gas* applying the Isle of Man scheme of arrangement provisions on an "as if" basis, it is to be preferred to *Cambridge Gas*.

108 I would therefore humbly advise Her Majesty not only that the appeal should be dismissed, but also that to have allowed it on the basis of the liquidators' primary argument would have involved Her Majesty's judges in a development of the law and their law-making powers which

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A would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional.

LORD CLARKE OF STONE-CUM-EBONY JSC

109 I agree that this appeal should be dismissed for the reasons given by Lord Sumption JSC. I add a short judgment of my own on the first issue B raised by Lord Sumption JSC in para 8, namely whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form) in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in C Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

110 I have reached the conclusion that, for the reasons given by Lord Sumption JSC, the answer to the first issue is that the Bermuda court does have such a power. The steps which lead me to that conclusion are these. While the recognition of such a power in an ancillary liquidation has not D thus far been recognised at common law, it is common ground that the common law has developed step by step and that it may be extended or developed in appropriate circumstances. It follows that the question is whether the circumstances are appropriate to justify the recognition of such a power in this class of case.

111 As Lord Sumption JSC demonstrates in para 20, significant E developments have been made by the common law in the past. They included the power to compel a person to give evidence, which was not originally statutory. As Lord Sumption JSC puts it, like the power to order discovery, it was an inherent power of the Court of Chancery devised by judges to remedy the technical and procedural limitations associated with the proof of facts in courts of common law. I agree with Lord Sumption JSC (at para 23) that the significance of the *Norwich Pharmacal* case [1974] AC F 133 in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when it is necessary to do so in order to give effect to a recognised legal principle.

112 The recognised legal principle in the present case is the principle of modified universalism derived from *Cambridge Gas* [2007] 1 AC 508: see G paras 19 and 23 in Lord Sumption JSC's judgment. I agree with him that it is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis notwithstanding the territorial limits of their jurisdiction. An important aspect of that public interest is a recognition that in a world of global businesses it is in the interest of every country that companies with H transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. I also agree with Lord Sumption JSC at para 23 (i) that this is a public interest which has no equivalent in cases where information may be sought for commercial

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purposes or for ordinary adversarial litigation; (ii) that the Bermuda court has properly recognised the status of the liquidators as officers of that court; (iii) that the liquidators require the information for the performance of the ordinary functions attaching to that status; (iv) that the information is unlikely to be available in any other way; (v) that none of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question; (vi) that the right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation; and (vii) that the recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

113 These are powerful factors. What then are the limits? I agree with Lord Sumption JSC that, as he puts it at para 25, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information but that the limits of this power are implicit in the reasons for recognising its existence. He gives four reasons. (1) It is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. (2) It is a power of assistance and exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers; so that it is not available to enable them to do something which they could not do even under the law by which they were appointed. (3) It is available only when it is necessary for the performance of the office-holder's functions. (4) It is subject to the limitation that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. I further agree with Lord Sumption JSC that it follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. Common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.

114 I further agree with Lord Sumption JSC, for the reasons he gives in para 28, that the common law power is not impliedly excluded by reason of section 195 of the Bermuda Companies Act but that it cannot be applied on the facts of this case because there is no similar power in the Cayman Islands and it would not be a proper use of the power of assistance to make good a

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A limitation on the powers of a foreign court of insolvency jurisdiction under its own law.

115 Like Lord Sumption JSC, I appreciate that it is important that this development should not open the floodgates to different unrelated classes of case. However, I see no reason why it should. I appreciate that Lord Mance JSC has reached a different conclusion. I do not pretend that it is
B possible to predict precisely how the development of the principle, which has been identified by Lord Sumption JSC and which both Lord Collins of Mapesbury and I support, will proceed. I agree with Lord Mance JSC that it is a step forward but do not agree that it is a step leap. I also agree with him (at para 137) that courts have tended to confine remedies of the kind we are discussing to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported
C by appropriate evidence. However, there is no reason why the common law should not be developed, provided that the development is measured and supports a recognised principle.

116 It will not always be easy to draw the line between permissible applications and impermissible applications. However, Lord Sumption JSC has identified, not only the policy, but also the principle derived from the
D policy and some of the limitations to its exercise, which to my mind provide a sensible approach for the future. I respectfully disagree with Lord Mance JSC when he says at para 146 that this is a development which is neither permissible nor appropriate. In doing so, I express no view on Lord Mance JSC's concerns (expressed in paras 120 and 121) as to the breadth of the terms of the order and as to the lack of safeguards to protect against costs
E or loss. These may well be sound and can be investigated in a case where such issues fall for decision. That is not this case because of the narrow ground on which the appeal must be dismissed.

LORD MANCE JSC

117 There are two potential issues of importance on this appeal: (a) whether the common law power to assist a foreign (Cayman Islands)
F liquidation enables the Bermudan courts to order anyone within its jurisdiction who may have relevant information or documentation about the company's assets (or, possibly also, its affairs generally) to attend for questioning about and disclose the same; (b) whether, if this power exists, it should be exercised by ordering such disclosure and questioning when the Cayman Islands courts have no equivalent power over persons within their
G jurisdiction.

118 I agree with Lord Sumption JSC that the short answer to the second question is negative. So it is unnecessary on this appeal to answer the first question, although Lord Sumption JSC has devoted the major part of his opinion to this question. I understand why it might be helpful if the Board could give a clear answer to it, but I think it unfortunate that it should try to do so on this appeal, bearing in mind the limitations in the way in which the
H question has been argued at all lower stages (see para 122 below) and its largely unexplored ramifications: see generally paras 130–145 below.

119 Before addressing the second issue in detail, it is relevant—and in my view important—to note three points. The first is the Chief Justice's order which the Court of Appeal set aside, and which the liquidators ask the

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Board to restore. The respondents, PwC, were (by clause 3a) ordered within 14 days to provide to the joint official liquidators ("JOLs")

> "all information they may have, including information and documentation in their possession, power, custody or control, concerning the promotion, formation, trade, dealings, affairs or property of the company [and] for the avoidance of doubt, such information and documentation to be provided is not to be limited to audit information . . ."

In addition PwC was (by clause 3d)

> "required to have a partner and/or employee or agent acceptable to the JOLs, examined on oath forthwith, within ten (10) days of being called on to meet by the JOLs, concerning the matters aforesaid, by word of mouth and on written interrogatories, and be required to reduce his/her answer to writing and require him/her to sign this . . ."

By clause 3e the JOLs were given leave to serve "Paul Suddaby and any other partners or officers of PwC . . . out of the jurisdiction", specific liberty was given to examine Paul Suddaby and he was specifically ordered to produce information in accordance with clause 3a. Clause 3f provided that

> "If PwC . . . does refuse to comply with any of the orders set out herein, it and its partners and officers shall be in contempt of court and they may be imprisoned, fined or their assets seized."

120 No doubt in case clause 3 did not go far enough, clause 4 provided:

> "Further and without limiting the generality of the foregoing, that the documentation referred to in Exhibit HD-7 of Hugh Dickson's third affidavit dated 7 February 2013 be produced within seven days by PwC . . . , in relation to [Singularis] . . . That the JOLs be able to obtain all information and documentation described herein that is in the possession, power, custody, or control of PwC . . . , whether this be in Bermuda, Dubai, or wherever it may be located."

Redaction was only to be permitted where necessary to protect information of a confidential nature belonging to third parties, and clause 4b required that:

> "the relevant partners and officers of PwC . . . do confirm on oath that all the documents requested have been produced."

The only exempt documents were to be those required to be produced in the Cayman Islands—that is documents actually belonging to Singularis.

121 No provision was made for the JOLs to meet, still less secure, any costs that PwC or its partners, officers or agents would incur complying with such an order, and no undertaking was given to meet any such costs or any other loss or liability that might result from doing so—even though PwC had asked the Chief Justice to deal with this aspect. This omission was raised in the Court of Appeal, where it remained relevant in relation to the order against SICL which that court upheld. PwC suggested that costs could be in the order of $500,000 and the JOLs argued that management time spent in compliance could not be recovered. The Court of Appeal declined to make any order or require any undertaking "in the absence of authority" and "particularly in circumstances where the cost of compliance is far from

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clear". "Absence of authority" is hardly surprising in relation to an order which was itself effectively unprecedented. PwC's costs of compliance would clearly be likely to be very substantial. Whether or not they were or could be quantified when the order was made, PwC should have been protected in respect of them. Common justice and established practice relating to freezing injunctions, *Anton Pillar* orders and *Norwich Pharmacal* relief should have confirmed the need for an appropriate order or undertaking in that respect.

122 The second point is that, in respect of Singularis, the only basis of Kawaley CJ's order against PwC and its officers was that the Bermudan courts have a common law power to grant assistance in aid of the Cayman Islands liquidation by applying local procedural remedies, in particular either "by directly applying" or "by analogy with" section 195 of the Bermudan Companies Act 1981, although it was common ground that this section does not in terms apply. This was also the only case put by the JOLs' written submissions to or adjudicated on by the Court of Appeal as well as the only basis on which permission was sought to appeal to the Board. Kawaley CJ considered that he could none the less rely directly on section 195 by virtue of inter alia *In re African Farms* [1906] TS 373, *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236 (paras 8, 49–74), or alternatively that he could proceed "by analogy with" it: paras 8, 36–48. The Court of Appeal held the contrary: see para 52, per Bell AJA, para 1, per Zacca P, and paras 4–59, per Auld JA. There is a hint in paras 49(1) and 50 of Auld JA's case that the JOLs may have begun to put their case more widely in oral submissions by suggesting some wider power based on "modified universalism" and independent of the Bermudan statutory power. But, if this is so, it can have received little prominence. Only before the Board has focus been directed to such an argument. As to the submission which was pursued below and accepted by Kawaley CJ, I agree with Lord Sumption JSC and Lord Collins of Mapesbury that there is no basis for judicial re-fashioning of, or action outside the bounds of but by analogy with, domestic legislation such as section 195. The Chief Justice's order cannot therefore be justified on the basis on which he made it. But it is perhaps ironic that so firm a rejection of any possibility of the domestic court exercising the powers conferred on domestic liquidators should be replaced by an embrace of the possibility of the domestic court giving effect to the wishes and/or powers of foreign liquidators: see paras 130 et seq below.

123 Neither court below addressed any observations to the question whether any jurisdiction existed or, if it existed, could properly be exercised to make orders against and serve Paul Suddaby and other partners or officers of PwC outside the jurisdiction of the Bermudan court. As paras 119 and 120 above show, the Chief Justice's order did that, though without joining Mr Suddaby or any other officer or partner in their personal capacities. In their written submissions before the Court of Appeal, the JOLs submitted that section 195 gave jurisdiction to serve abroad and relied on the English authority of *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 (decided under a section of the Insolvency Act 1986 using similar terms to section 195). Once one concludes, as the Board has, that section 195 is applicable neither directly nor by analogy, the question becomes whether there can be

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any such common law jurisdiction to order service out, on pain of sanctions, as that for which the JOLs argue.

124 Approaching the matter on that basis, it is clear that the Chief Justice's order must on any view have gone well beyond any jurisdiction which exists at common law in relation to PwC's partners and officers outside the Bermudan jurisdiction, as opposed to PwC itself which was within such jurisdiction. The area was examined in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, para 12, where the House of Lords (in a judgment given by myself with which all other members of the House concurred) spoke in these terms of:

> "the limitation of the court's power to enforce the attendance of witnesses or fine defaulting witnesses. From the Statute of Elizabeth 1562 (5 Eliz 1, c 9) onwards, this had been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under section 36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation of the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours*, 1964-I, *The Definition of Jurisdiction,* p 137): 'Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties on him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of states in regard to the taking of evidence as it has developed over a long period of time.' "

125 The issue in *Masri* was whether a power under rules (CPR r 71) made under statutory authority extended to enable an order for examination of an officer of a judgment creditor company, who was out of the jurisdiction. The House held that, in view of the presumption against extra-territoriality, it did not. In the course of so doing, it considered prior authority on other powers with a statutory basis. In *In re Tucker (RC) (A Bankrupt), Ex p Tucker (KR)* [1990] Ch 148, section 25(1) of the Bankruptcy Act 1914 gave the court power to summon before it for examination "any person whom the court may deem capable of giving information respecting the debtor, his dealings or property". But the Court of Appeal set aside an order obtained by a trustee in bankruptcy for the examination of the debtor's brother, a British subject resident in Belgium. Dillon LJ, after noting the limitations of the powers to serve out of the jurisdiction (then contained in RSC Ord 11) and to subpoena witnesses, said against this background that he "would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court": p 158E–F.

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126 In contrast, in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, section 133 of the Insolvency Act 1986 authorised the public examination of a narrower category of persons, viz

> "any person who— (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager . . . or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company",

and rule 12.12 of the Insolvency Rules 1986 (SI 1986/1925) gave the court express authority to order service out of the jurisdiction of any process or order requiring to be so served for the purposes of insolvency proceedings. The Court of Appeal upheld an order made for the public examination of a former director living in Alderney. Peter Gibson J, with whose judgment the other members of the court concurred, said (p 354F–H) that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice."

127 Although the House in *Masri* [2010] 1 AC 90 regarded impracticability of enforcement as a factor of greater significance than Peter Gibson J had suggested, it acknowledged the public interest served by section 133, and referred (in para 23) to "The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate". That factor being absent in *Masri*, it could lend no assistance to the argument that CPR r 71 extended extra-territorially. But the important feature of all these cases is that they turned on express statutorily conferred powers. There was no suggestion in any of them of any relevant common law power in any of the areas discussed.

128 The third point is that the JOLs' case has been at all times and is advanced solely on the basis that PwC have documents and information which it would help the JOLs to inspect and about which it would be helpful for them to be able to question PwC and its officers. The basis is not that PwC have property or assets of Singularis (beyond the documents which they have already been ordered by the Cayman Islands court to produce); nor is it that PwC have themselves done anything wrong or that they have been or are mixed up in any third party's wrongdoing. The House of Lords authority *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 was not relied upon, or even among the authorities put, before the Supreme Court. It was mentioned in passing during the final oral submissions in reply of Mr Moss QC for the JOLs, when the transcript records this exchange:

> "*Lord Mance JSC.* If they are accountants, as you told me earlier that they were, then on the face of it there is an advisory relationship and if

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you wish to know something which you yourself have mislaid or don't have from your accountant advisers one might think there was quite a good case for saying they owed a duty to disclose it to you, to help you.

"*Mr Moss*. There might be an arguable case relating to that advice, but what we're interested in are these audit documents which go to the assets of the company. I don't know whether the accounting had anything to do with that at all.

"*Lord Collins*. Is there nowhere a *Norwich Pharmacal* order can be obtained?

"*Mr Moss*. Well, yes. We've had a discussion about this. The problem with *Norwich Pharmacal* is that it is based on fraud.

"*Lord Collins*. Any wrongdoing, I think.

"*Lord Sumption JSC*. It is based on wrongdoing generally.

"*Mr Moss*. Yes, but it does involve alleging wrongdoing. You would have to allege that PwC became innocently mixed up in that wrongdoing—

"*Lord Clarke JSC*. They only have to be innocently mixed up.

"*Mr Moss*. Yes.

"*Lord Sumption JSC*. That's a fairly low threshold, after all the Customs and Excise were about as innocent mixed up people almost that you could probably want.

"*Mr Moss*. Yes. The result of that would be if we can get *Norwich Pharmacal* relief, then the Bermuda courts do have common law powers to give us exactly the type relief that we have here. It actually comes to the same thing. It wouldn't make much sense to send us right back to the Chief Justice to then ask for *Norwich Pharmacal* relief—

"*Lord Mance JSC*. It may not be as easy as that. You haven't formulated it as *Norwich Pharmacal*.

"*Mr Moss*. Yes, it would have to be abandoned and reformulated as a *Norwich Pharmacal*, but in substance it comes to the same sort of end. What that perhaps illustrates is that what we have and what we seek to maintain, or rather we have at one stage and the Court of Appeal have taken it away on a rather narrow ground, but we seek to have back is not something that radical in these types of circumstances, where there is a gigantic deficit, there has clearly been wrongdoing, documents have been taken and not available. It's exactly the kind of context in which one would expect relief to be given. It's not extravagant in any shape or form."

129 Contrary to Mr Moss's submission, the JOLs are seeking to do something very radical, and there is a deep dividing line between the basis on which they put their case and *Norwich Pharmacal*. The JOLs are seeking (a) to justify a far wider and more stringent order than could ever be obtained in *Norwich Pharmacal* proceedings and (b) to do so on the basis of an unverified assertion that they would, if they had tried, have been able to obtain a *Norwich Pharmacal* and without exposing themselves to the trouble and difficulty of showing that PwC were mixed up in any sort of wrongdoing about which they have any relevant information or documentation. I see neither force nor attraction in Mr Moss's invitation to prejudge the outcome of normal procedures by short-cutting them.

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A 130 In the light of these points, I come to the substance of the argument now presented. That is that a common law power exists to assist any foreign liquidation by ordering any person (whether or not an officer or agent of the company) to attend and be interrogated and produce documentation and information, on pain of contempt, in the manner which the JOLs advocate. The only explicit limits to the jurisdiction for which the JOLs now contend is that it should not be inconsistent with the law or policy of the forum. The B negative answer which the Board is giving to the second issue on this appeal means that there would exist a further limitation, that the jurisdiction would not exist or be exercisable to enable an order which could not be made against a person within the jurisdiction of the country of the insolvency.

131 Lord Sumption JSC now suggests that the principle should be further limited to any court-ordered liquidation (though that, in turn, leaves C uncertain the status of any winding up under supervision in any jurisdiction where that possibility, which existed formerly under section 311 of the English Companies Act 1948, still exists). Although Lord Sumption JSC speaks at one point of this as a "means of identifying or locating" assets (para 23), elsewhere he speaks of "enabling [foreign] courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers": para 25. The order in fact made by D the Chief Justice was, as noted, of great width. The scope of the proposed common law jurisdiction is therefore uncertain.

132 The suggested jurisdiction is said to follow from the principle of "modified universalism". This is a principle developed in English common law over the last 20 years with the strong support of Lord Hoffmann, though recognised over a 100 years ago in a Transvaal case which was itself until E recently lost in (unfair) obscurity. *In re African Farms* [1906] TS 373, was decided by Sir James Innes, who in addition to his own great legal distinction was grandfather of the distinguished wartime humanitarian lawyer Helmuth James von Moltke. The essence of the principle consists, as Lord Sumption JSC notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order restraining their disposition or F seizure inconsistently with the foreign liquidation. The novelty of this decision lay in the making of such an order in circumstances where there was no power to wind up the company in the domestic forum. In this respect, therefore, the co-operation extended in *In re African Farms* went a step further than that demonstrated in *In re Matheson Bros Ltd* (1884) 7 Ch D 225, where Kay J was, in the light of the fact that the English courts would G have had power to wind the relevant foreign company up in England, prepared to secure English assets to prevent English creditors executing against them, pending steps in the company's winding up in its country of incorporation to make the assets available for the company's English creditors pari passu with its foreign creditors.

133 The principle may also justify an order for the remission of the assets out of the jurisdiction to the foreign liquidator, if the foreign H liquidation rules would distribute them in the same way as the domestic jurisdiction. Even if the foreign liquidation rules would distribute them differently, but there is express statutory power enabling the remission to take place none the less, the principle may lend support to the exercise of that express statutory power. Beyond that, I do not read the majority of the

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House in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 as going, and anything that any of its members did say more widely about the existence or scope of a common law power was on any view obiter, since the appeal was decided on the basis that there existed express statutory authority for a remission although the assets would be distributed in the Australian liquidation differently from the way in which they would have been distributed in the English liquidation.

134 I agree with Lord Sumption JSC and Lord Collins that the second and third propositions for which *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 stands cannot be supported. A domestic court does not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency; and it cannot acquire jurisdiction by virtue of any such power. As to the first proposition, for reasons which I explained in *Rubin v Eurofinance SA* [2013] 1 AC 236, *Cambridge Gas* can, if correct, stand for no more than the proposition that a domestic court should, so far as it can consistently with its own law, recognise a foreign bankruptcy order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them. In another earlier decision of the Board, *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 35, Lord Walker said, aptly in my view, that the Cayman court "might have had some limited inherent power" to act in aid of the Bahaman winding up, but that it could not have the suggested power to set aside a voidable disposition modelled on a section in the Cayman Island bankruptcy legislation governing domestic liquidation which did not in terms apply in relation to a Bahaman winding up.

135 Where I part company with Lord Sumption JSC is in his assertion that the hitherto limited principle of modified universalism which I have just described extends to or justifies (or would be "an empty formula" without) the assumption or exercise of a common law power to "haul" anyone before the court (to use Dillon LJ's word in *Ex p Tucker* [1990] Ch 148), to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so and might enable him to locate some assets (or better understand the company's affairs). There is a step leap between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, in order to enable insolvency practitioners to understand a company's affairs). Lord Sumption JSC relies in para 23 on the House of Lords' decision in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 as illustrating "the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle." But the reference to "a recognised legal principle" begs the question whether the principle of modified universalism extends beyond the protection of identifiable assets within the jurisdiction, to enable orders to be made compelling third parties to assist with the provision of information and documentation which may assist the tracing of such assets (or otherwise assist the insolvency practitioners in their understanding of the company's affairs).

136 Information is a precious commodity, but it is not one which is generally capable of being extracted in court from private individuals

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without special reason; and the potentially intrusive, vexatious and costly nature of the exercise of any power to do so is apparent from the form of the Chief Justice's order in this case. The common law has not hitherto accepted any such jurisdiction. The existence of foreign insolvency proceedings, conducted for the benefit of creditors, does not appear to me to provide any justification for doing so now. The mere fact that insolvency practitioners are, at least in a compulsory liquidation, officers of the foreign court charged with winding up its affairs seems quite insufficient at common law, though it may be a factor which assists determine the scope of Parliament's likely intention where relevant legislation exists. There are many ordinary creditors, litigants and other persons who would like a facility to gather information to discover or trace assets or to assist them to pursue claims or to conduct their affairs generally. It is unclear what the logic is or would be for restricting the suggested common law power to foreign insolvencies. However much it may be intended, by using adjectives like "promiscuous", to discourage attempts to bring within this new jurisdiction either domestic insolvencies (if and where no complete common law scheme exists) or situations entirely outside the insolvency context, such attempts seem bound to occur. In the absence of any clear justification for giving insolvency practitioners the unique common law privilege which the JOLs now claim, such attempts may well be difficult to resist. Although I disagree with it, such attempts can only be encouraged by the statement at the end of para 21 of Lord Sumption JSC's opinion that "The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it."

137 In reality, far from displaying uninhibited willingness to develop appropriate remedies requiring the provision of information, courts have in my view been careful to confine such remedies to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. Thus: (i) A court has jurisdiction to protect identifiable property rights, which would include ordering a person shown to be likely to have property belonging to the company to deliver it up or disclose its whereabouts. (ii) A sustainable case of wrongdoing is the basis for the well-established jurisdiction to order the disclosure of information by or in conjunction with the making of an asset freezing (formerly *Mareva*) order or a search (*Anton Pillar*) order. (iii) The legal principle recognised in *Norwich Pharmacal* is that persons innocently mixed up in wrongdoing could be expected to disclose a limited amount of information and documentation about it to assist the victims.

138 On this appeal, no case has been advanced under any of these heads. The first could cover the disclosure by an agent of information which he held for, or owed a duty to pass to, his principal. As the transcript extract quoted in para 128 above confirms, no case is advanced on any such basis. Moreover, auditors are not agents, they are independent contractors engaged to review a company's accounts and report in accordance with statutory and professional requirements—in which connection there has been no suggestion of any failure or shortcoming on PwC's part. The second and third situations depend on evidence of wrongdoing, which has again not been asserted or attempted to be established. The third situation in particular bears no resemblance to the present case, in which it is said that

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innocent third parties can be compelled to produce information and documentation, without any allegation or evidence of wrongdoing, on insolvency practitioners showing that this could be useful to enable them to locate assets or better to understand the company's affairs.

139 It is notable that, even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the *Norwich Pharmacal* jurisdiction. It is "an exceptional one": *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, per Lord Woolf CJ. It depends on the existence of wrongdoing. The person with information must have been mixed up, however innocently in wrongdoing: *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112. Originally the jurisdiction was confined to discovery of the identity of the wrongdoer: *Ashworth Hospital Authority*, para 26, per Lord Woolf CJ; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911, 914, per Hoffmann J, emphasising that it was "no authority for imposing on 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."

140 More recently, the Divisional Court has said that *Norwich Pharmacal* may extend beyond the discovery of the identity of a wrongdoer or of a "missing piece of the jigsaw", but under the strict caveat that "the action cannot be used for wide ranging discovery or the gathering of evidence and is strictly confined to necessary information": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, para 133, cited by the Court of Appeal in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587 at [4].

141 Lord Sumption JSC suggests (para 20) that it will be possible in the present situation to draw a distinction between information which can permissibly be sought and evidence which cannot. At least two problems arise in this connection. First, it is, as I have noted, unclear whether any distinction or limitation is proposed between on the one hand information and documentation relating to assets and on the other hand information and documentation relating more generally to the company's affairs. Any such distinction or limitation seems likely in any event to be in practice illusory. An insolvency practitioner is ultimately only interested in assets and their distribution. Any questioning put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if they only consist of potential claims for maladministration or negligence.

142 The second problem is that the distinction between information and evidence seems likely also to be illusory. Evidence is at least confined to the issues in identified litigation, domestic or foreign. In contrast, the proposed relief sought against PwC is completely unconfined, in nature and scope. The later *Omar* case [2014] QB 112 highlights (para 12) a justified scepticism about maintaining a distinction between information and evidence which gives cause for caution about further extension by analogy of the *Norwich Pharmacal* jurisdiction to circumstances where identifiable wrongdoing is not in issue. The Chief Justice's remark in para 80 that "PwC . . . is not an overt target for adverse litigation brought by the JOLs at this stage" was I think also shrewd. Who can doubt that the JOLs would, in their examination both of the working papers and other documents and information disclosed by PwC and in their questioning of the partners and

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officers attending under an order such as that made by the Chief Justice, have a close eye on the possibility that this might show some possible claim against PwC as auditors? The Chief Justice's ensuing comment that the court should take "a healthily sceptical approach in evaluating the complaints made about the validity and scope of the ex parte orders", because "it seems clear that a combative and sophisticated defensive strategy has been engaged" appears to me in contrast unjustified. The jurisdiction to make or justification for such an order cannot depend on the defensive strategy adopted to resist it.

143 The principle now advanced by the JOLs lacks any substantial authority. The two first instance authorities cited by Lord Sumption JSC in para 24 offer the weakest of encouragement for the novel jurisdiction now proposed. *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 (A) treats the issue as one of applying *In re African Farms* [1906] TS 373, giving as the only reason that information is necessary if the ultimate aim of recovery of assets is to be realised. The court then in fact applied the statutory provisions of the forum on an "as if" basis [1990] 2 All SA 77 (A), sub-paragraph (d) on pp 4–5 and p 16. That I agree with Lord Sumption JSC and Lord Collins is not a sustainable approach.

144 The judgment in *In re Impex Services Worldwide Ltd* [2004] BPIR 564 suggests a breadth of common law power which would again be completely unlimited in its scope, enabling the Manx court "if it thinks fit" to make "an order summoning before it any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings and affairs or property of the company": para 106(8). Deemster Doyle explained this on the basis that (para 107):

> "Friendly and sophisticated jurisdictions which respect the rule of law and human rights need to be aware that if things go wrong in their jurisdiction and entities in the Isle of Man have information, documentation and evidence in their possession custody control or power that would assist them, then the Manx courts, in a proper case and subject to suitable safeguards and protections where necessary, will offer judicial co-operation and assistance where that is reasonably requested by the judicial authority in that friendly jurisdiction. When the call for help comes the Manx courts will, in proper cases, answer the call positively and provide the necessary co-operation and assistance."

English liquidators were the beneficiary of the far reaching principle thus promulgated, but I cannot accept that it represents English or Bermudan common law. If there might seem to be a hint in the Deemster's phrase "if things go wrong" that the reasoning and order may have been based on wrongdoing, that does not appear to be borne out by the full account of the background and proposed questions given earlier in his judgment. Like the order made by the Chief Justice in the present case, the Deemster's ready acceptance of the scope of the assistance which might be provided as extending to any information about the company's promotion, formation, trade, dealings and affairs or property as well as to evidence once again indicates the difficulty that there could be in keeping this novel power within bounds.

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145 Lord Collins's approving dictum in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33, quoted by Lord Sumption JSC in his para 19, is found in a paragraph listing a series of authorities on modified universalism, in circumstances where there was no examination in argument or in the Board's opinion of differences between them, or between situations where identifiable assets were in issue and other situations. But another dictum of Lord Collins in that case is in my view relevant. At para 129, he said that:

> "The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489."

That stands in stark contrast with the development of common law powers which the majority on this appeal supports.

146 The description of *In re Impex* [2004] BPIR 564 as a case of "judicial assistance in the traditional sense" can be seen now to be on any view unsustainable, and Lord Sumption JSC himself says (para 24) that he "would not wish to endorse all of the reasoning given" in the judgments in either *Moolman* [1990] All SA 77 (A) or *In re Impex*. He instances "in particular" those parts which appear to support the concept of applying statutory powers by mere analogy. That leaves open—in the context of the JOLs' present case that the Bermudan court can assist the Cayman Islands' liquidation without relying on Bermudan law—how far his approach accepts or disapproves the breadth of the reasoning and orders in *In re Impex* (see the previous paragraph)—or indeed in the present case: see paras 119–120 above. That is another of the unresolved uncertainties about the scope of the proposed new jurisdiction.

147 In these circumstances, and although anything said may be obiter, I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate.

148 I therefore consider that the appeal must be dismissed, because of the negative answer given to the second issue. But I would, if necessary, also have considered that it should be dismissed on the ground that a negative answer should be given on the first issue.

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A **LORD NEUBERGER OF ABBOTSBURY PSC**

149 I agree with the other members of the Board that we should humbly advise Her Majesty that this appeal should be dismissed. However, there is an issue which divides the members of the Board. It is whether, as Lord Sumption and Lord Clarke of Stone-cum-Ebony JJSC and Lord Collins of Mapesbury consider, the appeal should only be dismissed on the grounds
B (i) that there is no common law power to apply legislation which applies to domestic insolvencies by analogy to foreign insolvencies, and (ii) that the Bermudan courts should not exercise a common law power ("the Power") described by Lord Sumption JSC in para 25, because, as he explains in paras 29–30, the Cayman Islands courts have no such power, or whether, as Lord Mance JSC concludes, the appeal should also be dismissed on the ground (iii) that the common law power in question does not exist. On that
C issue, if it is appropriate to decide whether the alleged power exists, I would be in agreement with Lord Mance JSC.

150 As this is a judgment which dissents from the majority view on ground (iii), and there is little which I wish to add to the judgment of Lord Mance JSC, I can express my reasons relatively shortly.

151 It is unnecessary to decide whether the Power exists, because we are
D all agreed that, even if it does, it should not be exercised. I accept, of course, that we can decide (albeit, at least arguably, strictly only obiter) whether the Power exists. However, as it is not necessary for us to rule on that issue in order to dispose of this appeal, we should, in my opinion, be very cautious of doing so. While judges in a final court of appeal, perhaps particularly in a common law system, should give as much guidance as they can as to the substantive and procedural law in any area, they must always bear in mind
E the risks inherent in determining issues which do not have to be decided in order to dispose of the case before them.

152 As new problems arise, and as societal values and practices, technological techniques and business practices change, it is inevitable that judges can and should introduce new common law principles or procedures or make alterations to established common law principles and procedures.
F However, such developments should always be adopted cautiously, not least because, even with the benefit of submissions from advocates and consideration of previous cases, textbooks and articles, the wider implications of any new principle or alteration to an existing principle are very hard to assess. The need for caution in this connection is, in my view, supported by the judicial observations cited by Lord Collins in paras 65–68, although those observations were made in relation to a different aspect of
G the need for caution.

153 In the present case, there is obvious force in the point that the Board should determine whether the common law power alleged by the liquidators exists, as it is an important issue on which the sooner an authoritative decision is given the better, especially in the light of the somewhat confused state of the law as revealed in the judgments in this case.

154 However, that very confusion underlines the need for caution. The
H extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance: see the judgment of Lord Hoffmann on behalf of the Board in *Cambridge Gas Transportation Corpn v Official Committee of*

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Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, all five opinions in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, and the judgment of Lord Collins of Mapesbury for the majority of the Supreme Court in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, discussed by Lord Sumption JSC at paras 16–19, and the judgment of Lord Collins in this case.

155 The message I take from those cases is that, at least in this area, it would be better for the Board to approach any case in this field with a view to deciding it on a relatively minimalist basis, rather than by seeking to lay down general principles which it is not necessary to determine, particularly when those principles involve extending the court's powers in a way which may have substantial ramifications. While Lord Sumption JSC's explanation of the nature and extent of this alleged common law power appears very attractive, I think it could lead to all sorts of problems and uncertainties, as is implicit in the qualifications which Lord Sumption JSC makes, at para 25. It is all very well saying that they can be dealt with when they arise, but the fact that it is apparent that there will be problems and complications if the law is developed in a certain way suggests to me that the development should not be adopted unless it is necessary to do so. Accordingly, as it is unnecessary to decide whether the common law power exists, I would have preferred to leave the issue to be decided when it needs to be—with the benefit of the powerful arguments either way contained in the judgments on this appeal, which, with all respect to counsel, range more widely and deeply than the arguments which the Board heard during the hearing.

156 If, however, it is incumbent on me to express a view, I would conclude, in agreement with Lord Mance JSC, that the alleged common law power does not exist. He has set out the grounds for that conclusion convincingly, and they include reasons both of principle and of practicality. Accordingly, I do not propose to repeat those reasons, but there are one or two points I would like to emphasise.

157 The extreme version of the "principle of universality", as propounded by Lord Hoffmann in *Cambridge Gas*, has, as Lord Sumption JSC explains, effectively disappeared, principally as a result of the reasoning of Lord Collins speaking for the majority in *Rubin*, and speaking for the Board in this appeal. However, as with the Cheshire Cat, the principle's deceptively benevolent smile still appears to linger, and it is now invoked to justify the creation of this new common law power. It is almost as if the Board is suggesting that, while we went too far in *Cambridge Gas* and should pull back as indicated in *Rubin*, we do not want to withdraw as completely as we logically ought. In my view, the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle.

158 The limitation of the Power to insolvency cases may be seen by many to be questionable. More specifically, the limitation to liquidations which are being conducted by officers of a foreign court seems to me to be potentially arbitrary. Companies may be in court-imposed liquidation in many jurisdictions when it is "just and equitable" to wind them up, even if they are solvent: I do not see why liquidators in such a case should be able to invoke the Power when other people running solvent companies could not do so. Further, there is no reason why a statutory regime should not provide

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that voluntary liquidations are to be conducted under the aegis of the court, and, if so, the Power would seem to apply in such cases. And the status of administrators in administrations may be unclear in this connection.

159 The need to make subtle distinctions also concerns me. Thus, the distinction between information and documentation which is obtainable under this power, and "material for use in actual or anticipated litigation", appears very likely to give rise to difficult practical problems. I appreciate that these problems can arise in other circumstances, but that is not a reason for extending the circumstances in which these problems may arise; and, as the facts of this case suggest, I suspect that they are particularly likely to arise in relation to the exercise of the Power. Similarly, the question what is necessary for the performance of a liquidator's functions, which is said to be a prerequisite for the exercise of the Power, seems to be a fertile area for uncertainty and dispute.

160 More broadly, these distinctions seem to me to embody the sort of requirements one would expect to see in a statutory code rather than in judge-made law. As the judicial observations cited by Lord Collins suggest, judge-made law should be limited to "very modest development[s] . . . of existing principle", and should be made "in small steps" or "within . . . interstitial limits". Although I accept that the United Kingdom courts have been prepared to recognise a new common law right in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, the right involved was only exercisable in very specific circumstances where a serious wrong had been committed. I do not consider that that decision alters the fact that the creation of the Power would represent a development in the law which is, as Lord Mance JSC puts it, "radical". It may not seem radical in the sense that it can be said to be a fairly routine feature of the extreme "principle of universality" enunciated by Lord Hoffmann in *Cambridge Gas* [2007] 1 AC 508, but that view is no longer maintainable given that extreme principle has now been rejected by Lord Collins, speaking for the majority of the House of Lords in *Rubin* [2013] 1 AC 236 and for the Board on this appeal.

161 The contention that judges should not be creating the Power is reinforced when one considers the extent of domestic statutory law and international convention law in the area of international insolvency. Examples of such laws are described and discussed in paras 40–50 of Lord Collins's judgment. In this highly legislated area, I consider that the Power which is said to arise in this case is one which should be bestowed on the court by the legislature, and not arrogated to the court of its own motion.

162 I acknowledge the force of the arguments the other way, which are so clearly set out by Lord Sumption JSC. However, as already intimated, while I agree with the judgment of Lord Collins and otherwise agree with the judgment of Lord Sumption JSC, I would for my part reject the existence of the Power, if it is appropriate to decide that issue at all.

JILL SUTHERLAND, Barrister

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Exhibit 25

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Privy Council

Stichting Shell Pensioenfonds *v* Krys and another

[On appeal from the Eastern Caribbean Court of Appeal]

[2014] UKPC 41

2014 Oct 8, 9; Nov 26

Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Sumption, Lord Toulson JJSC

Conflict of laws — Jurisdiction — Anti-suit injunction — Dutch creditor obtaining pre-judgment garnishing attachment in Dutch court in respect of assets in Dutch bank account of company incorporated in British Virgin Islands — Company subsequently wound up in British Virgin Islands and liquidators appointed by court — Liquidators obtaining injunction to restrain creditor from prosecuting Dutch proceedings — Whether court precluded from granting anti-suit injunction restraining foreign creditors from bringing proceedings in courts of their own country — Whether necessary to show that creditor had acted vexatiously or oppressively by invoking jurisdiction of foreign court — Whether injunction rightly made

The defendant, a regulated Dutch pension fund incorporated in The Netherlands, invested large sums in F Ltd, a company incorporated in the British Virgin Islands. F Ltd invested in a scheme controlled by M, who was subsequently convicted of a major fraud. Immediately after M's arrest the defendant obtained a pre-judgment garnishing attachment from a Dutch court over approximately US$71m in F Ltd's account in the Dublin branch of a Dutch bank. About six months later a court in the British Virgin Islands made an order for the winding up of F Ltd and appointed the claimants as liquidators. The claimants applied in the British Virgin Islands for an injunction to restrain the defendant from pursuing the proceedings against F Ltd in The Netherlands. Bannister J refused the application but the Eastern Caribbean Court of Appeal allowed the claimants' appeal and granted the anti-suit injunction.

On the defendant's appeal—

Held, advising that the appeal be dismissed, that where an English company was being wound up in England, or a British Virgin Islands company in the British Virgin Islands, all of its assets, including those located within the jurisdiction of foreign courts, were subject to the statutory trusts; that the rights and liabilities of claimants against the assets were the same regardless of their nationality or place of residence; that, where a creditor or member of a company in insolvent liquidation who was amenable to the personal jurisdiction of the court began or continued foreign proceedings which would interfere with the statutory trusts over the company's assets, an injunction would in principle be available to restrain their prosecution, irrespective of the nationality or residence of the creditor or member in question, and there was no principle that such an injunction would not issue so as to prohibit a foreign litigant from resorting to the courts of his own country or some foreign court; that, although as a general rule there was no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court provided that it was an appropriate jurisdiction and that litigation there was not vexatious or oppressive to other interested parties, it was in principle inimical to the proper winding up process for a creditor to seek or to enforce an order from a foreign court which would result in his enjoying prior access to any part of the insolvent estate; that, on an application for an injunction to restrain foreign proceedings which were calculated to give a creditor such prior access, it was not necessary to show that the creditor had

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A acted vexatiously or oppressively by invoking the jurisdiction of the foreign court; that, as with any injunction, the court had a discretion to refuse relief if in the particular circumstances it would not serve the ends of justice; and that, accordingly, although it had not acted vexatiously or oppressively by invoking the jurisdiction of the Dutch court, since (i) the defendant had invested in a company incorporated in the British Virgin Islands and had, as a reasonable investor, to have expected that if that company became insolvent it would be wound up under the law of that B jurisdiction, (ii) it had submitted to the jurisdiction of the courts of the British Virgin Islands and thereby to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it, and (iii) there was nothing to suggest that allowing the defendant an advantage over other comparable claimants would be consistent with the ends of justice, the Court of Appeal had been entitled to exercise its discretion in the liquidators' favour and its order should stand (post, paras 24–28, 32–35, 38–40, 43, C 45).

In re North Carolina Estate Co Ltd (1889) 5 TLR 328, *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, PC and *Mitchell v Carter* [1997] 1 BCLC 673, CA applied.

Dictum of Lord Cranworth LC in *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416, 441, HL(E) explained.

In re Vocalion (Foreign) Ltd [1932] 2 Ch 196 not applied.

Per curiam. (i) The true principle, which applies to all injunctions and not just D anti-suit injunctions in the course of insolvency proceedings, is that the English and British Virgin Islands courts will not as a matter of discretion grant injunctions affecting matters outside their territorial jurisdiction if they are likely to be disregarded or would be "brutum fulmen". Various judicial statements suggesting a wider rule are in reality concerned either with personal jurisdiction over the person sought to be restrained or else with the practical efficacy of the remedy (post, para 34).

E (ii) Where the foreign litigant undertakes to bring any assets realised in the foreign proceedings into the bankruptcy so that no advantage would be obtained over other creditors, the basis on which an anti-suit injunction might otherwise be justified will not apply (post, para 40).

The following cases are referred to in the judgment of the Board:

F *Akers as a joint foreign representative of Saad Investments Co Ltd v Deputy Comr of Taxation* [2014] FCAFC 57; 311 ALR 167
Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)
Bank of Credit and Commerce International SA, In re [1992] BCLC 570
Barclays Bank plc v Homan [1993] BCLC 680, Hoffmann J and CA
Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG [2009] EWCA Civ 632; [2010] Ch 187; [2010] 2 WLR 349; [2009] Bus LR 1663, CA
G *Bushby v Munday* (1821) 5 Madd 297
Carron Iron Co Proprietors v Maclaren (1855) 5 HL Cas 416, HL(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
Chapman, In re (1872) LR 15 Eq 75
Cole v Cunningham (1890) 133 US 107
HIH Casualty and General Insurance Ltd, In re [2008] UKHL 21; [2008] 1 WLR H 852; [2008] Bus LR 905; [2008] 3 All ER 869, HL(E)
International Pulp and Paper Co, In re (1876) 3 Ch D 594
Kemsley v Barclays Bank plc [2013] EWHC 1274 (Ch); [2013] BPIR 839
Liddell's Settlement Trusts, In re [1936] Ch 365; [1936] 1 All ER 239, CA
Mitchell v Carter; In re Buckingham International plc [1997] 1 BCLC 673, CA
North Carolina Estate Co Ltd, In re (1889) 5 TLR 328

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Oriental Inland Steam Co, In re; Ex p Scinde Railway Co (1874) LR 9 Ch App 557 A
Robertson, Ex p; In re Morton (1875) LR 20 Eq 733
Rubin v Eurofinance SA (Picard intervening) [2012] UKSC 46; [2013] 1 AC 236; [2012] 3 WLR 1019; [2013] Bus LR 1; [2013] 1 All ER 521; [2013] 1 All ER (Comm) 513; [2012] 2 Lloyd's Rep 615, SC(E)
Singularis Holdings Ltd v PriceWaterhouseCoopers [2014] UKPC 36; [2015] 2 WLR 971, PC
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871; [1987] 3 WLR 59; [1987] 3 All ER 510, PC B
Vocalion (Foreign) Ltd, In re [1932] 2 Ch 196

The following additional cases were cited in argument:

Airbus Industrie GIE v Patel [1999] 1 AC 119; [1998] 2 WLR 686; [1998] 2 All ER 257; [1998] 1 Lloyd's Rep 631, HL(E)
Deutsche Bank AG v Highland Crusader Offshore Partners LP [2009] EWCA Civ 725; [2010] 1 WLR 1023; [2010] Bus LR 515; [2009] 2 All ER (Comm) 987; [2009] 2 Lloyd's Rep 617, CA C

APPEAL from the Eastern Caribbean Court of Appeal

The claimants, Kenneth Krys and Joanna Lau, in their capacity as joint liquidators of the company, Fairfield Sentry Ltd, applied for an anti-suit injunction to restrain the defendant, Stichting Shell Pensioenfonds, from prosecuting ongoing proceedings in The Netherlands against the company. On 9 August 2011 Bannister J sitting in the Commercial Division of the High Court of the British Virgin Islands refused the application. D

The claimants appealed. On 17 September 2012 the Eastern Caribbean Court of Appeal (Pereira, Mitchell and Belle JJA) allowed the appeal and made an order restraining the defendant from prosecuting its proceedings against the company in The Netherlands. E

The defendant appealed. The issue for the Judicial Committee of the Privy Council was whether, when a company was being wound up in the jurisdiction where it was incorporated, an anti-suit injunction should issue to prohibit a creditor or member of the company from pursuing proceedings in another jurisdiction which are calculated to give him an unjustifiable priority over other creditors or members. F

The facts are stated in the judgment.

Catherine Newman QC and *Arabella di Iorio* (instructed by *Herbert Smith Freehills LLP*) for the defendant.

Dutch law allows the courts of The Netherlands to grant pre-judgment attachment orders over assets in the jurisdiction or over assets of Dutch debtors. Since the company's choice of banker, Citco, is a Dutch company, the Amsterdam court had jurisdiction to grant attachments over debts owed by Citco to the company. The jurisdiction to garnish or attach does not depend on whether the Dutch court would have prior jurisdiction over the dispute between the person with the prior claim to the asset in the hands of the Dutch third party and the attacher. G

The right of a creditor to invoke his right of payment from assets in The Netherlands is not disturbed by a non-recognised foreign bankruptcy. The right of the liquidator to speak for the company does not disturb any such domestic principle. A foreign country such as the British Virgin Islands ("BVI") which has no treaty arrangement with The Netherlands cannot H

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A expect The Netherlands to abandon its own domestic law in favour of BVI law.

Statutory provisions preventing the continuation of litigation after the opening of an insolvency do not have extra-territorial effect. Before the court of the insolvency injuncts a foreigner from continuing proceedings in a foreign country (a fortiori his own) there must be a submission to the
B jurisdiction of the insolvency for all purposes or vexatious or oppressive conduct. A submission to the BVI court for the purpose of defending the anti-suit injunction application is not a submission for the purpose of bringing a claim in tort governed by the general law and not arising out of the insolvency. Nor was there any vexatious or oppressive conduct on the part of the defendant: *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187. There must be a good reason why the foreign court's
C decision to accept jurisdiction should not be respected: *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196. The natural forum for the litigation must be the domestic court. The company did not contend that the BVI court was the natural forum for the substantive litigation

It cannot be said that the company had no connection with The Netherlands. It had Dutch administrators and a Dutch bank account. The
D BVI must consider not only its own jurisdiction but also what the natural forum is for the resolution of the issues. [Reference was made to *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236.]

The defendant has not submitted to the jurisdiction of the BVI courts for all purposes although it respects the statutory scheme of the BVI liquidation. However, as in England, the statutory scheme of the BVI does not involve any provision which automatically provides for or requires the stay of
E foreign proceedings. The defendant is not amenable to the BVI jurisdiction for the purpose of making claims which are governed by the general law and not specifically governed by insolvency law. The defendant accepts that if the liquidator were to reject its proof, any appeal which it might wish to bring would have to be brought in the court of the insolvency proceedings. But the defendant does not accept that claims under the general law should
F be brought in the BVI courts.

The justification for the grant of an anti-suit injunction in the present case cannot be found in contract, in statute or in an aspirational term like "modified universalism". Nor do the ordinary principles of private international law applicable to submission to the jurisdiction provide a route. The law relating to submission to the jurisdiction depends upon the foreigner submitting becoming involved in proceedings in the domestic
G courts to decide the self same issues in a way which is inconsistent with resisting submission to the jurisdiction. That rule does not result in the defendant becoming amenable to BVI jurisdiction for all purposes as a result of attempting to prove. In *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733, by contrast, the creditor had accepted a dividend and attended a meeting.

H The BVI courts should not then use the anti-suit injunction simply to create a long-arm jurisdiction over foreigners or general law claims to establish rights where none exist.

There is no injustice to any creditor or redeeming member in permitting the defendant to litigate its claim in the Dutch court. In accepting jurisdiction to determine the defendant's damages claim the Dutch court was

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not exercising a jurisdiction which is exorbitant, oppressive, vexatious or unjust to those interested in the company's estate, nor was it interfering with the due process of the BVI court or the liquidation of the company.

The company has not suggested that it would not get a fair trial in The Netherlands. It was legitimate for the defendant, which is a regulated pension fund established to provide retirement income for Dutch former employees of the Royal Dutch Shell group, to seek, by its substantive proceedings, to advance its position from that of a member to that of a creditor.

Paul Girolami QC, Andrew Westwood and *William Hare* (instructed by *Wragge Lawrence Graham & Co LLP*) for the claimants.

The true issue is whether the Court of Appeal was correct to grant anti-suit relief against the defendant when the object and effect of the Dutch proceedings, if successful, would be to enable the defendant, by recourse to an asset which it had attached, to make recovery on its claims in priority to and at the expense of other creditors in the compulsory liquidation of the company.

The position in the BVI in respect of the liquidation of a company is the same as that under English law. In England, on the making of an order winding up a company incorporated in England, all the company's assets, wherever situated, are made subject to a statutory scheme for administration and distribution among the creditors and members in accordance with the Insolvency Act 1986. No creditor should be advantaged or disadvantaged by where the assets happen to be. The core of the scheme is pari passu distribution to all creditors, wherever situated and wherever their claims arise.

For that purpose "creditor" is widely construed and extends to all manner of claims, including contractual and tortious claims for damages. A foreign creditor is treated no differently from a domestic creditor. Nor is a creditor treated differently because he is in a jurisdiction where more or fewer of the assets or of the creditors are located. The reason for the principal liquidation being considered as having a worldwide reach is that it tends to achieve, so far as possible, the fairest and most effective distribution of all the company's assets to those entitled to share in them.

The scheme of the BVI legislation and of BVI policy are the same. [Reference was made to the British Virgin Islands Insolvency Act 2003, sections 2, 9, 12, 163, 175 and paragraph 5 of Schedule 3.]

The grounds for granting an anti-suit injunction are not confined to evidence of oppression or vexatiousness. One of the categories of case which the authorities recognise as potentially justifying the grant of anti-suit relief is where there is a need to protect an insolvent or other estate which the court is in the course of administering; and one of the particular instances recognised as justifying relief in order to afford such protection is where a creditor is taking proceedings to get hold of an asset and thereby gain priority.

The object and effect of the Dutch proceedings was to obtain priority over other creditors. The asset subject to conservatory attachment is money standing to the credit of a bank account in Dublin. That is an asset located in Ireland. There is no evidence of the company having any assets in The Netherlands. The Dutch proceedings are distinctly not proceedings for the

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A administration of the company's assets located in The Netherlands for the benefit of the company's creditors as a whole, nor even for the body of its Dutch creditors; they are not proceedings relating to any asset located in The Netherlands at all. The sole basis upon which the Dutch court attached the asset was that Citco as garnishee is present in The Netherlands. Jurisdiction then to determine the substantive claim made by the defendant against the company was founded upon the attachments having been made. Under B Dutch law any judgment obtained by the defendant will be enforced against the attached debt in priority to other creditors. The Court of Appeal rightly took the view that the defendant instituted the Dutch proceedings for the purpose of gaining priority. The question is not where there should be determined any underlying dispute as to the company's liability to the defendant, but rather whether the defendant should be able to take the C benefit of that priority. [Reference was made to *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416; *In re Chapman* (1872) LR 15 Eq 75; *In re International Pulp and Paper Co* (1876) 3 Ch D 594; *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196 and *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187.]

The BVI court has jurisdiction to restrain a creditor from pursuing such D proceedings. [Reference was made to *In re Oriental Inland Steam Co; Ex p Scinde Railway Co* (1874) LR 9 Ch App 557; *In re International Pulp and Paper Co* (1876) 3 Ch D 594; *In re North Carolina Estate Co* (1889) 5 TLR 328; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 and *Kemsley v Barclays Bank plc* [2013] BPIR 839.]

By submitting a proof in the liquidation of the company the defendant claimed for itself the benefit of, and invoked its rights under, the BVI E statutory scheme. Those were rights which would be protected under the BVI scheme. By doing so the defendant was making itself amenable to the jurisdiction of the BVI courts in matters relating to the liquidation of the company. It is the act of proof which is significant for the purposes of submission to the jurisdiction. A benefit need not have been received. [Reference was made to *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733 F and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236.] There is no reason why the same principle should not apply to BVI law.

By supporting the decision of Bannister J which proceeded on the basis that the defendant was amenable to the jurisdiction of the BVI courts for present purposes, the defendant voluntarily recognised that the BVI courts had jurisdiction to hear and determine the application for an anti-suit injunction on the merits. In the circumstances the defendant is precluded G from thereafter objecting to the court exercising its jurisdiction.

No considerations of comity apply to inhibit the grant of an anti-suit injunction and in all the circumstances the Court of Appeal was correct to restrain the defendant from pursuing the Dutch proceedings.

Newman QC replied.

H 26 November 2014. **LORD SUMPTION** and **LORD TOULSON JJSC** handed down the following judgment of the Board.

1 The question at issue on this appeal is whether, when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction should issue to prevent a creditor or member from pursuing

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proceedings in another jurisdiction which are calculated to give him an unjustifiable priority. This question falls to be decided under the law of the British Virgin Islands, which is not identical to the law of the United Kingdom, because of differences in their respective insolvency legislation. But for the purpose of the present issue, the laws of the two jurisdictions can be treated as the same.

Bernard L Madoff Investment Securities LLC and Fairfield Sentry Ltd

2 Bernard L Madoff Investment Securities LLC ("BLMIS"), was a New York-based fund manager controlled by the eponymous Bernard Madoff. Although not all of the facts are yet known, it appears that over a period of at least 17 years he operated what was probably the largest Ponzi scheme in history, accepting sums variously estimated between $17 billion and $50 billion for investment. From at least the early 1990s there appear to have been no trades and no investments. Reports and returns to investors were fictitious and the corresponding documentation fabricated. On 11 December 2008, Mr Madoff was arrested, and in March 2009 pleaded guilty to a number of counts of fraud.

3 Funds for investment were commonly entrusted to BLMIS by "feeder funds", of which the largest was Fairfield Sentry Ltd, the company whose winding up has given rise to this appeal. Fairfield Sentry is incorporated as a mutual fund in the British Virgin Islands. Its liquidators have stated that as at 31 October 2008 about 95% of its assets, amounting to some US$7·2 billion, were placed with BLMIS. Investors participated indirectly in these placements by acquiring shares in Fairfield Sentry at a price dependent on the net asset value per share published from time to time by the directors. Investors were entitled to withdraw funds by redeeming their shares under the provisions of the fund's articles of association, also at a price based on the published NAV per share. The information provided to investors was contained in a private placement memorandum, which made it clear that funds subscribed for shares would be placed for investment with BLMIS, and described in general terms the way that the scheme was supposed to work.

4 Fairfield Sentry's business involved the use of a number of intermediaries. For present purposes three of them may be mentioned. Fairfield Greenwich Ltd was a Cayman-incorporated associate which acted as its investment manager. Dealings with investors were handled by Citco Fund Services (Europe) BV, a company incorporated in the Netherlands which served as Fairfield Sentry's administrative agent. Citco Bank Nederland BV, an associated company of Citco Fund Services, is a Dutch bank which acted as Fairfield Sentry's asset custodian under its agreements with subscribers. Citco Bank Nederland had a branch in Dublin. It maintained an account in the name of Fairfield Sentry in which substantial cash balances were held.

5 The appellant, Stichting Shell Pensioenfonds, which we shall call "Shell", is a Dutch pension fund incorporated and with its seat in the Netherlands. Between 2003 and 2006, it subscribed US$45m for 46,708·1304 Fairfield Sentry shares, under five successive subscription agreements. These agreements were governed by New York law and contained submissions to the exclusive jurisdiction of the New York courts. Before the first of its placements, Shell obtained a side-letter dated 26 March

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2003 from Fairfield Sentry and its parent company Fairfield Greenwich Ltd containing various warranties, including a warranty that the contents of the private placement memorandum were correct and complete.

The Dutch proceedings

6 On 12 December 2008, the day after Mr Madoff's arrest, Shell applied to redeem its shares. However, no redemption payment was received and, six days later on 18 December, the directors of Fairfield Sentry suspended determinations of its Net Asset Value per share, thereby in practice bringing redemptions to an end.

7 On 22 December 2008 Shell applied in the Amsterdam District Court for permission to obtain a pre-judgment garnishment or conservatory attachment over all assets of Fairfield Sentry held by Citco Bank up to a value of US$80m, including any credit balance on its account with Citco Bank's Dublin branch. An order in those terms was made on the following day, 23 December 2008. In accordance with that order, attachments were made on 23 December 2008, 21 January 2009 and 16 March 2010 of sums in the Dublin account totalling about US$71m. It is common ground that no other assets of Fairfield Sentry are subject to the Dutch attachments. The initial application for authority to attach was made ex parte. However, Fairfield Sentry was entitled to apply inter partes to lift the attachment and did so. The application was rejected by the District Court of Amsterdam on 16 February 2011.

8 The effect of the attachments as a matter of Dutch law was the subject of argument in related proceedings in the Netherlands and of evidence in other related proceedings in Ireland. The parties are substantially agreed about it. Three points should be noted:

(1) Where the asset attached is a debt, the fact that the debtor (in this case Citco Bank Nederland) is amenable to the jurisdiction of the Dutch courts is a sufficient basis on which to establish the jurisdiction of the Dutch courts to hear the substantive claim. Fairfield Sentry being resident outside the European Union, it is the only basis of jurisdiction available in the present case. It was a term of the court's permission to attach assets of Fairfield Sentry that Shell should begin proceedings in support of its substantive claim within four months.

(2) The attachments do not, as a matter of Dutch law, create any kind of proprietary interest in the balances on the Dublin account. But they purport to conserve the funds in the account so that they will be available to satisfy any judgment which may be obtained against Fairfield Sentry in due course. Subject to any relevant period of limitation, it would be open to any other person with claims against Fairfield Sentry to take the same course as Shell has done, and apply in the Dutch courts to attach its assets in the hands of Citco Bank. Where there is more than one judgment creditor with attachments over the same assets, the funds attached will then be shared between them.

(3) In principle a claimant is entitled as of right to attach assets in support of an arguable claim, subject only to the reservation that an attachment will not be authorised if the substantive claim is unarguable or the attachment would put the garnishee at risk of having to pay twice. However, except in cases governed by the insolvency legislation of the European Union, the fact that the debtor is in liquidation elsewhere and that the attachment will

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prevent its assets from being distributed pari passu, is regarded as irrelevant to the exercise of the power to authorise an attachment. In rejecting Fairfield Sentry's challenge to the attachment order, the District Court of Amsterdam explained that Dutch law does not treat a foreign insolvency, even where it is proceeding in the jurisdiction of incorporation, as applying to assets located in the Netherlands.

9 The four-month deadline for the commencement of proceedings on Shell's substantive claim was extended several times, and the proceedings were ultimately commenced within the extended time on 19 March 2010. The principal claim made was for US$45m damages for the alleged breaches of the representation and warranties contained in the side-letter of 26 March 2003. The present status of the Dutch proceedings is that they have been left to lie on the file pending the final resolution of the injunction proceedings in the BVI.

The winding up proceedings

10 On 21 July 2009, Fairfield Sentry was ordered by the High Court of the British Virgin Islands to be wound up and Mr Kenneth Krys and Ms Joanna Lau were appointed as its joint liquidators. There are broadly speaking three categories of claimant or potential claimant in the BVI liquidation. First, there are what one can loosely call trade creditors, unpaid suppliers of goods or services. The Board was told that the value of their claims was small. Second, there are redemption claims, from shareholders in Fairfield Sentry who submitted redemption notices before the determination of its NAV per share was suspended on 18 December 2008. The Board understands that there are persons claiming to fall within this category. However, on 14 August 2014 Bannister J in the High Court directed that subject to any contrary order of the court the assets should be distributed on the footing that no outstanding redemption moneys were due to any member or former member of Fairfield Sentry. Third, there are shareholders entitled to share in any surplus. Somewhat unusually, therefore, it is likely that by far the greater part of the recoveries made by the liquidators will be distributed to shareholders in Fairfield Sentry. No one, however, suggests that these distributions will represent more than a small part of the losses that they will have suffered by investing in the company.

11 On 5 November 2009, Shell submitted a proof of debt in the liquidation for US$63,045,616·18. This amount was said to represent the redemption price of Shell's shares, calculated by reference to the NAV per share published by the directors of Sentry at 31 October 2008. It was claimed as a debt due under Shell's redemption notice of 12 December 2008. The joint liquidators rejected Shell's proof on 21 August 2014, as a result of Bannister J's direction of 14 August, subject to Shell's right if it objected to the assets being distributed in accordance with that direction to put forward its objection in writing by 17 October 2014. The Board was told that some other members claiming to be entitled to redeem have objected, and their objections will be heard by the BVI court later this year. But Shell has not objected, and the position at the time of the hearing of this appeal was that it was not intending to do so.

12 Manifestly, the effect of the attachments is that if Shell succeeds in its claim in the Dutch courts, it is likely to be able to satisfy its judgment-debt in full out of Fairfield Sentry's balance in the Dublin account, whereas others

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A who have claims in the liquidation ranking with or ahead of theirs may recover only a dividend. Shell says that it would have been open to other claimants to obtain attachments through the Dutch courts against the Dublin account in support of their own claims against Fairfield Sentry. If that had happened, there would have to be a kind of mini-liquidation in the Netherlands in which Shell might or might not fare better than comparable claimants in the liquidation. Shell also says that if it had proved for its B damages claim (as it was and remains entitled to do), it would arguably be entitled to rank as a creditor ahead of other members and might have recovered in full anyway. These conjectural possibilities depend on questions that are not before the Board, and for present purposes can be ignored. Miss Newman QC, who appeared for Shell, candidly acknowledged, as she did below, that the real purpose of the Dutch attachments is to obtain priority C which Shell would not, or not necessarily get in the liquidation. The issue on this appeal is whether Shell was in principle entitled to do that, and if not whether an injunction can issue to stop it.

13 On 8 March 2011, shortly after the District Court of Amsterdam rejected Fairfield Sentry's challenge to the attachments, the joint liquidators applied in the High Court of the British Virgin Islands for an anti-suit injunction restraining Shell from prosecuting its proceedings in the D Netherlands and requiring it to take all necessary steps to procure the release of the attachments. The application was heard inter partes by Bannister J in July 2011, who rejected it in a judgment delivered on 9 August. His main reason, in summary, was that as a matter of principle the BVI court would not prevent a foreign creditor from resorting to his own courts, even if he was amenable to the BVI court's jurisdiction. The Court of Appeal allowed E the appeal and made an order in substantially the terms which the joint liquidators had asked for in their notice of appeal. The order restrained Shell from taking any further steps in the existing Dutch proceedings against Fairfield Sentry or commencing new ones, but did not refer in terms to the attachments. The Court of Appeal's reasons, in summary, were (i) that Shell was subject to the personal jurisdiction of the BVI court by virtue of having lodged a proof in the liquidation, (ii) the assertion by the Dutch courts of a F jurisdiction to attach assets on the sole ground that it consisted in a debt owed to the insolvent company by a Dutch entity was exorbitant; and (iii) Shell should not be allowed to avail itself of that jurisdiction so as to gain a priority to which it was not entitled under the statutory rules of distribution applying in the British Virgin Islands.

G *Anti-suit injunctions in insolvency cases*

14 In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute: *Ayerst v C & K (Construction) Ltd* [1976] AC 167. In the case of a winding up of a BVI H company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court, but all assets world-wide. In England, this follows from the unqualified terms of section 144(1) of the Insolvency Act 1986. In the British Virgin Islands, it is provided for in terms by section 175(1) of the Insolvency Act 2003, combined with the inclusive definition of "asset" in section 2(1) ("every description of property, wherever

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situated"). It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation pari passu among unsecured creditors and, to the extent of any surplus, among its members.

15 This necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction. The lex situs is of course relevant to the question what assets are truly part of the insolvent estate. It will generally determine whether the company had at the relevant time a proprietary interest in an asset, and if so what kind of interest. Thus, if execution is levied on an asset of the company within the territorial jurisdiction of a foreign court before the company is wound up, it will no longer be regarded by the winding up court as part of the insolvent estate. But short of a transfer of a proprietary interest in the asset prior to the winding up order, it is generally for the law of that jurisdiction to determine the distribution of the company's assets among its creditors and members, at any rate where the company is being wound up in the jurisdiction of its incorporation. In England and the BVI the court may, and commonly does, assert dominion over the local assets of an insolvent foreign company by conducting an ancillary winding up. But it does so in support of the principal winding up, and so far as it can in such a way as to ensure that creditors and members are treated equally regardless of the location of the assets. It does not seek to ring-fence local assets or local creditors. As Sir Nicolas Browne-Wilkinson V-C put it in *In re Bank of Credit and Commerce International SA* [1992] BCLC 570, 577:

> "The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions."

16 In the present case the attachments were obtained some six months before the company was ordered to be wound up in the British Virgin Islands. Therefore at the time that they were obtained there could have been no inconsistency with the law of the British Virgin Islands. If the effect of the attachments as a matter of Dutch law had been to charge the assets attached or otherwise transfer a proprietary interest in them to Shell, and if that were held to be effective in relation to an asset situated in Ireland, the interest thus created would have ranked prior to the statutory trust created on the winding up order and there would be no basis for an anti-suit injunction. It is, however, common ground that no alteration in the proprietary interests in the Dublin balance was effected at the time of the attachments and that no right to execute against the balance had yet arisen. Any proprietary interest which might come into existence in future on execution being levied against it would in the eyes of BVI law be postponed to the administration of the statutory trust. It must follow that since the date of the winding up order, 21 July 2009, the attachments, which exist only for the purpose of enabling property in the Dublin balance to be transferred to Shell if and when it recovers judgment in the Dutch proceedings, have been directly inconsistent

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A with the mandatory statutory scheme resulting from the winding up order in the British Virgin Islands.

17 The fundamental principle applicable to all anti-suit injunctions was stated at the outset of the history of this branch of jurisprudence by Leach V-C in *Bushby v Munday* (1821) 5 Madd 297, 307. The court does not purport to interfere with any foreign court, but may act personally on a B defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require.

18 The "ends of justice" is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject matter and the circumstances. In *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416, Lord Cranworth LC (at pp 437–439) identified three categories of case which, without necessarily C being comprehensive or mutually exclusive, have served generations of judges as tools of analysis. The first comprised cases of simultaneous proceedings in England and abroad on the same subject matter. If a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject matter, the court might restrain him on the ground that his conduct was a "vexatious harassing of the D opposite party". The second category comprised cases in which foreign proceedings were being brought in an inappropriate forum to resolve questions which could more naturally and conveniently be resolved in England. Proceedings of this kind were vexatious in a larger sense. The court restrained them "on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill-adapted to secure complete justice". Third, there are cases which do E not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience". It is with this third category that the House of Lords was concerned. The appeal arose out of the administration by the English court of the insolvent estate of a deceased who appears to have been F domiciled in England. The estate comprised property in both England and Scotland. The Carron Iron Co, which had claims against the estate, brought proceedings against the executors in Scotland, in which they obtained letters of arrestment. These attached the deceased's Scottish property and would have resulted in the application of that property to the satisfaction of their own claim in priority to claims in the liquidation. The House of Lords by a majority (Lord Cranworth LC and Lord Brougham, Lord St Leonards G dissenting) refused an injunction to restrain the Scottish proceedings on the ground that the company was not amenable to the personal jurisdiction of the English court. The Board will return to that question below. But all three members of the House agreed on the principle on which such an injunction would issue if personal jurisdiction had existed. Lord Cranworth LC said, at p 440:

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> "In general, after a decree under which the creditors of a testator may come in and obtain payment of their demands, the court does not permit a creditor to institute proceedings for himself. The decree is said to be a judgment, or in the nature of a judgment, for all the creditors. The court takes possession of the assets, and distributes them rateably, on principles

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> of equality, giving, however, due effect to any legal rights of preference which any one creditor may possess. To allow a creditor, after such a decree, to institute proceedings for himself, would give rise to great inconvenience and injustice: it would disturb the general principle of equal distribution which the court is always anxious to enforce, and would leave the executors exposed to actions after the assets have been taken out of their hands. Of the general justice, therefore, of the rule on which the court acts, no doubt can, I think, be entertained."

The basis of this conclusion, as the reasoning of all three members of the House shows, is that the court has an equitable jurisdiction to restrain the acts of persons amenable to the court's jurisdiction which was calculated to violate the statutory scheme of distribution.

19 The principle thus stated has been applied on a number of occasions. In *In re Oriental Inland Steam Co; Ex p Scinde Railway Co* (1874) LR 9 Ch App 557, a creditor proved in the liquidation of the Oriental Inland Steam Co in England but attempted to obtain priority to other creditors by attaching property of the company in India. He was restrained by injunction from proceeding in India, but obtained the value of his debt from the liquidator in return for lifting the attachment, without prejudice to the question whether he should be allowed to retain it. The Court of Appeal affirmed an order of Malins V-C requiring him to repay it. James LJ said, at p 559:

> "All the assets there would be liable to be torn to pieces by creditors there, notwithstanding the winding up, and there would be an utter incapacity of the courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way . . . One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one cestui que trust getting possession of the trust property after the property had been affected with notice of the trust. If so, that cestui que trust must bring it in for distribution among the other cestuis que trust . So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. The assets must be distributed in *England* upon the footing of equality."

20 In *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328, Chitty J applied the same principle, observing that:

> "Under the Companies Act of 1862 it was clear that after a winding up order the assets of the company were to be collected and applied in discharge of its liabilities, and that the assets were fixed by the Act of Parliament with a trust for equal distribution among creditors (*In re Oriental Inland Steam Co* LR 9 Ch App 557, 559; *In re Vron Colliery Co* (1882) LR 20 Ch D 442). No creditor, therefore, could be allowed, by taking proceedings at his own will and pleasure, to destroy, waste, or

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impair assets which were subjected to a trust for the general benefit of all creditors alike."

21 In *Mitchell v Carter* [1997] 1 BCLC 673, Millett LJ referred to the jurisdiction as well established. He said, at p 687:

> "a creditor who successfully completes a foreign execution is able to gain priority over the unsecured creditors. To prevent this, the English court has jurisdiction to restrain creditors from bringing or continuing the foreign execution process . . ."

22 In the United States, the Supreme Court has independently arrived at the same position and recognised the right of the state of an insolvent's domicile to restrain proceedings in another state designed to obtain a more favourable distribution of the assets, notwithstanding the constitutional duty of each state to give full faith and credit to judicial proceedings in every other state: *Cole v Cunningham* (1890) 133 US 107. As Fuller CJ observed, delivering the opinion of the court, at p 122:

> "At the time of these proceedings, as for many years before, the Commonwealth of Massachusetts had an elaborate system of insolvent laws, designed to secure the equal distribution of the property of its debtors among their creditors. Under these insolvent laws, all preferences were avoided and all attachments in favour of particular creditors dissolved. The transfer of the debtor's property to his assignees in insolvency extended to all his property and assets, wherever situated. This was expressly provided as to such as might be outside the state . . . Nothing can be plainer than that the act of Butler, Hayden & Co in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tended directly to defeat the operation of the insolvent law in its most essential features, and it is not easy to understand why such acts could not be restrained within the practice to which we have referred."

The court regarded this, as the English courts do, as the enforcement of an equitable right: see p 116.

23 The leading modern case on the jurisdiction to restrain foreign proceedings is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. This was an alternative forum case, in which the Judicial Committee, sitting on appeal from Brunei, granted an injunction restraining proceedings in Texas on the ground that Texas was not the appropriate forum and the proceedings there were oppressive. Lord Goff of Chieveley, delivering the advice of the Board, pointed out that the insolvency cases proceeded on a different principle, which was based not on protecting litigants against vexation or oppression, but on the protection of the court's jurisdiction to do equity between claimants to an insolvent estate. At pp 892–893, he observed:

> "The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case

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> arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of the injunction is to protect the jurisdiction of the English court . . . Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry v Lewis* (1882) 22 Ch D 397 and *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225."

It is clear from Lord Goff's formulation that he was making the same distinction as Lord Cranworth made in the *Carron Iron* case between cases such as the insolvency cases, in which there is an equitable jurisdiction to enforce the statutory scheme of distribution according to its terms, and cases in which the court intervenes on the ground of vexation or oppression.

24 The conduct of a creditor or member in invoking the jurisdiction of a foreign court so as to obtain prior access to the insolvent estate may well be vexatious or oppressive, in which case an injunction may be justified on that ground. An example is provided by the decision of the English Court of Appeal in *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187, where a creditor used a foreign attachment order in a manner which the court regarded as amounting to sharp practice. However, vexation and oppression are not a necessary part of the test for the exercise of the court's jurisdiction to grant an anti-suit injunction in a case where foreign proceedings are calculated to give the litigant prior access to assets subject to the statutory trust. In the Board's opinion there are powerful reasons of principle why this should be so. The whole concept of vexation or oppression as a ground for intervention, is directed to the protection of a litigant who is being vexed or oppressed by his opponent. Where a company is being wound up in the jurisdiction of its incorporation, other interests are engaged. The court acts not in interest of any particular creditor or member, but in that of the general body of creditors and members. Moreover, as the Board has recently observed in *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] 2 WLR 971, para 23, there is a broader public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the

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race to grab them is to the swiftest, and the best informed, best resourced or best lawyered.

25 The Board is not prepared to say that Shell acted vexatiously or oppressively by invoking the jurisdiction of the Dutch courts, but for the reasons that it has given, this does not prevent the issue of an anti-suit injunction.

26 It does not, however, follow that an injunction must issue. There are at least two matters to be considered before that step can be justified. The first is whether Shell, as a foreign entity, is amenable to the court's jurisdiction. The second is whether, even on the footing that an anti-suit injunction is available in principle, it is right to make one as a matter of discretion. To those questions the Board will now turn.

Jurisdiction

27 As Chitty J pointed out in *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328, it necessarily follows from the fact that the court acts in personam against the foreign litigant, that the latter must be must be amenable to its personal jurisdiction. He must be present within the jurisdiction or amenable to being served with the proceedings out of the jurisdiction, or else he must have submitted voluntarily.

28 Subject to a reservation to which the Board will return, Miss Newman accepted that her clients had submitted to the jurisdiction of the BVI courts for the purpose of being amenable to an anti-suit injunction, by participating unconditionally in the injunction proceedings. Mr Girolami QC said that they had submitted not just by doing that but also by proving for the debt alleged to arise under their redemption notice of 12 December 2008. In common with the Court of Appeal, the Board considers that Shell submitted in both ways. The Board will deal first with the consequences of the lodging of a proof of debt, about which the parties are fundamentally at odds, before turning to Miss Newman's reservation about the effect of participating in the injunction proceedings.

29 In *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733, a Scottish merchant proved in the bankruptcy of his debtor for a debt of £367 and recovered a dividend without bringing into account £120 which he had obtained from the insolvent estate separately. He was held to be subject to the jurisdiction of the court in proceedings to recover the £120 for the benefit of the estate. Bacon CJ observed, at pp 737–738:

> "what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it—that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast on the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate . . . can there be any doubt that the appellant in this case has agreed, as far as he is concerned . . . the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit . . . [The appellant] is as much bound to perform the conditions of the compact, and to submit

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to the jurisdiction of the court, as if he had never been out of the limits of *England*." A

30 This was a case where the creditor had actually received a dividend. However, in *Akers as a joint foreign representative of Saad Investments Co Ltd v Deputy Comr of Taxation* (2014) 311 ALR 167, where no dividend had been received, the Full Court of the Federal Court of Australia held that in *Ex p Robertson* the submission consisted in the lodging of the proof and B not the receipt of the dividend. Accordingly, at para 165:

"formal submission of a proof of debt to the insolvency administration will generally be adequate to support a conclusion that the court supervising the administration thereafter has jurisdiction to make orders in matters connected with the administration against the creditor who has proved." C

The same view was taken by the Supreme Court in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. Lord Collins of Mapesbury (with whom on this point the rest of the court agreed) held at paras 165, 167, citing *Ex p Robertson*, that there was:

"no doubt that orders may be made against a foreign creditor who proves D in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court . . . having chosen to submit to New Cap's Australian insolvency proceeding, the syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding." E

31 It has been suggested by Professor Briggs in a recent lecture in Singapore (*New Developments in Private International Law: A Busy 12 Months for the Supreme Court*, 21 November 2013) that this conclusion was "astonishing" because no proof had been admitted and no dividend had been paid. Miss Newman, adopting this criticism, submitted that Lord Collins was wrong on this point. The Board is satisfied that his statement F was correct. The present case is not properly speaking a case of election, like those in which a party must elect between two mutually inconsistent remedies. In such cases he is usually not taken to elect until he has actually obtained one of the remedies. The question here is not what remedy is Shell entitled to have, but whether it has submitted to the jurisdiction of the court. A submission may consist in any procedural step consistent only with G acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a H dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its

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merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants.

32 Turning to Miss Newman's reservation, the argument was that Shell had not submitted to the jurisdiction of the BVI courts for all purposes. In particular, it was said to have submitted only for the purpose of claims under the Insolvency Act and Rules, and not for the purpose of claims governed by the general law, such as its claim in the Netherlands for misrepresentation and breach of warranty. This, it was said, was because the BVI courts have no subject matter jurisdiction over the damages claim that is being asserted in the Netherlands. The Board has no hesitation in rejecting this contention. It has no bearing on the question whether Shell submitted by participating in the injunction proceedings, because that submission necessarily involved an acceptance on its part of the court's jurisdiction to grant the injunction sought in those proceedings. The point appears to the Board to be equally irrelevant to the question whether Shell submitted by lodging a proof of debt for the redemption price. Liquidation is a mode of collective enforcement of claims arising under the general law. There is, in the present context, no relevant difference between the claim for which Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being proved in the liquidation. If they are proved, the BVI courts will have subject matter jurisdiction to adjudicate on them. And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it.

Application to foreign litigants

33 Against that background, the Board turns to Miss Newman's main point, which was that even on the footing that Shell submitted to the jurisdiction of the BVI court, that was not enough to make it amenable to an anti-suit injunction. This, she contended, was because there was a distinct principle that an anti-suit injunction will not issue so as to prevent a foreign litigant from resorting to the courts of his own country (or at any rate some foreign court).

34 In the Board's opinion, there is no such principle. Where an English company is being wound up in England or a BVI company in the BVI, all of its assets are subject to the statutory trusts including those which are located within the jurisdiction of foreign courts. The rights and liabilities of claimants against the assets are the same regardless of their nationality or place of residence. A distinction between foreign and English claimants would respond to no principle known to the law. The true principle, which applies to all injunctions and not just anti-suit injunctions in the course of insolvency proceedings, is that the English and BVI courts will not as a

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matter of discretion grant injunctions affecting matters outside their territorial jurisdiction if they are likely to be disregarded or would be, as the colourful phrase went, "brutum fulmen". With one exception, to which the Board will return, the various judicial statements suggesting a wider rule are in reality concerned either with personal jurisdiction over the person sought to be restrained or else with the practical efficacy of the remedy.

35 In the *Carron Iron* case 5 HL Cas 416 Lord Cranworth LC, having set out the principles on which the court acts, continued, at p 441:

> "the first question is, whether there is any rule or principle of the Court of Chancery which, after a decree for administering a testator's assets, would induce it to interfere with a foreign creditor resident abroad, suing for his debt in the courts of his own country? Certainly not. Over such a creditor the courts here can exercise no jurisdiction whatever. He is altogether beyond their reach, and must be left to deal as he may with his own forum, and to obtain such relief as the courts of his own country may afford."

The observation that over such a person the English court can exercise "no jurisdiction whatever" shows that Lord Cranworth LC was in fact addressing the question of personal jurisdiction. The issue which divided the House was whether the Carron Iron Co was domiciled in England as well as Scotland (as Lord St Leonards thought) or only in Scotland (as the majority thought). The injunction was refused for want of personal jurisdiction, not because the Carron Iron Co was a Scottish company proceeding in the courts of Scotland. That this was the issue is apparent from Lord Cranworth LC's observation at pp 442–443 that the position would have been different if the Carron Iron Co had "come under the decree, so as to obtain payment partially from the English assets" or had "sought or obtained any relief in this country".

36 Cases in which the courts have been concerned with the practical efficacy of their injunctions include *In re Chapman* (1872) LR 15 Eq 75, 77. In that case, Bacon CJ refused an injunction to restrain proceedings brought by American creditors in New York on the ground that

> "neither this court not the Court of Chancery ever grants injunctions that will be wholly ineffectual."

In *In re International Pulp and Paper Co* (1876) 3 Ch D 594, Jessel MR granted an injunction restraining proceedings brought by an Irish creditor in Ireland. He distinguished between creditors resident in another jurisdiction of the United Kingdom and those resident in a "purely foreign country" such as Turkey or Russia. They were both equally outside the territorial jurisdiction of an English court. The difference was that there were statutory procedures for enforcing English judgments in Ireland as if they were judgments of the Irish courts. Without such procedures, the English court's orders were likely to be disregarded by locally resident litigants. At p 599, Jessel MR said:

> "although it would be desirable in the interests of the person concerned in the litigation to make that creditor come in with the rest, yet the court cannot restrain the action for want of power—not from want of will or want of provisions in the Act of Parliament, but simply that the Act of

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A Parliament cannot give this court jurisdiction over *Turkey* or over *Russia*. That is the only reason . . . Therefore, as to a purely foreign country, it is of no use asking for an order, because the order cannot be enforced."

In *In re North Carolina Estate Co Ltd* 5 TLR 328, Chitty J observed that it was:

B "quite true . . . that Parliament did not legislate for a foreign country. The point, however, was would the court grant an injunction which was ineffectual, not as being against the foreign court but as being against a person who could not be reached?"

37 In some of the older cases, the foreign residence of a claimant combined with the foreign location of the relevant assets, was treated as a reason for expecting an order of the English courts to be disregarded. In an C age when assets and persons were less mobile, the English courts were realistic enough to appreciate that the mere existence as a matter of English law of personal jurisdiction over a foreign resident offered no assurance that the injunction would in practice be observed. In modern conditions, with an increasingly unified global economy, the English courts have generally assumed that their injunctions will be obeyed by those who are subject to D their personal jurisdiction, irrespective of their place of residence. The modern law takes the more robust position stated by the Court of Appeal in *In re Liddell's Settlement Trusts* [1936] Ch 365, 374 (Romer LJ), that it is "not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed". In *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 574 Lord Scarman, with the E agreement of the rest of the House of Lords, regarded this retort as a sufficient answer to the submission that an anti-suit injunction should be refused because it was liable to be disregarded by a Portuguese party suing in Texas.

38 The case which on the face of it does most to advance Miss Newman's submission is the decision of Maugham J in *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196. Maugham J declined to issue an injunction F restraining proceedings by a resident of Victoria in Melbourne. His reason, expressed at pp 209–210 was:

"I can find, however, no reason to doubt that a person domiciled abroad can sue in his own courts a company which, in carrying on business there, has incurred a debt or liability to him, whether or not that company is being wound up in this country, to which he owes no G allegiance and with the laws of which he is not acquainted; though, as pointed out in Dicey, p 377, if he desires to benefit under the English winding up he must, generally speaking (see for an exception *Moor v Anglo-Italian Bank* (1879) 10 Ch D 681), give up for the benefit of other creditors any advantage which he may have obtained for himself by the proceedings abroad. If these views be well founded it is difficult to see H why an English court should attempt to restrain such a creditor from enforcing his rights in his own country merely because it is possible to serve him with process here. To prevent a misconception I should point out that I am not here dealing with the case of a British subject or a corporation incorporated under our law, nor am I dealing with the case where the person sought to be restrained from proceedings abroad has

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made himself a party to the proceedings in the liquidation, for instance by putting in a proof or in some other way."

Maugham J concluded, at p 210, that where a foreigner is proceeding in his own courts:

"in general it will be more conducive in such a case to substantial justice that the foreign proceedings should be allowed to proceed."

These observations were not a statement of law. As Millett LJ observed in *Mitchell v Carter* [1997] 1 BCLC 673, they went to the court's discretion. What is thought to be "conducive to the ends of justice" is liable to change over time. The Court of Appeal in the present case considered that Maugham J's remarks could no longer be regarded as consistent with the policy of the law relating to international insolvencies. The Board is of the same view. Maugham J's approach would be fair enough if the common law regarded insolvency proceedings as purely territorial. But it has not taken that view for many years, either in relation to its own winding up proceedings which have always been universal, or in relation to the corresponding proceedings of foreign courts dealing with the insolvency of their own companies. The object of the winding up court in dealing with an international insolvency is to ensure, so far as it properly can, that the worldwide assets of the company and the worldwide claimants to those assets are treated on a common basis: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 30 (Lord Hoffmann); *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] 2 WLR 971, para 19.

39 The Board concludes that where a creditor or member who is amenable to the personal jurisdiction of the court begins or continues foreign proceedings which will interfere with the statutory trusts over the assets of a company in insolvent liquidation, in principle an injunction will be available to restrain their prosecution irrespective of the nationality or residence of the creditor in question.

40 The Board would accept that as a general rule, there can be no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court, provided that it is an appropriate jurisdiction and that litigation there is not vexatious or oppressive to the liquidators or other interested parties. But it is in principle inimical to the proper winding up process for a creditor to seek or enforce an order from a foreign court which will result in his enjoying prior access to any part of the insolvent estate. In *Kemsley v Barclays Bank plc* [2013] BPIR 839, para 41 Roth J observed that where the foreign litigant undertakes to bring any assets realised in the foreign proceedings into the bankruptcy so that no advantage would be obtained over other creditors, the basis on which an anti-suit injunction might otherwise be justified will not apply. The Board wishes to record its endorsement of that approach.

Discretion

41 As with any injunction, this is subject to the court's discretion to refuse relief if in the particular circumstances it would not serve the ends of justice. It is neither possible nor desirable to identify what circumstances might have that effect. But it has often, and rightly, been said that the jurisdiction to grant anti-suit injunctions is to be exercised with caution.

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There may in particular be factors at work other than the desire to obtain an advantage over comparably placed creditors or members which make it just to allow the foreign proceedings to continue, either without restriction or on terms which will sufficiently protect other interests. In the present case, the judge having concluded that the issue of an injunction would be contrary to principle, the Court of Appeal were entitled to overrule him and to exercise their own discretion. They exercised it in the liquidators' favour, and the Board will not interfere unless it is shown that they were guilty of some error of principle or misconception of fact, or that they were plainly wrong.

42 The only substantial criticism made of the way that they exercised their discretion was that as a matter of comity they ought to have left to the Dutch courts the decision whether the Dutch proceedings should be allowed to proceed. The District Court of Amsterdam having rejected Fairfield Sentry's application to lift the attachments, it was said that the courts of the British Virgin Islands should have respected that decision. In the Board's opinion this submission misunderstands the role that comity plays in a decision of this kind. Where the issue is whether the BVI or the foreign court is the more appropriate or convenient forum, it can in principle be decided by either court. Comity will normally require that the foreign judge should decide whether an action in his own court should proceed: *Barclays Bank plc v Homan* [1993] BCLC 680, *Mitchell v Carter* [1997] 1 BCLC 673 (Millett LJ). In the present case, however, there is no room for deference to the Dutch court's decision. In the first place, the question does not turn on the relative convenience or appropriateness of litigation in the courts of the Netherlands and the BVI. Both courts can adjudicate on the substantive dispute, the Dutch courts in Shell's current proceedings, and the BVI court in ruling on a proof if Shell lodges one. But the BVI is the only forum in which priorities between claimants generally can be determined. The question before the Court of Appeal was whether Shell should be allowed to invoke the jurisdiction of the Dutch courts to obtain an unjustified priority in violation of a mandatory statutory scheme in the British Virgin Islands. Second, the relevant principles of Dutch law would prevent the Dutch courts from deciding in which court the issues would be better determined. It is apparent from the evidence of Dutch law and the judgment of the Amsterdam District Court rejecting Fairfield Sentry's application, that the decision does not involve identifying the most appropriate forum. Save in the case of unarguable claims or those in which an attachment would expose the garnishee to a real risk of having to pay twice, the issue of an attachment is a matter of right in the Netherlands. The Dutch courts have no regard to foreign insolvencies so far as they conflict with Dutch domestic law or limit the recovery of local creditors. Third, although when a company is being wound up under the law of the jurisdiction of its incorporation the distribution of its assets among creditors and members is in general a matter for that law, there may well be circumstances in which as a matter of discretion an English or BVI court might refuse an injunction on the ground that the foreign court had a special interest in asserting dominion over an asset forming part of the insolvent estate within its own territory. However, that question could not arise in the present case, because the relevant asset was not located in the Netherlands but in Ireland. The jurisdiction of the Dutch court under its own law to authorise the attachment of an Irish debt owed to a BVI company in liquidation in the BVI may fairly be described, as

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the Court of Appeal did, as exorbitant. There are cases, as Hoffmann J observed in *Barclays Bank plc v Homan* [1993] BCLC 680, 688, in which

> "the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law".

In the Board's opinion, this is such a case.

43 There appears to the Board to be nothing to suggest that allowing Shell an advantage over other comparable claimants would be consistent with the ends of justice. Nor, in the circumstances, should Shell find this surprising. It invested in a company incorporated in the British Virgin Islands and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction.

The scope of the order

44 It is necessary, finally, to refer to an issue about the scope of the relief sought which arose in the course of the hearing of the appeal. The reasoning of the Court of Appeal was based on the inconsistency between the Dutch attachments and the statutory trust of Fairfield Sentry's assets. But its order, following the form proposed in the notice of appeal, restrained Shell from pursuing the Dutch proceedings generally without any specific reference to the attachments. As the Board has pointed out, merely by invoking the adjudicatory jurisdiction of a foreign court, a creditor does not necessarily act inconsistently with the statutory trusts. The vice of the Dutch proceedings lay in the attachments. In the generality of such cases, absent vexation or oppression, an order restraining the entire proceedings would be too wide. Miss Newman, however, objected to the order being modified so as to limit it to the attachments because no application to limit it in that way had been made in the Court of Appeal and an attempt to modify it after judgment failed. The result is that both parties were contending for an all or nothing solution.

45 In the particular circumstances of this case, the Board is persuaded that it should leave the order of the Court of Appeal as it stands. The effect of that order is that there can be no judgment on the merits in the Netherlands to which the attachment could relate. The order as framed therefore achieves the desired result of preventing the attachments from leading to execution against the Dublin account. In theory, it achieves more than that by also preventing the exercise of the Dutch court's adjudicatory jurisdiction. But this is rather unreal. The sole substantial purpose of the Dutch proceedings was to obtain the attachments and the resulting priority. The attachments are also the sole basis in Dutch law for the Dutch court's exercise of any adjudicatory jurisdiction. Therefore an injunction requiring Shell to procure the lifting of the attachments would in reality have brought an end to the Dutch proceedings as a whole by removing their jurisdictional basis, just as the order of the Court of Appeal does. This will not deprive Shell of any advantage to which it is legitimately entitled. It may prove in the liquidation for its damages for misrepresentation and breach of warranty. While the position as regards limitation has not been explored in detail on this appeal, Miss Newman was not able to assert that a proof of debt for the

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claims brought in the Netherlands would be time-barred in the British Virgin Islands, and nothing in the material before the Board suggests that it would be. Since the operative date for limitation purposes in the liquidation will be the date of the winding up order and the Dutch substantive proceedings were begun after that date, if the claim which Shell have brought in the Dutch courts is not time-barred there, there is no reason to think that a proof of debt would be time-barred either.

46 The practical inconvenience of the present state of affairs is that the Dutch proceedings and the attachments may remain for some time in existence without going anywhere, and that in the meantime the liquidators will be unable to access the balance on the Dublin account. As between responsible parties such as these, the Board would expect this problem to be resolved by agreement. If that does not happen, and the result is that the money in Dublin remains in balk when the liquidators need it to fund distributions, it may well be appropriate for the liquidators to make a further application in the High Court for an order requiring the attachments to be released.

Conclusion

47 The Board will humbly advise Her Majesty that the appeal should be dismissed.

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Exhibit 26

McPherson & Keay

The Law of Company Liquidation

bankruptcy transactions, although there is a great deal of similarity between the provisions and some of the cases to which I make reference in the chapter are bankruptcy cases.

C. The rationale for the provisions

11-014 The rationale behind the existence of provisions allowing for the adjustment of transactions that were quite permissible when made, deserves a brief consideration.[52] It is somewhat unfortunate, particularly in relation to legislative development, that while the adjustment provisions have been regularly considered by courts, there has been little attempt to ascertain and articulate the rationale for the provisions.

Historically, the adjustment (or avoidance) provisions contained in the insolvency legislation of the UK (and in other common law countries such as Australia, New Zealand, Canada and the US)[53] can, it is submitted, be divided loosely into two groups of provisions. First, there are provisions, such as s.239[54] that regulate the giving of preferences by a corporate debtor, and aim at adjusting rights among the creditors inter se.[55] The second group, including provisions such as s.238[56] and s.423, is designed to adjust the rights of creditors as against the debtor.[57] This latter group has its origins in fraudulent conveyance law which can be traced back to the Statute of Elizabeth,[58] and are aimed at preventing the depletion of the estate of a debtor to non-creditors and with loss for the creditors.

Fraudulent conveyances[59] involve debtors making transfers and incurring obligations with the intent to delay, hinder or defraud creditors.[60] The essence of a fraudulent conveyance is that an insolvent parts with property or money and receives nothing or little in return[61]; this action will prejudice all of the creditors of the insolvent,[62] whereas with preferences one or more creditors are benefited vis-à-vis the other creditors. The classic instance of a fraudulent conveyance is the transfer of property or money by a debtor to an associate or a relative (for little or no consideration), thereby placing it out of the reach of creditors.[63] Fraudulent conveyances involves debtor misbehaviour in that the debtor is acting improperly

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1990), p.3.

52 For a detailed discussion, see Keay, "In Pursuit of the Rationale for the Avoidance Provisions in Insolvency Law" (1996) 18 *Sydney Law Review* 55.

53 Many EU Member States take a similar approach. See McCormack, Keay and Brown, *European Insolvency Law* (2017), Ch.4.

54 See other examples in other countries, such as Corporations Act 2001 (Aust.) s.588FA and Bankruptcy Reform Act 1978 (U.S.) s.547, which cover the same material.

55 Jackson, "Avoiding Powers in Bankruptcy" (1984) 36 *Stanford Law Review* 725, 726; T. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Massachusetts: Harvard University Press, 1986), pp.68–69.

56 See Corporations Act 2001 (Aust.) ss.588FB, 238; Bankruptcy Reform Act 1978 (US) s.548.

57 See, Oditah, "Assets and the Treatment of Claims in Insolvency" (1992) 108 L.Q.R. 459, 465.

58 13 Eliz.1 c.5.

59 The fraudulent conveyance was recognised in Roman law (Kennedy, "Involuntary Fraudulent Transfers" (1987) 9 *Cardozo Law Review* 531, 535).

60 *Lloyd's Bank Ltd v Marcan* [1973] 1 W.L.R. 1387 at 1392; *Re World Expo Park Pty Ltd* (1984) 12 A.C.S.R. 759 at 768; D. Baird, *The Elements of Bankruptcy* (Westbury, Foundation Press, 1992), p.134. See s.6 of the Statute of Elizabeth; Baird and Jackson "Fraudulent Conveyance Law and its Proper Domain" (1985) 38 *Vanderbilt Law Review* 829.

61 Baird, *The Elements of Bankruptcy* (Westbury: Foundation Press, 1992), p.136.

62 See Langstaff, "The Cheat's Charter" (1975) 91 L.Q.R. 86, 87.

63 Cullina, "Recharacterising Insider Preferences as Fraudulent Conveyances: A Different View of

in disposing of assets for less than, or no, value (often to associates). Preferences are designed to adjust the benefits received by creditors, i.e. a creditor who receives more from a transaction within a certain time zone before liquidation than would be received if the creditor had to prove in the winding up. Preferred creditors may be directed to pay to the insolvent an amount equal to the benefit received. Preferences involve creditor misbehaviour in that it is creditors who are trying to steal an advantage over and above their fellow creditors. More will be said about provisions in the mould of fraudulent conveyances and the preference provision later in this chapter.

11-015 There is little doubt that the adjustment provisions have been included in the Act to foster a general purpose of liquidation law, i.e. to provide an orderly process for dealing with the affairs of insolvents,[64] and, one might add, to ensure distribution of company property pursuant to the statutory scheme.[65] This latter view is demonstrated in the Australian decision of *Burns v Stapleton*,[66] where it was stated that a transfer would be a preference if it were to dislocate the statutory order of priorities amongst creditors.[67]

The provisions seek to assist the bringing of orderliness to the disorder that often marks an insolvent's relationship with creditors, in that they endeavour to resolve the creditor-debtor conflict[68] by enabling the insolvent (through the agency of the liquidator) to work out the situation through co-operation with all creditors.[69] In this working out, a liquidator will be required to balance the need for an orderly and fair resolution of the estate with the private interests of creditors. It is submitted that the adjustment provisions are an important factor in insolvency law's policy of providing for a collective process,[70] i.e. transactions entered into by the insolvent within certain periods before liquidation are set aside so that the property or money involved can be collected and distributed to the creditors.

Three primary rationales have been given for the existence of a preference provision in insolvency legislation, namely the promotion of the pari passu principle, the prevention of the dismemberment of the debtor and deterring people from taking preferences. The first has been subject to significant questioning by some commentators,[71] as indicated earlier.

11-016 As has already been noted, it has been traditionally asserted that one of the

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Levitt v Ingersoll Rand" (1991) 77 *Virginia Law Review* 113, 159.

64 This is consistent with the approach adopted in the United States. See *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No.137 Pt 1, 93rd Congress, 1st Sess. (1973), p.19, p.71 cited by Ponoroff, "Evil Intentions and on Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time" [1993] *Wisconsin Law Review* 1439, 1474; Orelap, "Avoidance of Preferential Transfers Under the Bankruptcy Reform Act of 1978" (1979) 65 *Iowa Law Review* 209, 210–211; Warren, "Bankruptcy Policy in an Imperfect World" (1993) 92 *Michigan Law Review* 336, 351; Nimmer, "Security Interests in Bankruptcy: An Overview of section 547 of the Code" (1980) 17 *Houston Law Review* 289, 291.

65 For example, see Mokal,"Priority as Pathology: The Pari Passu Principle Myth" (2001) 60 CLJ 581.

66 *Burns v Stapleton* (1959) 102 C.L.R. 97.

67 *Burns v Stapleton* (1959) 102 C.L.R. 97 at 104.

68 Neider, "Voidable Preferences: An Analysis of the Proposed Revisions of Section 60b" [1974] *Wisconsin Law Review* 481, 491.

69 Broome, "Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments" (1987) *Duke Law Journal* 78, 115.

70 Professor Michael Bridge in "Collectivity, Management of Estates and Pari Passu" in Armour and Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (2003), p.4 states that the collective process is a necessary precondition for the application of the pari passu principle.

71 Most notably by Professor Riz Mokal in "Priority as Pathology: The Pari Passu Principle Myth" (2001) 60 CLJ 581.

Exhibit 27

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A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation

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ABSTRACT

The freedom of movement of capital in the modern global economy has been indispensable to the development of international corporate enterprise. This paper argues that the judicial and legal institutions of states are as essential to the stability of the global economy as the traditionally heralded international economic channels that have been so carefully crafted globally. In fact, in the sphere of trans-border insolvency and bankruptcy, judicial and legal institutions could be perceived as even more vital, as the vibrancy and the health of global enterprises can be radically challenged and even severely impeded should countries fail to institute universally accepted legislative and judicial codes of practices. The quest for this normative approach has found expression by the United Nations in its development of the UNCITRAL Model Law, a prototype which has since been adopted by twenty-two States. A number of other States, as well, have adopted measures which mirror the cooperation and co-ordination principles of the UNCITRAL Model Law These States all accept that legislative and judicial capacity and competence are essential ingredients in the salutary infusion of mutual confidence, and it is this very shared trust that is the ultimate catalyst for successful resolution of cross-border and other disputes. For Offshore Financial Centres (OFCs), reinforcement of confidence in their Courts in the international arena is perhaps even more highly critical to their sustained roles in today's globalized economy. This paper outlines the legislative and judicial competencies and roles that have enabled the Cayman Islands, as an example of a key OFC, to emerge as a major player in international cross-border conflict resolution. This discourse also acknowledges the hurdles OFCs have had to overcome in both perceptions and reality in the global marketplace and the increased pressures faced by Courts today in meeting demands of public policy objectives. With specific regard to the Cayman Islands as an example of an effectively functioning OFC, the paper examines the Islands' insolvency regime, reviews a number of cases demonstrating the efficacy of the approach of the Islands' Courts, and highlights relevant Cayman Islands' legislation and orders made pursuant to those laws. This analysis demonstrates how, by implementing through its Courts a public policy model on a par with international codes of conduct, the territory has vouchsafed its ability to render the kind of international judicial assistance that is critical to the fulfilment of the tenets of the UNCITRAL Model law and to the principles of universality of bankruptcy that the Law embraces. A further benefit is that Cayman's Courts and court-appointed officials, in turn, may expect to receive full cooperation from other jurisdictions. Indeed, the emergence of the Cayman Islands as a leader among financial centres is due in no small part to its compliance with international regulatory requirements across the breadth of its financial industry. In addition to complying with FATF Directives on money laundering, the territory complies with OECD threshold requirements for tax information exchange and serves as a member of the Steering Committee of the OECD's Global Forum on Transparency and Exchange of Information. Furthering its position of strength, the Islands' legal and judicial system is based on English common law traditions, and its local legislative arsenal is being constantly modernized to meet contemporary Cayman Islands' needs. This legislative progression, given the Islands' continued status as a British Overseas Territory (UKOT) located in the North West Caribbean Sea, includes the extension, as required, of United Kingdom legislative provisions to the Islands.

Keywords: Global Economy; Bankruptcy; Judicial Capacity; Cross-Border; Insolvency Regime; Legislation

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1. Introduction

Since World War II, economists, business interests and politicians have worked together to promote trade and growth and manage adverse consequences. Institutions such as the World Bank, the International Monetary Fund and the World Trade Organisation were formed as vehicles for global objectives. Barriers to international trade have been lowered through international agreements, such as the General Agreement on Tariffs and Trade (GATT).

This structure has fostered the emergence of worldwide production markets and allowed consumers and corporations broader access to worldwide markets and foreign products. It was intended to, and has successfully stimulated the emergence of, worldwide financial markets and created easier access to external financing for corporate and governmental borrowers alike.

As a central tenet of this post-World War II phenomenon, "freedom of movement of capital" has been the clarion call. So much so that it has found expression at the core of the most advanced political economic unions. For instance, Article 73b(1) of the European Community Treaty provides in terms that within the framework of the other provisions of the Treaty "all restrictions on the movement of capital between Member States and between Member States and Third countries shall be prohibited".[1]

Because of the size and strength of its economy and the influence of the dollar, the United States has been very successful in utilizing the global market place. Like the United States, the rapid rise of the Chinese economy, the growth of India's economy, and the success of the European Union are all due to the ability of their economies to respond to the opportunities provided by globalization.

Other emerging economies also recognise the benefits to be gained from globalization, and the competition amongst them to attract inward investment has become a driving force of the international financial markets.

This is the well-spring of international financial activity from which the Offshore Financial Centres ("OFCs") have emerged.

That activity also explains the advent of offshore corporate vehicles and gives the background to their important role as instruments for the movement of capital in the global economy.

In this context, the success of some of the OFCs demonstrates that the only way that they can and will survive as global players in international financial markets is to ensure that their legal and judicial institutions comply fully with common law principles of comity, in line with the principles of the UNCITRAL Model Law.

2. Historical Misconceptions about OFCs

The role of OFCs and of offshore corporate vehicles has been a constant source of controversy. This paper does not proceed on a premise that is oblivious to the perennial debate about this subject, generated especially by the concerns about "harmful tax competition" and about the unfavourable impact some OFCs could potentially have upon the high tax regimes of "Onshore" jurisdictions.[2]

But such concerns having been time and again met and addressed by the OFCs within the various international fora, the debate should not be allowed to detract from the reality of the crucial role of offshore companies, the recognition of which is necessary for a proper appreciation of the juridical and economic imperatives that require the giving of judicial co-operation, not only by the judiciary of the OFCs to the judiciary of Onshore jurisdictions, but also the other way around.[3]

3. Courts' Cooperation and Co-Ordination—the Challenges

Indeed, the recent global financial crisis and the consequential failure of many transnational entities have challenged the courts of countries—including the OFCs—to respond with unprecedented urgency and efficacy. The nature of the challenge has come to be described in the

[1]This is a provision that the European Court has been called upon to interpret in a number of cases [C-484/93; C-367/98; C-483/99; C-503/99; C-174/04].
In Case C-367/98—*Commission of European Convention v Portuguese Republic*, the Court emphasized the particular importance of the freedom of investors to acquire shares in corporate entities, including where such entities may own and control national undertakings. In this regard, the Court held that: "*A member state which adopts and maintains in force national rules* 1) *prohibiting the acquisition by investors from other Member States of more than a given number of shares in certain national undertakings and* 2) *requiring the grant by the State of prior authorisation for the acquisition of a holding in certain national undertakings in excess of a specified level fails to comply with its obligations under Article* 73*b of the Treaty* (*now Article* 56 *EC*)."

[2]The impact that OFCs have upon the global financial system is now regarded in a more positive light by "Onshore" regulators, since the OFCs' near universal acceptance of the need for strict anti-money laundering regimes and tax co-operation agreements. The Cayman Islands complies with FATF Directives on money laundering and with OECD threshold requirements for tax information exchange agreements and serves as a member of the Steering Group of the OECD's Global Forum on Transparency and Exchange of Information. As long ago as 5th April 2000, the Financial Stability Forum of the IMF concluded that the OFCs present no threat to world financial stability. See its Report of that date at page 9 Box 3 where some of the benefits of OFCs are discussed. www.financialstabilityboard.org/publication.

[3]There is already a body of academic work in support of the proposition that OFCs are beneficial in the impact that they have on the global economy. See for instance: "*Offshore Financial Centers and Regulatory Competition*" Edited by Andrew P. Morriss; AEI Press. (May 2010) and "*Offshore Financial Centers and the Canadian Economy*" by Walid Hijazi, Rotman School of Management, University of Toronto.

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"co-operation" and "co-ordination" principles of the UNCITRAL Model Law on Cross-Border Insolvency, Articles 25, 26, 27, 29 and 30. These provisions place obligations on both courts and insolvency representatives in different States to communicate and co-operate to *the maximum extent possible*, to ensure that a debtor entity's insolvent estate is administered fairly and efficiently, with a view to maximizing benefits to creditors. Those principles are designed to meet the following public policy objectives:

1) The need for greater legal certainty for trade and investment;

2) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor;

3) Protection and maximization of the value of the debtors' assets for distribution to creditors, whether by reorganization or liquidation;

4) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple states; and

5) The facilitation of the resumption of financially troubled businesses with the aim of protecting investment and preserving employment.

This is a far-reaching and daunting mandate. However, as a basic position from which to respond, it is reassuring that the commercial necessity for international co-operation between courts in matters of cross-border insolvency has long been recognized and is repeatedly stressed in case law.[4]

4. The Cayman Islands' Insolvency Model

As in England and Wales, in the Cayman Islands foreign bankruptcy or insolvency proceedings (whether corporate or personal) may be recognized at common law if the bankrupt or debtor company submitted, or is properly deemed to have submitted, to the jurisdiction of the foreign court. See *Barclays Bank plc v. Homan* (1993) *BCLC* 680, *In the Matter of Al-Sabah* (below); and, in the case of foreign corporate receiverships, see the seminal Cayman Islands decision in *Kilderkin v Player* (below).

Judicial international co-operation is a well-established tradition in Cayman Islands' jurisprudence, and the common law conflict-of-law rules applicable in this area are carefully applied. The circumstances under which assistance may be given or requested and the principles that guide the making or granting of requests are many and varied. Many instances are the subject of judicial pronouncement. *The Cayman Islands Law Reports* contain the reported judgments on the subject of judicial international assistance.[5] Some of these judgments have come to attract academic interest in seminal textbooks on the subject.[6]

Comity as a Central Tenet of OFC Survival: The over-arching principle is, of course, Comity—that civilized notion that requires reciprocity of co-operation and assistance between the courts of different countries, classically described by Lord Denning in the Westinghouse case in relation to a request by the United States Federal Court in this way:

"*It is our duty and pleasure to do all we can to assist that court, just as we would expect the United States Court to help us in like circumstances. Do unto others as you would be done by.*"[7]

An alternative and more categorical definition was given as long ago as 1895 by the United States Supreme Court in *Hilton v Guyot* (1895) 159 *U.S.* 113, 164, in the following terms recently adopted by the Cayman Islands Court of Appeal:[8]

"*...comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.*"

This established and increasing reliance on comity has come, in the field of bankruptcy and corporate insolvency, to embrace the *principle of universality*, explained by Lord Hoffmann in a trilogy of seminal judgments given on behalf of the House of Lords and the Privy Council. Perhaps most famously, in the following terms from the second judgment, that given in the *Cambridge Gas* case:

"*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal applica-*

[4]See for example: *In re African Farms Ltd.* [1906] *T.S.* 373; Schemmer v Property Resources Ltd. [1975] Ch. 273; In *Re Bank of Credit and Commercial S.A.*. [1992] *BCLC* 570; *Banque Indosuez v Ferromet Resources Inc*. [1993] *BCLC* 112.

[5]See www.caymanjudicial-legalinfo.com.ky/judgments/index

[6]Cross-Border Judicial Co-operation in offshore litigation (The British Offshore World) Editors: Ian R. C. Kawaley, Andrew Bolton and Robin J. Major; Widdy Simmonds & Hill publishing; Confidentiality in Offshore Financial Law; Prof. Rose-Marie Antoine; Oxford University Press.

[7]*In Re Westinghouse Uranium Contract* [1978] 1 *AC* 547,560.

[8]In *HSH Cayman II GP Ltd. and others v ABN Amro Bank N.V. London, Civil Appeal No.* 3 *of* 2010 (*Judgment*: 24 *May* 2010). *In this case the Court of Appeal unsurprisingly did not accede to an application for a stay of a local petition to wind up HSH in deference to proceedings which were merely proposed to be brought in Delaware but not yet instituted there. It was proposed to place HSH in Chapter* 11 *Bankruptcy proceedings there. The local petition was found to be properly based upon a due but unpaid liability and no realistic prospect of a compromise by way of Chapter* 11 *proceedings was shown to exist.*

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tion. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated… universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalization, many other countries have come around to the same view."

"*…the underlying principle of universality…is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company (or bankrupt) as entitled to do so in England.*"[9]

The cases also reflect the important developments at common law which now clearly recognise that "bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights, not to establish them" (per Lord Hoffman in the *Cambridge Gas case* (para. 15)). The import of this statement, for present purposes, is that a foreign insolvency or bankruptcy proceeding may be granted recognition as a collective regime for the enforcement of rights, though particular stakeholders may seek to assert different rights and may not have submitted to the jurisdiction of the foreign courts, provided that their interests (as shareholder or creditor) are to be properly regarded as subsumed within the collective enforcement regime of the foreign proceedings.[10]

5. A Review of Cayman Islands' Insolvency Cases

A review of Cayman Islands cases will reveal that the aspirations embodied in the principle of universality and in the mandate in the case law for the collective enforcement of rights in insolvency and in bankruptcy have, for quite some time, been shared, recognized and enforced by the Courts.

***Kilderkin v. Player* 1984 *CILR* 63**: This case, decided by the Cayman Court of Appeal, is an appropriate starting point. There a receiver, having been appointed as such over an Ontario-registered company by the Supreme Court of Ontario, applied to the Cayman Grand Court for an order recognizing its appointment. The receiver had been appointed at the instance of investors and creditors whose investments had been diverted to purposes outside the authorised scope of investments by the principals of the company. Proceeds of investments (and of certain loans) were traced to bank accounts held by related companies in the Cayman Islands and the receiver applied to the Grand Court for recognition of its appointment by the Ontario Court and for ancillary orders to enable its recovery of the traced assets. In granting recognition, the Court of Appeal held (among other things) that:

"*The Grand Court had jurisdiction (derived from that exercised by the High Court in England) to recognize in the Cayman Islands the receiver as a receiver appointed by a foreign court if it were satisfied that there was a sufficient connection between the defendant company [(or its affiliates in whose names some assets were held)] and the jurisdiction in which the receiver was appointed, to justify recognition of the foreign court's order. Such a connection clearly existed as the defendant companies were obliged to and had submitted to the jurisdiction of the Ontario Court. Since the receiver had the power to litigate on behalf of the defendant companies and the duty to preserve the assets in the interests of all lawful claimants, there was a sufficient connection with the receiver's claim to justify the application for recognition and for authority to identify and recover the defendant companies' assets within the Cayman Islands.*"

Thus the case is an expression of the Courts' understanding of the principles—later to be given the label of "universality"—with the particular emphasis upon ensuring the success of the "collective" approach to the administration of the debtor's estate.

The Court of Appeal also noted—though not as a condition of the recognition given the receiver in the case—that a relevant consideration could be whether or not the courts of the jurisdiction where the company in receivership was incorporated would themselves recognize a foreign-appointed receiver. In the case of the courts of Ontario, that was noted to be so.

The Al-Sabah Case: In circumstances of personal bankruptcy, the need for cross-border co-operation can be just as urgent and important for the protection of creditors, as in circumstances of corporate insolvency.

In 2004, the worldwide quest of the Kuwaiti Government to recover the proceeds of Sheikh Fahad Al Sabah's massive fraud found support in the Cayman Courts, as ultimately confirmed in a judgment of the Privy Council[11]. A bankruptcy order against Sheikh Fahad was obtained in the Bahamas, where he lived, by reliance on an unpaid English judgment in favour of the Kuwaiti Government in the order of some L600 million.

The Trustee-in-bankruptcy then applied to the Cayman

[9] *Cambridge Gas Transportation Corp. v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 *AC* 508 *at* 517 *to* 518. *See also* Wight v Eckhardt Marine GmbH 2003 CILR 211 (P.C. on appeal from the Cayman Islands and In Re HIH Casualty and General Insurance Ltd. [2008] 1 WLR 852 H.L., and see further McGrath v. Riddell [2008] UKHL 21.

[10] Cambridge Gas Transportation Corp. v Official Committee of Unsecured Creditors of Navigator Holdings plc and others (above) followed and applied in *Rubin v Eurofinance S.A.* [2010] *EWCA Civ*. 895.

[11] First instance judgment reported at 2002 CILR 148 upheld in *In the Matter of Al Sabah* 2004-05 *CILR* 373. Injunctive measures for the preservation of assets until the bankruptcy proceedings could be instituted were also made available: sub nom *Grupo Torras S.A. v Bank of Butterfield et al.* 2000 *CILR* 441.

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courts for recognition and authority to enforce the judgment debt as against certain trusts (one of which was originally governed by Bahamian law but was migrated to the Cayman Islands when the English proceedings against Sheikh Fahad were already imminent). The assets of the trusts were alleged to be amenable on the basis that they had been fraudulently disposed into the trusts by Sheikh Fahad and were so recoverable as assets belonging to his bankrupt estate. The recognition of the Trustee and enforcement of the judgment were opposed by Sheikh Fahad on the basis that the Court lacked jurisdiction. By the rather arcane but essential route of reliance on the old Imperial Bankruptcy Act of 1914—long since repealed by the British Parliament, but the extension of which to the Overseas Territories had never been repealed—the Cayman Courts, in the exercise of their bankruptcy jurisdiction, were regarded as having the jurisdiction to grant recognition of and to enforce the orders of other foreign courts of bankruptcy.

In this case, while the enforcement process may be said to have been engaged at the instance of a single judgment creditor—the Kuwaiti Government—the process by which Sheikh Fahad was forced into bankruptcy was nonetheless of universal and "collective" effect, one in which any creditor, wherever located, could have sought relief.

The principle decided by the Al-Sabah case may also be regarded as addressing the objectives of Article 23 of the UNCITRAL Model Law which provides standing for a foreign representative, on being granted recognition, to take proceedings to rectify illegitimate antecedent transactions. The parallel in the Al Sabah case was the setting aside of the earlier fraudulent dispositions of assets into the trusts.

As to the jurisdiction to recognise and enforce the Bahamian bankruptcy judgment: by dint of judicial construction, the jurisdiction of the Grand Court was construed to be as wide as that conferred by section 426 of the modern Insolvency Act 1986 of the UK, which operated as though the bankruptcy had occurred in the territory receiving the request (here, the Cayman Islands). So construed, the powers vested by the Act of 1914 enabled the Grand Court, in the further exercise of its special statutory powers given in local legislation, to apply those powers in favour of the Bahamian trustee, even though similarly wide powers may not have been granted to him there due to the Bahamian statute's stricter requirements. An important consideration in recognising the appointment of the Bahamian Court was the bankrupt's connection to the Bahamas as the requesting state, which there was no reason to doubt, having regard to his established permanent residence there. The bankruptcy judgment having been recognised, there was no need for the separate recognition or enforcement of the English judgment as that judgment debt, along with all other liabilities and assets of the bankrupt, had been subsumed within his bankruptcy estate.

Accordingly, the assets of the Cayman trusts (USD 30 - 40 million in value) were made available ultimately to the Trustee as part of the global recovery of all the bankrupt's assets in satisfaction of the judgment debt.

The BCCI case: An unheralded success of the Bank of Credit and Commerce (Overseas) Ltd. (BCCI) case has been the unprecedented level of transnational co-operation attained as between the three primary insolvency regimes of BCCI and other international entities and institutions, ever since the worldwide operations of the bank were put into co-ordinated liquidation in 1991. This has been achieved notwithstanding many obstacles encountered at national levels, including the ring-fencing of twenty-seven branches of BCCI by their respective national regulatory authorities, seeking to prefer the interests of local depositors over those of the general worldwide body of creditors of the bank.

Such obstacles notwithstanding, by the crucial agreement reached by which all assets and liabilities were pooled and by the steadfast adherence to the *pari passu* principle, the Liquidators, acting with the sanction of their supervisory courts (in the Cayman Islands, England and Luxembourg) have managed to achieve practical parity of treatment across the entire BCCI estate.[12] This parity of treatment has been extended to include even the ring-fenced branches, where returns were realised typically at less than the levels realized by the Liquidators within the pooled estate. Creditors of many of those branches, by a process of "hotchpot" (bringing into account returns paid by the branches) were allowed to "top up" to the levels of dividends paid globally to the creditors.[13] As the result of the remarkable co-operation between the principal liquidation regimes and the Majority Shareholder that led to the agreed pooling of assets, liabilities and expenses worldwide, the woeful projection of recoveries of a mere few cents in the dollar at the outset have instead now materialised, near the end of the liquidation, into returns of more than 86 cents in the dollar.

Another crucial benefit of early co-operation involved

[12]The sanctioning decision of the English Court is explained in *Re BCCI* (*No.* 3) [1993] *BCLC* 1490. The pooling agreement was approved in the Cayman Islands by Harre J on June 14th 1992: See 1992 CILR Note 7.

[13]Explained in Wight v. Eckhardt Marine GmbH 2003 CILR 211 (at p. 222); and in which the Cayman Liquidators obtained declaratory relief from the Privy Council confirming the applicability of the pari passu principle to ring-fenced branches which remained the legal subsidiaries of BCCI Overseas and provided the indebtedness had not been fully and legally extinguished at the branch level. See also *In Re BCCI* 2009 *CILR* 373: *the need for a standard rate of exchange for payment of dividends across global liquidation estates to ensure application of the pari passu principle*.

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persuading the United States authorities to abate the very draconian penal sanctions they had imposed on BCCI for its role in the unlawful acquisition of certain American banking interests, a role that led to the subsequent collapse of the banks involved. As a result, after arduous negotiations between the Liquidators (approved by their respective courts) and the American authorities, a plea agreement was struck which allowed, among other things, for the restoration to the BCCI liquidation estate of more than 1.2 billion dollars of forfeited assets. The following is an extract from the BCCI (Overseas) Liquidators' report:

"*In November and December of* 1991, *under the supervision of the Grand Court of the Cayman Islands*, *the District Court of Luxembourg*, *and the High Court in England*, *the BCCI liquidators negotiated an historic plea and co-operation agreement with the United States*. *The Agreement was presented to the Grand Court of the Cayman Islands and approved in December* 1991."

"*In accepting this agreement, Judge Joyce Hens Green of the United States District Court for the District of Columbia stated*:

The Plea Agreement now before the court reflects on a truly global measure extraordinary efforts and amazing co-operation of a multitude of signatories representing myriad jurisdictions, *to fully settle actions against the corporate defendants*, *which had operated in* 69 *countries around the globe*, *and through the plea restitution*, *to locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors*, *creditors*, *United States financial institutions*, *and other victims of BCCI. The promise of the Plea Agreement is that those extraordinary efforts*, *that amazing co-operation*, *should continue*."

Seven and a half years later, as she closed the case, Judge Green found that the promise of the Plea Agreement for unprecedented international co-operation had been realized. She called the agreement a "partnership between the Department of Justice and the Court Appointed Fiduciaries" and praised the foresight of the official liquidators acting pursuant to the direction of the Cayman Court, stating that "their efforts on behalf of the victims in this case and beyond have been truly inspirational".[14]

Here, too, were to be found early emanations of the doctrine of universalism, as the judge reflected that the hallmarks of the Plea Agreement "are principles which should serve to guide the relationship between (countries) in dealing co-operatively with international frauds in the future. Those principles are restitution to victims, co-operation in sharing investigative materials and respect and comity for their respective legal systems".[15]

***The Case of FU JI Food and Catering Services Holdings Limited*:** From the Cayman Islands perspective, the inventiveness of the common law and the benefit of co-operation have become manifest in this still further example of judicial cooperation in aid of trans-border insolvencies.

The Matter of FU JI Food and Catering Services Holdings Limited (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.

Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—principally in food production, restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.

As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active interest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.[16]

[14] *United States v BCCI Holdings* (*Luxembourg*) *S.A.* 1999 *WL* 499134 *at* 27.

[15] *Ibid*.

[16] Fully discussed in *In the Matter of Basis Yield Alpha Fund* (*Master*) 2008 *CILR* 50 in which the Grand Court issued letters of request to the Australian court in New South Wales seeking the recognition of its court-appointed liquidators and authority for them to garner information about the Fund in Australia by reliance on the powers of the Australian Court. That court granted the letter of request and accorded the Cayman Proceedings "Foreign main proceedings" recognition in keeping with Article 20 of the UNCITRAL Model law. In *Basis Yield Alpha* in the Cayman Court, the earliest exercise of the jurisdiction by the Grand Court in which letters of request were sent to the English High Court was noted and applied: *In Re BCCI* (*Overseas*), *Grand Court Cause* 284 *of* 1991, *December* 7 2002, *unreported*, applied. The English Courts judgment in which that request was granted by reliance on the statutory jurisdiction under section 426 of the English Insolvency Act 1986 is reported at *Bank of Credit and Commerce Int'l S.A.* (1994) 3 *All. E.R.* 764 (*per Rattee J*).

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Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from *Cambridge Gas* was noted and applied:

"*The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum* (*para* 22, *page* 518)."

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.[17]

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.[18]

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings.

In the now commonplace context of the master/feeder hedge fund structure, corporate operations take place in different jurisdictions. Often, in the Cayman context, the structure involves investors' participating in the fund through Cayman Islands entities which are either the feeder or master fund administered in the Cayman Islands, but where the investment management takes place elsewhere in an onshore jurisdiction.

***Lancelot Investment Fund Limited*:** This scenario also applied to *Lancelot Investment Fund Limited*, a Cayman Islands domiciled open-ended investment fund through which investors provided funds, of over USD1 billion, for investment in specified United States securities to be managed by a United States investment manager.

When allegations of fraudulent misappropriation of its assets were raised by the investment manager against a borrowing syndicate to which all the assets had been loaned, a Trustee-in-Bankruptcy was appointed by the U.S. Court under Chapter 7 of the US Bankruptcy Code and he took control of the known assets, all of which were located in the United States.

Nonetheless, some investors—a major international bank and a third party investment fund, to the combined value of more than USD80 million—petitioned the Cayman Court for the winding up of Lancelot in the Cayman Islands. They petitioned on the basis that they had made their investments through Lancelot as a Cayman Islands entity governed by Cayman Islands law and, as the substratum had failed amidst the allegations of fraud, they were entitled to a winding up on the "just and equitable basis", so that their interests may be protected by the involvement of a liquidator acting under the aegis of the Cayman Court. A particular concern was that it was the

[17]In this way observing nonetheless, the dictum from Lord Hoffman in *Cambridge Gas* (518 e - f) as to the limits of the common law jurisdiction to grant recognition and assistance: "At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency".

[18]Unusual though the case was, it was not unprecedented. Kawaley J. of the Bermuda High Court *In Re Dickson Group Holdings Limited* [2008] *Bda LR* 34, granted a stay of proceedings against a Bermuda company, at the instance of its Hong Kong Court appointed permanent liquidators, to enable and facilitate parallel schemes of arrangement under both Bermudian and Hong Kong law designed to restructure the company's debt and capital so that its shares (under substantially new ownership) could once again trade on the HKSE.

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investment manager responsible for placing the loans with the syndicate, which had itself petitioned the U.S Court after the allegations of fraud had come to light.

In an approach that demonstrates that there can indeed be a "(modified) universalism", Quin J. of the Grand Court made the order for winding up over the objection (raised by letter but without formal appearance) of the Chapter 7 Trustee and the majority of investors (who formally appeared), as he was satisfied that the petitioners should have someone to represent their particular concerns to both the U.S. Court and the Cayman Court. Even though the judge recognized the United States as the principal place for the liquidation of Lancelot, as its incorporation and many of the arrangements for the investments were governed by Cayman Islands law and would therefore have to be examined and assessed against that law, he resolved to appoint only a single liquidator, mindful that the Chapter 7 Trustee may wish and should be free to apply for the recognition of his appointment in the Cayman Islands. Furthermore, the Cayman winding up order was stayed, in keeping with the principles of comity and universality in corporate insolvency.

This approach would give both the Cayman Liquidator and the Chapter 7 Trustee an opportunity to discuss their respective roles and attempt to reach an agreed protocol for the efficient liquidation of Lancelot, thus avoiding multiple proceedings and duplication of costs. Further, the Court was keen to encourage co-operation with the US Court, both in recognizing the Cayman Liquidator in the US Court, with the Chapter 7 Trustee reconsidering his stated intention to oppose, and in the Trustee similarly being encouraged to apply to the Cayman Court for recognition of his appointment.

The wisdom and efficacy of this approach has been borne out by the fact that a protocol was entered into between the two Court-appointed office holders and has been successfully implemented. In practice, the minimal costs—of having a Cayman liquidator who can liaise with his U.S. counter-part and the U.S Court and report to the Cayman Court, with an eye to the Cayman public interests in the proper investigation and resolution of allegations of fraud for the protection of investors in a Cayman Fund company and for the protection of investors as a whole—is likely to prove a small price to pay. While the protocol allows in practical terms for the imperative that insolvency shall be "both unitary and universal"—(as Lord Hoffmann further described the principle in the House of Lords decision in *Re HIH Casualty & Gen. Ins. Ltd* (above) p. 852, para 6)—it also allows for the legitimate public policy concerns recognized by the Grand Court. In this regard, the following passage from Lord Hoffmann in the *HIH* case (at para 30) was adopted and applied:

"*The primary rule of private international law which seems to me applicable to this case is the principle of* (*modified*) *universalism*, *which has been the golden thread running through English cross-border insolvency law since the* 18*th century. That principle requires that English courts should*, *so far as is consistent with justice and UK public policy*, *co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal* [*of assets to Australia*][19] (*emphasis supplied*)."

In citing and following the earlier decision of Henderson J of the Grand Court in *Re Philadelphia*[20] Quin J also applied the following dictum from Robert Walker J. (as he then was) in *Re Gordon & Breach Science Publishers* (1995) 2 *BCLC at* 199: dictum that had found favour with Henderson J. in *Re Philadelphia*.

"*Fairness and commercial morality may require that a substantial independent creditor* (*in this case investor*) *which feels itself to be prejudiced by what it regards as sharp practice should be able to insist on the company's affairs being scrutinized by the process which follows a compulsory order. Such a creditor is entitled to an investigation which is not only independent, but can be seen to be independent. This may be so even where the voluntary liquidation is already well advanced and a compulsory order may cause further expense and delay*…."

Such concerns, about "fairness and commercial morality", have dictated the need in still further cases for the appointment of different liquidators after winding up had commenced by removing liquidators who had been appointed but who were likely to suffer from a potential conflict of interest. See *Re Bear Sterns High-Grade Structural Credit Enhanced Leverage* (*Overseas*) *Ltd*. *Grand Court*, *February* 22, 2008, *unreported.*

Potential conflicts of interests to arise from the appointment of the same liquidators over both the master and feeder funds have also dictated the need for separate appointments and separate windings up before different Courts: ***In the Matter of DD Growth Premium Master Fund* 2009 *CILR Note* 11.**

The foregoing survey of cases reveal the approach taken by the Cayman Courts at common law and the general adherence, where circumstances and policy allow, towards the unitary and collective approach to trans-

[19] *In the Matter of Lancelot Investment Fund Limited* 2009 *CILR* 7.
[20] *In re Philadelphia Alternative Asset Fund Ltd*. 2006 *CILR*, Note 7, unreported.

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border co-operation in insolvency matters.[21]

6. Cayman Islands Legislation Complies with UNCITRAL Model

Legislation, aimed at expressing statutory confirmation of the common law precepts of co-operation in transborder proceedings and at further achieving the objectives of the UNCITRAL Model Law on Cross-Border Insolvency, was passed in 2009 with the enactment of Part XVII of the Companies Law. This came about although the Cayman Islands, unlike the United Kingdom, have not itself subscribed to the UNCITRAL Model Law.

7. Orders Made Under Cayman Islands Legislation

Pursuant to Part XVII, orders "ancillary to foreign bankruptcy proceedings," have already been made by the Grand Court.

Among these, on 24th June 2009, the Icelandic court-appointed "Moratorium Assistant" in bankruptcy proceedings in relation to the affairs of Straumur Bank—Iceland's largest investment bank—was recognized by the Grand Court as, in the words of the Law, "a foreign representative". This recognition authorized him to act within the Cayman Islands on behalf of Straumur Bank, including for the purposes of identifying and restraining assets of the Bank located within the Cayman Islands. Out of concern that competing claims to those assets may be brought against the Bank in the Cayman Islands, on the 9th September 2010 a further order was made on the application of the Moratorium Assistant enjoining any application against the Bank in the Cayman Islands without the leave of the Court. The Court was informed about the nature of the Icelandic bankruptcy proceedings (which afforded the Bank a moratorium during which it sought to arrive at a composition with all its creditors) and was satisfied that the objectives of the Icelandic Court should be supported. In enjoining the commencement of proceedings in the Cayman Islands, the Court stated:

"*Notwithstanding that there are currently no proceedings against Straumur in the Cayman Islands and there are no known Cayman Islands creditors, the fact that there are significant Cayman assets may be sufficient to tempt a putative creditor of Straumur to commence proceedings here. In order to protect the global integrity of the Composition, it is of crucial importance that creditors of Straumur (wherever they may be located) should not be permitted, while the moratorium is in place, to issue proceedings in the Cayman Islands against Straumur.*"[22]

The local statutory jurisdiction was also invoked on February 5th 2010. Then Jones J. of the Grand Court granted the petition of Irving H. Picard in his capacity as Trustee *of Bernard L. Madoff Investment Securities LLC* (*BLMIS*), *for a declaration that he has the right to act in the Cayman* Islands on behalf of BLMIS. BLMIS was incorporated in accordance with the laws of the State of New York and was then the subject of bankruptcy proceedings before the Hon. Burton Lifland in the U.S. Bankruptcy Court for the Southern District of New York. On 15th December 2008, Mr. Picard had been appointed trustee for the liquidation of the business of BLMIS with all the duties and powers of a trustee as prescribed in the U.S. Securities Investor Protection Act, 1970.

The Grand Court pronounced its decision in these terms:[23]

"*Part XVI of the Companies Law* (2009 *Revision*) *was enacted in* 2008 *and came into force with effect from* 1*st March* 2009. *Section* 241(1) (*a*) *did not change the pre-existing conflict of laws rules relating to this subject. Its purpose is to provide foreign representatives with a convenient and expeditious manner of establishing their credentials and right to act on behalf of the debtor in a way which will have universal effect within the jurisdiction, without the need to establish his right separately as against every individual counterparty. The Cayman Islands conflict of laws rules applicable to this issue are well established. First, all matters concerning the constitution of a corporation are governed by the place of its incorporation. It follows that the law of the place of incorporation determines who are the company's officials authorised to act on its behalf. Second, the authority of a*

[21]Despite this history, Cayman insolvency proceedings have sometimes not gained ready recognition by the U.S. Bankruptcy Court for reasons which seem to ascribe too narrow an ambit to the fact of incorporation in the Cayman Island and to the level of corporate activity that takes place there. For instance, notwithstanding that the SphinX Funds were being liquidated in the Cayman Islands as the place of incorporation and without any challenge as to it being the proper forum, recognition of the Cayman proceedings were only accorded the "foreign non-main proceeding status:" *Re SphinX Ltd* 371 *B.R.*10 (*Bankr. S.D.N.Y. July* 2007). Cayman proceedings were refused recognition altogether on a very narrow view being taken of the test whether the Fund had an "establishment" in Cayman and again, notwithstanding the presumption accorded the place of incorporation as the proper forum and the fact that liquidation was underway in the Cayman Islands: *In re Bear Sterns Master Fund* 374 *B.R.* 122 (*Bankr. SDNY Sept.* 2007). A more acceptable position has however been taken in comparable circumstances by the same judge (Lifland J.) on July 22, 2010, by recognition as "foreign main proceedings", the liquidation in the BVI of Fairfield Sentry Limited: *In re Fairfield Sentry Limited, et al.* Case No. 10-13164 S.N.D.Y. 22 July 2010).

[22]*Cause No. FSD* 0188/2010-*ASCJ—In the Matter of Straumur-Burdaras Investment Bank HF, written judgment delivered on 9th September* 2010.

[23]Cause FSD 47 OF 2010, written judgment delivered on 5th February 2010: In the Matter of BLMIS (In Securities Investor Protection Act Liquidation).

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bankruptcy trustee or liquidator appointed under the law of the place of a company's incorporation is recognised in the Cayman Islands (*Dicey and Morris*, *The Conflict of Laws* 10*th Ed*., *Rule* 139(2) *and Rule* 143)."

"*…as a matter of Cayman Islands law*, *Mr. Picard is entitled to be recognised as the sole person having the right to act on behalf of BLMIS in this jurisdiction*."

8. Strong Tradition of Cooperation Set to Continue

In the light of such decisions emanating from the early exercise of the statutory jurisdiction under Part XVII of the Companies Law, there is every reason to believe that the strong tradition of co-operation in trans-national insolvency and bankruptcy matters at common law will continue by the Cayman Islands Courts.

Considerations such as whether the foreign court presides at the "centre of main interests" of the debtor entity or whether the foreign proceedings are "main" or "non-main proceedings" or whether in that regard the debtor entity had an "establishment" in the foreign jurisdiction —all matters of import under the UNCITRAL Model Law[24]—can all be accorded due if not exclusive weight by the Cayman Courts in deciding whether or not to grant recognition to foreign proceedings and foreign representatives. This ability to co-operate can, in large measure, be attributed to the flexibility provided by the wide discretion vested in the Court in exercise of the jurisdiction under Cayman Islands law.

Accordingly, the Cayman Islands jurisprudence can be expected to develop well in pace with the development of the common law principles of comity, in keeping with the principles of the UNCITRAL Model Law and in keeping with the legitimate demands of the international financial markets within the wider global economy.

[24]Cause As well as under U.K. Law by virtue of Insolvency Regulations 2006 giving affect to the UNCITRAL Model Law; also in United States Law under Chapter 15 of the U.S. Bankruptcy Code which also gives effect to the UNCITRAL Model Law. The U.K. and the U.S. are two of the 20 States now adhering to the Model Law. Similar considerations will arise as a matter of E.U. Law by virtue of E.C. Regulations No. 1346/2000 (29th May 2000) on Insolvency Proceedings and the European Union Convention on Insolvency Proceedings.

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Exhibit 28

ANGUILLA

IN THE COURT OF APPEAL

HCVAP 2011/001

A, B, C & D

Intended Appellants

and

E

Intended Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice
The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice M. Pereira — Justice of Appeal

Appearances:

Mr. Gerhard Wallbank for the Intended Appellants
Ms. Ayodeji D. Barnard for the Intended Respondent

2011: July 5;
September 19.

Civil appeal – Leave to appeal – Norwich Pharmacal order – Whether Norwich Pharmacal orders are injunctions for the purpose of determining whether leave to appeal is required – Whether Norwich Pharmacal orders are final orders for the purpose of determining whether leave to appeal is required – Per incuriam principle

On 30th December 2010, the intended appellants ("the appellants") were refused *Norwich Pharmacal* and *Bankers Trust* relief by the trial judge in the court below. Written reasons were given for this decision on 26th January 2011, and the appellants filed a notice of appeal on 28th January 2011, without first obtaining leave to do so.

The Court directed that the parties address the question of whether leave to appeal was required in light of two earlier decisions of the Court of Appeal, namely TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company and another[1] and Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation et

[1] Civil Appeal No. 13 of 2010 – Territory of the Virgin Islands (delivered 27th July 2010 – unreported).

al.[2] In both of these cases, the court had been called upon to consider whether leave was required to appeal decisions involving *Norwich Pharmacal* orders, firstly on the basis that such orders were in the nature of injunctions – which would have brought them within the exception of the requirement for leave provided by the Supreme Court Act – and secondly, on the basis that such orders were in substance, in the nature of final orders.

Held: deeming the Notice of Appeal against the refusal to grant *Norwich Pharmacal* relief validly filed and making no order as to costs, that:

1. Notwithstanding that a *Norwich Pharmacal* (disclosure) order is a specific type of order directed to a party who may not be said to be a wrongdoer and in respect of which no other cause of action may exist, such an order, by virtue of its import and intent, is an injunction. The learned judge's order which refused the appellant *Norwich Pharmacal* relief was therefore, an order refusing to grant an injunction, and, based on the Supreme Court Act, would fall in the excepted class of orders for which leave to appeal would not be required.

   Bullen & Leake & Jacob's Precedents of Pleadings 16th Ed. Vol. 2 para. 49.03 cited; Norwich Pharmacal Co. and Others v Customs and Excise Commissioners [1974] A.C. 133 (H.L.(E.)) cited; Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7 cited; British Steel Corporation v Granada Television Ltd. [1981] A.C. 1096 cited; Novo Nordisk A/S v Banco Santander (Guernsey) Ltd. (1999-2000) 2 I.T.E.L.R. 557 cited; TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company and another Civil Appeal No. 13 of 2010 – Territory of the Virgin Islands (delivered 27th July 2010 – unreported) and Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation et al Civil Appeal No. 24 of 2005 – Territory of the Virgin Islands (delivered 3rd April 2006 – unreported) both considered and treated as having been decided per incuriam.

2. Whether a *Norwich Pharmacal* order granted on an interlocutory application may be considered a final order as opposed to an interlocutory one does not admit of a straightforward answer. In the case at bar, the trial judge's refusal to grant the appellants *Norwich Pharmacal* relief brought finality to the proceedings; the appellants could go no further with their claim, which sought the same relief. Thus, on the peculiar facts of this case the order made would have been a final order. However, in general, whether such orders are considered final or interlocutory may turn on various factors and depend on the circumstances of each case.

   Othniel Sylvester v Satrohan Singh Civil Appeal No. 10 of 1992 – St. Vincent and the Grenadines (delivered 18th September 1995) cited; TSJ Engineering Consulting Limited v Al Rushaid Petroleum Investment Company and another Civil Appeal No. 13 of 2010 – Territory of the Virgin Islands (delivered 27th July 2010 – unreported) cited.

[2] Civil Appeal No. 24 of 2005 – Territory of the Virgin Islands (delivered 3rd April 2006 – unreported).

JUDGMENT

[1] PEREIRA, JA: On 30th December 2010, the trial judge refused to grant '*Norwich Pharmacal*' and '*Bankers Trust*' relief[3] to the intended appellants ("the appellants"). The trial judge gave written reasons for her decision on 26th January 2011. The appellants filed a Notice of Appeal on 28th January 2011, without first seeking the court's permission to so do. On 7th February 2011, the Court directed that the parties address the question whether leave to appeal was first required. This was in light of the Court's prior decision in TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company and another[4] delivered on 27th July 2010, which in turn followed an earlier decision of the Court, namely, Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation et al[5] given on 3rd April 2006. In these earlier decisions the Court was called upon to consider whether leave to appeal was required in respect of *Norwich Pharmacal* orders:

(i) firstly, on the basis that such orders were in the nature of injunctions which would have brought them within the exception of the requirement for leave provided by the Supreme Court Act. In the Virgin Islands, the relevant provision is section 30 of the West Indies Associated States Supreme Court (Virgin Islands) Act.[6] The relevant portion of section 30(4) states as follows:

> "No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases-
>
> (i) ...;

[3] The *Norwich Pharmacal* relief, in more modern times called a disclosure order, derives its name from the watershed decision, Norwich Pharmacal Co. and Others v Customs and Excise Commissioners [1974] A.C. 133 of the House of Lords in England; *Bankers Trust* type relief which is a relief akin to *Norwich Pharmacal* relief, derives its descriptive name from the decision Bankers Trust Co. v Shapira and Others [1980] 1 W.L.R. 1274, a decision of the English Court of Appeal.

[4] Civil Appeal No. 13 of 2010 – Territory of the Virgin Islands (unreported).

[5] Civil Appeal No. 24 of 2005 – Territory of the Virgin Islands (unreported).

[6] Cap. 80, Revised Laws of the Virgin Islands 1991.

(ii) *where an injunction or the appointment of a receiver is granted or refused;*
(iii) ... ;
(iv) ... ;" and

(ii) secondly, on the basis that those orders are in substance in the nature of final orders.

The earlier decisions

[2] In Morgan & Morgan the Court held in essence that a *Norwich Pharmacal* (disclosure) order was (a) not a final order (for which no leave would be required) and (b) was not an injunction (which would have brought it within the exception of the requirement for leave in respect of an interlocutory order) and accordingly leave to appeal was required.

[3] At paragraph 6 of the judgment, Barrow JA (as he then was) had this to say:

> "The discovery respondent's other submission, that a disclosure order is an injunction, is a completely novel one. Counsel was unfazed by his inability to find any judicial decision or academic writing that supported his view and easily offered the suggestion that basic propositions were frequently assumed without discussion. It was a fleet response. A Norwich Pharmacal disclosure order is a highly specific type of order. It compels the production of information to enable a party to put forward his case. An order for disclosure does not become an injunction because it commands a person to do something. If that were so all orders that commanded persons to do things would be injunctions. An order for specific performance compels a person to do the thing he had promised to do, but that does not make it an injunction. Similarly an order for an account compels a party to do something but it is not an injunction. The reason why these other orders are not called injunctions is because they are not injunctions. In the Secilpar [sic] case, in addition to the disclosure order, the court had also granted an injunction restraining the respondents from disclosing the disclosure order. In the instant case the very order purportedly appealed contained, in addition to the disclosure order, a freezing order or injunction. It is because a disclosure order is not an injunction that, in these cases, the court found it necessary to grant an injunction as a separate order." (emphasis mine)

[4] In TSJ Engineering counsel urged the Court not to follow its prior decision in Morgan & Morgan on the basis that the decision therein was given per incuriam. He sought to show on the authorities on which he relied,[7] that the *Norwich Pharmacal* order was firstly, in the nature of a mandatory injunction; and secondly, was in the nature of a final order and that the Court's decision in Morgan & Morgan was given per incuriam. At paragraph 20 the learned Chief Justice in his judgment (with which the other members of the panel concurred), said in part:

> "... I know of no authority which supports the view that a Norwich Pharmacal order is an order in the nature of an injunction. In my view such orders fall within the category of non-injunctive orders which create legal obligations or command the performance of particular acts, such as orders of mandamus or for specific performance. In the premises, I find that the order in the present case is not exempted from the leave requirement provided under section 30(4) (ii) of the Supreme Court Act." (emphasis mine)

[5] Counsel had also argued in TSJ Engineering that the Court in Morgan & Morgan, ought not to have followed the decision of the Gibraltar Court of Appeal in Secilpar SL v Fiduciary Trust Limited[8] which concluded that the order was an interlocutory order because it was ancillary to the main proceedings in another jurisdiction. He said that in any event it was of persuasive authority only, and that it was also unsound. He argued also that the obligation to disclose was in itself a cause of action. For this proposition he placed reliance on certain dicta of the Lord Justices in the Norwich Pharmacal case. The Court however was not so persuaded and accordingly held that the *Norwich Pharmacal* order, at least on the peculiar facts of TSJ Engineering, was not in the nature of a final order. I propose to return to this later in my judgment.

[6] Mr. Wallbank, counsel for the appellants in the case at bar, where the same issue of leave to appeal from *Norwich Pharamacal* proceedings has arisen, seeks yet

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[7] These authorities were the Norwich Pharmacal case (supra note 1); Maclaine Watson & Co. Ltd. v International Tin Council (No. 2) [1989] Ch. 286; Gidrxslme Shipping Co. Ltd. v Tantomar-Transportes Maritimos Lda. [1995] 1 W.L.R. 299; and Spry's Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages.

[8] Civil Appeal No. 5 of 2004 (24th September 2004) (unreported).

again to persuade this Court to depart from its two earlier decisions on the basis, that those earlier decisions were given *per incuriam.* He relies also on English authorities which, he says, had they been brought to the Court's attention in the earlier decisions, would have yielded a different result and that in essence the Court would have held that a *Norwich Pharmacal* (disclosure) order is (a) a type of injunction, and (b) a final order.

The per incuriam principle

[7] Before considering those authorities on which Mr. Wallbank relies in urging the Court to depart from its two prior decisions, I consider this an appropriate point to refer to the per incuriam principle which has long been established in Young v Bristol Aeroplane Company, Limited,[9] (a decision of the English Court of Appeal in 1944) as one of the exceptions to the doctrine of stare decisis, a doctrine fully embraced and applied by this Court, being an intermediate appellate court. This doctrine is to the effect that, save in exceptional circumstances, this court is bound to follow previous decisions of its own. The objective is to ensure certainty or finality in the law. This doctrine, as indicated, gives way, as enunciated in the said decision, to notable exceptions: the doctrine and the principles engaged in applying the exceptions were recently addressed and restated in Brandwood and Others v Bakewell Management Ltd.[10] another decision of the English Court of Appeal given in 2003. These principles for present purposes, may be summarised as follows:

(1) This Court is bound to follow previous decisions of its own save only in exceptional circumstances.

(2) Such exceptions are where:

(a) the court is confronted with two conflicting decisions of its own, then it may decide which of the two decisions it will follow;

[9] [1944] K.B. 718.
[10] [2003] EWCA Civ. 23, [2003] 1 E.G.L.R. 17.

(b) a decision of its own, though not expressly overruled , cannot in its opinion stand with a decision of a higher court (in this case the Privy Council) which is binding;

(c) the court is satisfied that its prior decision was given per incuriam.

[8] What are the guiding principles on which the court may conclude that a prior decision was given per incuriam? Examples are usually given and cover cases in which the court has acted in ignorance of a previous decision of its own which dealt with the matter before it, in which case it must decide which case to follow; or where the court has acted in ignorance or forgetfulness of the terms of a statute or rule having statutory force or some inconsistent authority binding on the court; or where, in rare and exceptional cases, when it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to a final appellate court.[11] The instances are not closed. In Brandwood, Ward LJ opined[12] that 'the test is whether the earlier decision is demonstrably wrong' He added this:

> "(5) It is not sufficient for the court to be persuaded of no more than that the previous court did not have the benefit of the best argument that the researches and industry of counsel could provide.
> (6) There remains a residual category, best left undefined, where, in exceptional cases of the rarest occurrence, the court may overrule its own earlier decision if that had been made through some manifest slip or error.
> (7) That exceptional category is more likely to be confined to cases of procedural error, because in relation to the substantive law, certainty is to be preferred to correctness.
> (8) If in doubt this court should leave any correction of the error to the House of Lords." [In the context of this court this would be the Privy Council]."

Is a Norwich Pharmacal order a type or form of injunction?

[11] See: Halbury's Laws 4th Ed. Reissue Vol. 37 para. 1242.
[12] At paragraph 21.

[9] Firstly the question as to what is 'an injunction' should be addressed. Black's Law Dictionary[13] defines an injunction as *"a court order* commanding *or* preventing *an action."* It would follow then that all orders of the court which command or compel an action by whatever case specific name it may be called, would be an injunction. Accordingly, an order for specific performance which compels the performance of a contract or some covenant or condition therein is no less an injunction although in specific terms it is properly so called, an order for specific performance.[14] The converse however does not follow. All injunctions are certainly not orders for specific performance. Gee in his treatise Commercial Injunctions[15] stated thus:

> "Injunctions can be mandatory, prohibitive or negative. The former requires some positive act to be done by the person enjoined, e.g. to pull down a building or to provide information..." (my emphasis). Similarly, Bullen & Leake & Jacob's Precedents of Pleadings[16] contains this statement:
>
> "Often in claims based in fraud the claimant will seek injunctive relief before or at the outset of the action. The relief is likely to take the form of claims to preserve assets pending judgment and enforcement, to preserve evidence or for information and evidence required to formulate properly the claim against the prospective defendant. The most common forms of injunctions obtained are freezing orders (formerly called Mareva injunctions) search orders (Anton Piller Orders) and orders to produce information and evidence under the Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] 1 A.C. 133 and Bankers Trust Co. v Shapira [1980] 1 W.L.R. 1274 jurisdictions. ..." (My emphasis)

[10] Accordingly the term injunction is in reality a generic term for a remedy which the court may grant either compelling or prohibiting an action, which may take varied forms and names depending on the specific facts and circumstances of the case in respect of the action brought. I am satisfied that the *Norwich Pharmacal*

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[13] 9th Ed. p. 855.

[14] In Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd. [1998] A.C. 1, a decision of the House of Lords [UK], Lord Hoffman spoke of specific performance in the context of the grant of a mandatory injunction to carry out building works under a building contract (see page 14).

[15] 5th Ed. para. 2.002.

[16] 16th Ed. Vol. 2 para. 49.03.

(disclosure) order which is an order directed to a person compelling that person to disclose information is, notwithstanding that it is an order of a specific type directed to a party who may not be said to be a wrongdoer and in respect of which no other cause of action may exist, is nonetheless by virtue of its import and intent, an injunction.

[11] Orders for discovery have been a feature of the law for an aeon and accordingly the jurisdiction of the court to grant such orders is well settled. As Lord Reid stated in Norwich Pharmacal,[17] '*discovery as a remedy in equity has a very long history.'* What was not well settled prior to Norwich Pharmacal was the question whether discovery, as an exclusive remedy, availed a claimant who sought it from a party who could not truly be said to be a wrongdoer, (but yet because of the relationship in which that person stood to the wrongdoer, could not be said to be a mere witness) as an aid in finding out who the wrongdoer was. The House of Lords in Norwich Pharmacal settled this point when it decided that '*where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers...'*

It is specifically this type of order for disclosure from which the *Norwich Pharmacal* order derived its name.

[12] Neither the Supreme Court Act[18] nor the Civil Procedure Rules 2000 made thereunder, specifically address this peculiar type of order. Injunctions are however addressed generally both in the Act and the Rules. The Act empowers the court to grant injunctions 'in all cases in which it appears to the Court or judge

[17] At page 173.
[18] This is an Act passed and operative in every State and Territory comprising the jurisdiction of the Eastern Caribbean States Supreme Court and which may be styled so as to identify the particular State or Territory but its substantive provisions are in almost every respect identical.

to be just or convenient…'[19] The Rules set out the procedure for seeking interim remedies such as injunctions generally. Yet the *Norwich Pharmacal* jurisdiction is as important today as it was in years past and perhaps even more so given the useful purpose which it serves in providing a remedy in circumstances where none would otherwise exist. It has never been questioned (nor could it be) that this equitable and exclusive jurisdiction is enjoyed to the same extent by the Eastern Caribbean Supreme Court applying the exact same principles. Indeed the starting point for this Court in considering an application for a *Norwich Pharmacal* order is the very decision in Norwich Pharmacal. This Court has in similar manner embraced all the refinements and extensions of the *Norwich Pharmacal* principles developed by subsequent case law. The grant of *Norwich Pharmacal* relief is now very much part and parcel of the legal landscape of this Court's jurisdiction, particularly in the Virgin Islands where the volume of commercial litigation is comparatively high. This is self-evident in the TSJ Engineering and Morgan & Morgan cases themselves. This is no doubt so because the court is charged with exercising the same equitable jurisdiction as the English courts of similar standing. Furthermore, the Supreme Court Act (enacted in all member States and Territories) contains two provisions (one in relation to the High Court, the other in relation to the Court of Appeal) which, in essence, says this:

> "The jurisdiction vested in the Court in civil proceedings shall be exercised in accordance with the Act [the Supreme Court Act], rules of court and any other law in force in the State and where no special provision is therein contained, such jurisdiction shall be exercised as nearly as may be administered for the time being in the Courts [High Court and Court of Appeal] in England. (My emphasis)

It is fair to say that the equitable jurisdiction of the court is one which continues to be shaped and developed as it seeks to achieve, as times and circumstances change, its fundamental objective of ensuring that justice is done. It is not surprising that the expression of the court's jurisdiction is often contained in case law rather than in rules and statutes.

[19] See: section 23(1) of the Eastern Caribbean Supreme Court (Anguilla) Act, Revised Statutes of Anguilla, Chapter E15.

[13] It bears note that throughout the judgments of the learned law lords, in Norwich Pharmacal, there is no mention of the term 'injunction' in terms of describing this remedy. Indeed it does not appear that, apart from the decisions of this court, has it been necessary to consider the nature of the relief or the terminology used to describe such relief. Perhaps this is so given the requirements generally, for permission to appeal interlocutory orders and the specific exceptions stated in the Supreme Court Act coupled with the terminology used therein. Whatever it may be, it has clearly given rise to differing interpretations in instances where clarification and certainty is desirable.

[14] To what sources do we look for authoritative pronouncements as to the nature of the *Norwich Pharmacal* order? It is firmly established that authorities of the English courts are of persuasive force only in our courts whereas decisions of the Privy Council, as our final appellate court, are binding and therefore of authoritative force. Counsel for the appellant has referred us to the decision of the Privy Council in Equatorial Guinea v Royal Bank of Scotland International[20] in which the Board approved and applied British Steel Corporation v Granada Television Ltd.[21], a decision of the House of Lords. Both decisions concerned *Norwich Pharmacal* type relief. In BSC v Granada Lord Templeman opened his judgment in this way:[22]

> "B.S.C. sought and Sir Robert Megarry V.-C. granted a mandatory injunction directing Granada to identify the B.S.C. employee who provided Granada with B.S.C. documents which were the property of B.S.C."

He was clearly speaking of a *Norwich Pharmacal* order. He went on further to say:

> "It has long been the law that one wrongdoer may be compelled by the victim to disclose the identity of another wrongdoer where their offences are connected: see the *Norwich Pharmacal* case... The decision in the *Norwich Pharamacal* case established that an innocent person who becomes involved in the actions of a wrongdoer may also be ordered to disclose the identity of the wrongdoer provided that disclosure is necessary to enable the victim to take proceedings against the wrongdoer."

[20] [2006] UKPC 7.
[21] [1981] A.C. 1096.
[22] At page 1131.

[15] In the Equatorial Guinea case, the Privy Council referred with approval to Lord Templeman's speech in BSC v Granada in which he referred to the remedy of discovery as being one intended to enable justice to be done. Lords Bingham and Hoffman again confirmed the *Norwich* principle and its purpose. They opined[23] that '*Norwich Pharmacal* relief exists to assist those who have been wronged but do not know by whom. ... Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance.'

[16] Given the very origin of the *Norwich Pharamcal* principles can it be seriously argued that the English courts' treatment and acceptance of such an order as an injunction is merely persuasive on this Court? I would think not in the circumstances. Indeed given the court's adoption and full embracement of the principle, the English courts' treatment and view of the nature of such an order as borne out by the cases as well as the academic writers can only be treated to all intents and purposes as being of authoritative force. In Novo Nordisk A/S v Banco Santander (Guernsey) Ltd.,[24] the Royal Court of Guernsey invariably referred in its judgment to the order requiring disclosure as an injunction.

[17] The case law and the treatises to which I have referred are of such highly persuasive authority as to be considered, for the reasons given, as binding on this Court. Accordingly, I am satisfied that a *Norwich Pharmacal* order is an injunction. It follows then that when the learned judge in the case at bar refused to grant the *Norwich Pharmacal* relief sought by the appellant, it was a refusal to grant an injunction. Based on the Supreme Court Act it would have fallen in the excepted class of orders for which leave to appeal would not be required. The Notice of Appeal filed without leave would be validly filed and accordingly stands. Had the Court been assisted with these authorities, which were available at the time the

[23] At paragraph 16.
[24] (1999-2000) 2 I.T.E.L.R. 557.

Court decided the two earlier decisions, it would not have fallen into error. The earlier decisions in Morgan & Morgan and TSJ Engineering on this point must be treated as having been decided per incuriam.

Is a Norwich Pharmacal order made on an interlocutory application a final order?

[18] Having concluded that the order is an injunction, this is sufficient to dispose of the preliminary question posed on the filing of the Notice of Appeal. But guidance is also sought as to whether a *Norwich Pharmacal* order granted on an interlocutory application which is usually the common approach is a final order. This does not admit of a straightforward answer. The test adopted by this Court for determining whether an order is final or interlocutory has been since 1995 in the case of Othniel Sylvester v Satrohan Singh[25] the application test which in essence is this: *An order is final if on an application brought the determination of the Application, whichever way it goes, brings finality to the issue or proceedings.* If not, then the order is interlocutory and would require leave to appeal unless it falls within the stated exceptions under the Supreme Court Act. This approach has been restated many times over in subsequent decisions of this court.

[19] *Norwich Pharmacal* orders are more often than not sought by interlocutory applications even when a claim form is issued seeking precisely the same relief. Some are even sought ex-parte. Where such an order is granted ex-parte it is more difficult to argue that it is final as the order will normally make provision for the matter to come on at a later date on an inter-partes hearing. As Rawlins CJ said in the TSJ Engineering case,[26] much may turn on the terms of the order. In the case at bar, the *Norwich Pharmacal* relief was refused on an inter-partes hearing. This certainly brought finality to those proceedings. The appellants could go no further with their claim which sought the same relief. We cannot say what would have been the position were the relief granted. It may have brought an end

[25] Civil Appeal No. 10 of 1992 – St. Vincent and the Grenadines (delivered 18th September 1995).
[26] At paragraph 31.

to the proceedings in the sense that what the appellants wanted they in fact got. There is also the possibility that the order may have contained further directions requiring further disposition of various ancillary matters by the Court, notwithstanding that the substantive issue, so far as *Norwich Pharmacal* relief is concerned, will have been disposed of. In some instances the court is invited, on dealing with the application inter-partes, to treat the hearing as the hearing of the claim. This gets around the obvious difficulty of having a claim 'hanging' once the order has already been obtained on the inter-partes hearing. This has often been the case, prompting the filing of a Notice of Discontinuance (once the order has been complied with), which, in my view, is in-apt as the relief sought on the claim has already been granted by way of the interlocutory application and the claim to all practical intents and purposes has been spent. A discontinuance or withdrawal of a claim presupposes a claim which is not being pursued, whereas here the claim has been pursued and concluded by way of the disclosure order as the exclusive relief sought. In such a case it may be successfully argued that the order is a final order.

Conclusion

[20] From all that I have said then, it may be deduced that whether a *Norwich Pharmacal* order is final or interlocutory may turn on various factors. However, for the purposes of leave to appeal this exercise is now rendered academic, having concluded that it is an injunction.

[21] The Notice of Appeal against the refusal to grant *Norwich Pharmacal* relief is accordingly validly filed. There shall be no order as to costs.

[22] I am grateful to counsel for their invaluable assistance.

Janice M. Pereira
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

Exhibit 29

A.C.

[HOUSE OF LORDS]

AYERST (INSPECTOR OF TAXES) . . . . . RESPONDENT

AND

C. & K. (CONSTRUCTION) LTD. . . . . APPELLANTS

1975 April 14, 15, 17; May 21

Lord Diplock, Viscount Dilhorne, Lord Kilbrandon and Lord Edmund-Davies

Revenue—Income tax—Discontinuance of trade—Compulsory liquidation of company—Business of liquidated company sold to subsidiary company—Nature of ownership of shares of subsidiary company held by liquidated company—"Beneficial ownership"—Whether discontinuance of trade—Whether subsidiary company entitled to income tax relief for losses of liquidated company—Companies Act 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 243—*Finance Act* 1954 (2 & 3 *Eliz.* 2, *c.* 44), *s.* 17 (1), (4) (*b*) (*c*), (5), (6) (*a*) (*b*)

Company—Winding up—Company's assets—Compulsory order—Whether company retains beneficial ownership of assets—Companies Act 1948, *s.* 243

By section 17 of the Finance Act 1954:

"(1) A trade carried on by a company, . . . shall not be treated for any of the purposes of the Income Tax Acts as permanently discontinued, nor a new trade as set up and commenced, by reason of a change . . . in the persons engaged in carrying on the trade, if the company is the person or one of the persons so engaged immediately before the change and on or at any time within two years after the change the trade . . . belongs to the same persons as the trade or such an interest belonged to at some time within a year before the change, . . . (4) For the purposes of this section—. . . (*c*) a trade or interest therein belonging to a company shall, where the result of so doing is that the conditions for subsection (1) . . . of this section to apply to a change are satisfied, be treated in any of the ways permitted by the next following subsection. (5) For the purposes of this section, a trade or interest therein which belongs to a company carrying it on may be regarded— . . . (*b*) in the case of a company which is a subsidiary company, as belonging to a company which is its parent company, or as belonging to the persons owning the ordinary share capital of that parent company, . . . (6) For the purposes of the last foregoing subsection— (*a*) references to ownership shall be construed as references to beneficial ownership, . . ."

The taxpayer company, registered as a private company, carried on the business of building and civil engineering. Out of 100 of its issued shares 99 were owned by M. Ltd., a company trading as building and civil engineering contractors, which in 1962 was ordered to be compulsorily wound up. In 1963 the whole of its business was sold to the taxpayer company, which was assessed to income tax under Schedule D for the years 1962–63 and 1963–64. The taxpayer company claimed to be entitled under section 17 of the Finance Act 1954 to set off against those assessments the unrelieved losses and

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capital allowances of M. Ltd. The special commissioners so decided. Templeman J., whose judgment the Court of Appeal affirmed, reversed that decision.

On the taxpayer company's appeal:—

Held, dismissing the appeal, that when a company was ordered to be wound up under the Companies Act 1948 the effect was to divest it of the "beneficial ownership" of its assets within the meaning of the expression in section 17 (6) (*a*) of the Finance Act 1954, since it could not use them for its own benefit, and accordingly the taxpayer company was not entitled to set off the unrelieved losses and capital allowances of M. Ltd. against its own assessments to income tax (post, pp. 180F, 181A–D).

Pritchard v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409 approved.

Decision of the Court of Appeal [1975] 1 W.L.R. 191; [1975] 1 All E.R. 162 affirmed.

The following cases are referred to in their Lordships' opinions:

Albert Life Assurance Co., In re; The Delhi Bank's case (1871) 15 S.J. 923.

Commissioner of Stamp Duties (Queensland) v. *Livingston* [1965] A.C. 694; [1964] 3 W.L.R. 963; [1964] 3 All E.R. 692, P.C.

General Rolling Stock Co., In re (1872) 7 Ch.App. 646.

Knowles v. *Scott* [1891] 1 Ch. 717.

Oriental Inland Steam Co., In re, Ex parte Scinde Railway Co. (1874) 9 Ch.App. 557.

Pritchard v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409; [1969] 2 All E.R. 670; 45 T.C. 360.

The following additional cases were cited in argument:

Anglo-Oriental Carpet Manufacturing Co. Ltd., In re [1903] 1 Ch. 914.

Barleycorn Enterprises Ltd., In re [1970] Ch. 465; [1970] 2 W.L.R. 898; [1970] 2 All E.R. 155, C.A.

Brooklands Selangor Holdings Ltd. v. *Inland Revenue Commissioners* [1970] 1 W.L.R. 429; [1970] 2 All E.R. 76.

Calgary and Edmonton Land Co. Ltd., In re [1975] 1 W.L.R. 355; [1975] 1 All E.R. 1046.

Calgary and Edmonton Land Co. Ltd. v. *Dobinson* [1974] Ch. 102; [1974] 2 W.L.R. 143; [1974] 1 All E.R. 484.

Carron Iron Co. v. *MacLaren* (1855) 5 H.L.Cas. 416, H.L.(E.).

Central Sugar Factories of Brazil, In re Flack's case [1894] 1 Ch. 369.

Commercial Bank Corporation of India and the East, In re (1866) 1 Ch.App. 538.

English Sewing Cotton Co. Ltd. v. *Inland Revenue Commissioners* (1947) 176 L.T. 481; [1947] 1 All E.R. 679, C.A.

Farrow's Bank Ltd., In re [1921] 2 Ch. 164, C.A.

Gerard v. *Worth of Paris Ltd.* [1936] 2 All E.R. 905, C.A.

Inland Revenue Commissioners v. *Olive Mill Ltd. (In Liquidation)* [1963] 1 W.L.R. 712; [1963] 2 All E.R. 130.

North Carolina Estate Co. Ltd., In re (1889) 5 T.L.R. 328.

Paraguassu Steam Tramroad Co., In re (1872) 8 Ch.App. 254.

Parway Estates Ltd. v. *Inland Revenue Commissioners (Note)* (1958) 45 T.C. 135, Upjohn J. and C.A.

Rudewa Estates Ltd. v. *Commissioner of Stamp Duties* [1966] E.A. 576.

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Vocalion (Foreign) Ltd., In re [1932] 2 Ch. 196.
Wood Preservation Ltd. v. *Prior* [1969] 1 W.L.R. 1077; [1969] 1 All E.R. 364, C.A.

APPEAL from the Court of Appeal.

This was an appeal brought by leave of the House of Lords from an order made by the Court of Appeal (Stamp and Scarman L.JJ. and Brightman J.) on October 28, 1974, affirming an order made by Templeman J. on November 27, 1973, allowing an appeal by the present respondent, William George Ayerst (H.M. Inspector of Taxes) by way of case stated from a determination of the Commissioners for the Special Purposes of the Income Tax Acts. By that determination the special commissioners had allowed an appeal by the appellant company C. & K. (Construction) Ltd. against assessments to income tax made upon it under Schedule D in respect of the profits of its trade of building and civil engineering under the provisions of the Income Tax Act 1952 for the years 1962–63 and 1963–64. By the order of Templeman J., affirmed by the Court of Appeal, it was ordered that the assessments be restored and the case remitted to the special commissioners for them to adjust the assessments in accordance with his judgment.

For many years prior to and until January 18, 1963, Mactrac Ltd. carried on the trade of builders and civil engineering contractors. Throughout that period the issued share capital of the appellant company (formerly Disorods Ltd.) was £100 divided into 100 shares of £1 each. Mactrac was the legal and beneficial owner of 99 shares and the beneficial owner of the remaining share. From January 18, 1962, until after January 18, 1963, the shareholders of Mactrac remained unchanged. On March 3, 1962, a receiver of Mactrac was appointed by a debenture holder. A statement of affairs was, after the liquidation of Mactrac, prepared by the directors and secretary and showed an estimated deficiency as to both creditors and members on March 31, 1962, in the total sum of £389,977. On May 21, 1962, a petition for the compulsory winding up of Mactrac on the ground of its insolvency was presented by a creditor. On June 4, 1962, a compulsory winding-up order was made against Mactrac. On January 18, 1963, the receiver of Mactrac, acting with the approval of the liquidator, sold its trade to the appellant company. On that date the unrelieved losses incurred by Mactrac in its trade amounted to £326,486 and its unrelieved capital allowances amounted to £82,025. On February 19, 1963, the receiver of Mactrac, acting with the approval of its liquidator, sold to an outside purchaser the issued share capital of the appellant company. The appellant company was assessed to tax under Case 1 of Schedule D in the sum of £350 for 1962–63 and in the sum of £1,000 for 1963–64.

The appellant company claimed that it was entitled under section 17 of the Finance Act 1954 to set off against these assessments the unrelieved losses and capital allowances of Mactrac. The special commissioners allowed the appeal of the appellant company against the assessments and adjourned the case for the agreement of figures.

C. N. Beattie Q.C., *Richard Sykes* and *Rex Bretten* for the appellant company. The trade was " carried on " until January 18, 1963, by Mactrac

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within section 17 (1). From January 18, 1963, the trade was carried on by the appellant company which under the section is entitled to bring forward the unrelieved losses and capital allowances of Mactrac and set them off against its income tax assessments for 1962–1963 and 1963–1964. Although Mactrac was in liquidation it had not been divested of its beneficial ownership before the transfer. A trade can belong to a person either as trustee or as beneficial owner.

The only question is whether a company in liquidation is beneficial owner of its assets. It is admittedly the legal owner. It remains beneficial owner whether the liquidation is voluntary or compulsory liquidation and whether it is a members' winding up, a creditors' winding up or a compulsory winding up.

A company in liquidation does not hold its assets as trustee. The liquidator is in a fiduciary position, but the assets do not belong to him but to the company. He is neither the legal owner of them nor a trustee: section 133 of the Companies Act 1862 which creates statutory duties but no trust. A company is always holding its assets for the benefit of somebody, since somebody always has an interest in them.

The foundation of the difficulties in the present case is *In re Oriental Inland Steam Co., Ex parte Scinde Railway Co.* (1874) 9 Ch.App. 557 which decided that a company in liquidation is not the beneficial owner of its assets. It is not to be assumed that in enacting it Parliament had in mind every remote decision on beneficial ownership. Reliance is placed on *Knowles* v. *Scott* [1891] 1 Ch. 717.

The assets of a company in liquidation remain its property beneficially, though the liquidator is to deal with them in a special way to ensure that the creditors are paid off in accordance with their priorities and that the surplus is distributed among the contributories in accordance with their interests, but this does not mean that, pending the realisation and distribution of the assets, the company is not the beneficial owner of them: see *In re Farrow's Bank* [1921] 2 Ch. 164, 170 and *Rudewa Estates Ltd.* v. *Commissioner of Stamp Duties* [1966] E.A. 576. It must be wrong to draw a distinction between a case where a company is solvent and one where it is not, because one cannot know which it is until the end of the liquidation. *Calgary and Edmonton Land Co. Ltd.* v. *Dobinson* [1974] Ch. 102, 106, 107 and *In re Calgary and Edmonton Land Co. Ltd.* [1975] 1 W.L.R. 355, 359 show that creditors and contributories of a company in liquidation are not the beneficial owners of the company's assets. Should it be held that neither was the company itself the beneficial owner of its assets, the result would be that the beneficial ownership would be in suspense. *Pritchard* v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409, 414, which is identical with the present case, was wrongly decided.

Beneficial ownership of assets is in suspense during the course of administration: *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694. While the doctrine of suspense of beneficial ownership is necessary in the case of a deceased person, because on his death he is no longer there to be the beneficial owner and those who inherit cannot become beneficial owners until administration has been completed, that doctrine should not be extended to any case in which it is not necessary, e.g., a contract of sale in *Wood Preservation Ltd.* v. *Prior* [1969] 1 W.L.R.

1077. It is not necessary to treat beneficial ownership as in suspense in the case of a company in liquidation, because it remains in existence and is available to be treated as the beneficial owner.

English Sewing Cotton Co. Ltd. v. *Inland Revenue Commissioners* (1947) 176 L.T. 481 is authority for saying that, though one's property may be encumbered, one does not cease to be the beneficial owner. If a man mortgages his house and undertakes not to grant leases, he does not cease to be beneficial owner. The mere fact that restrictions are imposed by law or contract on his right to use his property does not deprive him of the beneficial ownership.

When property is held in trust the beneficial ownership is necessarily divided. The beneficial interest in that case is not in suspense but is always somewhere. The life tenant is not the beneficial owner, nor is the remainderman, but the two together have the beneficial ownership. Where there are several beneficiaries under a trust, the beneficial ownership resides in them collectively.

The company acts through its agent, the liquidator, who must carry out his statutory duty. The beneficial ownership remains in the company.

Sykes following. Under the provisions of the Companies Act 1948 relating to liquidation there is no question of a trust or of suspension of the beneficial ownership. A liquidation may be voluntary, compulsory or subject to supervision. A voluntary liquidation may be a creditors' or a members' liquidation. Both in a voluntary and a compulsory liquidation the company may be either solvent or insolvent. In a liquidation creditors, post-liquidation creditors and shareholders all have interests in the assets. The relevant provisions of the Companies Act 1948 are sections 212, 226, 227, 228, 231, 232, 243, 244, 245, 257, 265, 273, 281, 282, 285 (2), 296 (2), 301, 302, 303, 307, 309, 316, 319 (5), 333 and 357.

Unlike a deceased person, a company remains alive during a winding up. It dies only at its dissolution and at the end of the winding up. Unlike the case of the assets of a bankrupt its assets remain in its ownership after the start of the liquidation. The liquidator is clothed with the powers of a superior director by a statute which imposes on him particular duties. No one but the company has any beneficial interest in its assets. The only right of a creditor or a contributory is to require the company to do that which the statute has imposed on it. The company receives the fruits of its assets (e.g., dividends on shares which it owns). By its liquidation it can sell assets in order to pay its creditors as and when, through its liquidation, it thinks fit, subject to the limitations imposed by its constitution. There is no question of the fruits of its assets being held on any trust or being enjoyed by anyone but the company. Under an appropriate constitution the position of a company in liquidation could be similar to that of a company not in liquidation. There is no suspension of the beneficial ownership of its assets.

If a creditor initiated an execution on a company's assets in a foreign country the question would arise whether the court could exercise its discretion to stop it. The liquidator might initiate liquidation proceedings in the country where the assets were situated, since most civilised countries have insolvency laws enabling insolvent companies to be liquidated. As

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to the right of a foreign creditor to prosecute his remedy where he thinks fit, see *Carron Iron Co.* v. *MacLaren* (1855) 5 H.L.Cas. 416, 436–437. A creditor in a foreign country is not amenable to the English courts, nor is it possible for the English courts to prevent him from levying execution there and retaining the fruits. But when a creditor amenable to the English courts seeks to levy execution, but has not yet put the execution in train, they can restrain him from doing so. When the execution has been commenced but has not been completed, the English courts will allow him to continue on terms that he accounts to the liquidator for the fruits of the execution. When a creditor amenable to the jurisdiction has completed the execution and is holding the fruits of it, the English courts, without there being a trust of the assets of the company, can require the creditor to disgorge the fruits of the execution. It is a fundamental principle that the creditors must share pari passu. For the courts to take such action it is not necessary that there should be a trust.

Leonard Bromley Q.C. and *Peter Gibson* for the respondent. As to the functions of and control over the liquidator, see sections 250 and 251 of the Act of 1948 and rules 59 and 78 of the Companies (Winding up) Rules 1949.

The Companies Act imposes a statutory scheme on the administration of the assets of a company in liquidation, whether compulsory or voluntary: see sections 257 and 302 of the Act of 1948. After the discharge of the liabilities it is the members, and not the company, who take the balance: see section 265 and rule 195 and also sections 309 and 319. On a liquidation the expenses must be paid including the liquidator's remuneration: see *In re Barleycorn Enterprises Ltd.* [1970] Ch. 465.

On beneficial ownership, *Wood Preservation Ltd.* v. *Prior* [1969] 1 W.L.R. 1077 was rightly decided. The question in the present case is whether the quality of such rights as Mactrac had in the assets immediately before and after the transfer in 1963 amount to beneficial ownership, i.e., whether the trade " belongs to the same persons as the trade . . . belonged to at some time within a year before the change." Attention must be directed to the period immediately before and after the transfer. The nature and quality of the rights Mactrac had in its assets immediately before the transfer to C. & K. on January 18, 1963, did not amount to beneficial ownership of those assets.

" Ownership " in section 17 (6) (*b*) and (*c*) means beneficial ownership. Reliance is placed on *Wood Preservation Ltd.* v. *Prior* [1969] 1 W.L.R. 1077, 1096 (Lord Donovan), 1096–1097 (Harman L.J.), 1097 (Widgery L.J.). The right formulation of the question is: Has the company beneficial ownership? That is how Lord Donovan formulated it and what Harman L.J. said indicates the essential quality of the beneficial ownership. A company in liquidation does not have beneficial ownership of its assets. The question is whether Mactrac in liquidation had the right to deal with its assets as its own. Mactrac did not have that and did not have " beneficial ownership." What was said in the *Wood Preservation* case [1969] 1 W.L.R. 1077 was adopted in *Brooklands Selangor Holdings Ltd.* v. *Inland Revenue Commissioners* [1970] 1 W.L.R. 429, 448–450. See also *Parway Estates Ltd.* v. *Inland Revenue Commissioners* (*Note*) (1958) 45 T.C. 135, 148.

The effect of the Companies Act is not, in winding up, to impose obligations in personam. It is concerned with the application of the assets which are to be applied under a statutory scheme of administration.

The duties of the liquidator are to be carried out for the benefit of classes of persons who do not include the company as such. The benefits of realisation of the assets are for those who take under the statutory scheme and not the company.

In such circumstances the company is not the beneficial owner of the assets.

Reliance is placed on *In re Oriental Inland Steam Co.*, 9 Ch.App. 557, 559. See also *In re Commercial Bank Corporation of India and the East* (1866) 1 Ch.App. 538, 545.

The liquidator had duties in the administration of the assets under the statutory scheme and was obliged to take account of the directions of the creditors: see sections 246 (1) and 257 of the Act of 1948. It had attributes of a trust, though not with all the characteristics of a trust as developed by equity. For over a hundred years the description of trust has often been adopted in describing the statutory scheme, though this may be misleading. There has been imposed on the assets, not on the company, a scheme of administration: see *Halsbury's Laws of England*, 4th ed., vol. 7 (1974), pp. 648–649, paras. 1110 and 1111, which repeat, with small and immaterial changes, what was said in the previous edition. See also pp. 649–650, para. 1112 and p. 683, para. 1180.

In *In re Albert Assurance Co. Ltd.; The Delhi Bank's* case (1871) 15 S.J. 923 was the first statement of principle in relation to what is now section 257 of the Act of 1948. It is cited in *Buckley's Companies Acts*, 13th ed. (1957), p. 512. *In re General Rolling Stock Co.* (1872) 7 Ch.App. 646 is significant because the Court of Appeal held that there was a trust, overruling a decision by Lord Romilly M.R.: see also *In re Paraguassu Steam Tramroad Co.* (1872) 8 Ch.App. 254, 260. In *In re Oriental Inland Steam Co.*, 9 Ch.App. 557, 559, 560, James L.J. referred to a trust in terms which made it clear that he was referring to the trust created by the Act and Mellish L.J. said that the beneficial interest was clearly taken out of the company. See also *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328; *Knowles* v. *Scott* [1891] 1 Ch. 717; *In re Central Sugar Factories of Brazil* [1894] 1 Ch. 369 and *In re Anglo-Oriental Carpet Manufacturing Co. Ltd.* [1903] 1 Ch. 914. The cases are consistent and numerous. The relevant passage in *Buckley's Companies Acts*, 7th ed. (1897), p. 282 is to be found in the 2nd ed. (1875) and is repeated in the 13th ed. (1957), p. 498 (see also p. 512).

The highest point against the respondent is *In re Farrow's Bank Ltd.* [1921] 2 Ch. 164, 170 but it is no authority on the point whether a company in liquidation has beneficial ownership of its assets. In the judgments there is no reference to *In re Oriental Inland Steam Co.*, 9 Ch.App. 557, and accordingly it cannot be supposed that it was disapproved.

In section 42 (3) of the Finance Act 1938, relating to national defence contribution (the forerunner of profits tax), it is said that in that section and in Part I of Schedule 4 to the Act references to ownership shall be construed as references to beneficial ownership. In section 17 (6) (*a*) of the Finance Act 1954 it was said that for the purposes of subsection (5)

references to ownership were to be construed as references to beneficial ownership and by subsection (6) (*c*) the tracing provisions were related to Part I of Schedule 4 to the Act of 1938. "Beneficial ownership" means the same thing in both the Acts. The Act of 1938 also dealt with beneficial ownership in relation to stamp duties: see section 50. As to stamp duties, see section 55 of the Finance Act 1927 and section 42 of the Finance Act 1930, amended by section 27 (2) of the Finance Act 1967. As to excess profits tax, see sections 12 (1), 14 (1) and 17 of the Finance (No. 2) Act 1939. The legislature clearly and consistently refers to "beneficial ownership" in the sense submitted, as established by the authorities.

Gerard v. *Worth of Paris Ltd.* [1936] 2 All E.R. 905, carries the matter no further; the circumstances there were wholly exceptional. The *English Sewing Cotton* case, 176 L.T. 481, was not wrongly decided but it was not concerned with liquidation at all and the authorities on winding up were not cited. See Lord Greene M.R. on "beneficial interest" at p. 484. The proper question is not: where is the beneficial interest? It is: has the company got it? The statutory scheme is for the benefit of persons other than the company, i.e., for creditors and contributories: and see section 302 of the Companies Act 1948.

In re Oriental Inland Steam Co., 9 Ch.App. 557, was followed in *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196, 204, 209 and the relevant part of the ratio was followed in *Inland Revenue Commissioners* v. *Olive Mill Ltd. (in Liquidation)* [1963] 1 W.L.R. 712. It was also impliedly followed in *Pritchard* v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409, 414. Nothing in *Livingston's* case [1965] A.C. 694, 708, 712 is against the respondent; the court was not concerned to ask whether the executor had beneficial ownership. *In re Oriental Inland Steam Co.*, 9 Ch.App. 557, was rightly decided on the grounds stated in the judgments and nothing in the *Carron Iron Co.* case, 5 H.L.Cas. 416, detracts from it. The right test of beneficial ownership is the power to deal with property as one's own. It is not right to call the company a beneficial owner where it has no right to deal with the property as its own or to benefit from it.

Gibson following. Compare the position of a receiver as agent of a company with that of a liquidator. The agency of a receiver ends on the liquidation of his principal, when a new situation arises and the receiver thereafter acts as principal. A liquidator is empowered to do certain things for and on behalf of the company. But it is a strange form of agency when the principal cannot do what the agent is able to do. In the usual agency situation (such as a receivership) the agent ceases to be able to exercise his power when the principal cannot act. This points to the special fettered status of a company in liquidation.

In section 17 of the Act of 1954 Parliament has imposed an arbitrary test, beneficial ownership, which is well known to the legislature. It is wrong to assume that the test was intended to be satisfied in a liquidation situation.

Beattie Q.C. in reply. The *English Sewing Cotton* case, 176 L.T. 481, is authority for the meaning of "beneficial ownership" and applies to section 17 of the Act of 1954. One is not deprived of beneficial ownership simply because one's property is encumbered. In the case of a tree preservation order one is deprived of the right to cut it down but not of the beneficial

ownership. A company in liquidation, though it must pay its creditors, holds its property for its own benefit. Its assets remain its assets though they must be dealt with in a particular way. As regards beneficial ownership there is no difference between compulsory and voluntary liquidation: see section 302 of the Companies Act 1948. The liquidator has fiduciary duties imposed by statute but is not really a trustee. The beneficial ownership is not in the creditors.

In *Brooklands Selangor Holdings Ltd.* v. *Inland Revenue Commissioners* [1970] 1 W.L.R. 429 the company which owned the shares was bound by the scheme entered into to transfer them to someone else. The beneficial ownership had gone when the relevant contract of sale was entered into. The *Parway Estates* case, 45 T.C. 135, was similar. Neither case is of assistance in the present problem. In *In re General Rolling Stock Co.*, 7 Ch.App. 646, 647, 648–649, though the decision of Lord Romilly M.R. was reversed, his reasoning was not attacked.

A company only ceases to be the beneficial owner of its assets if the beneficial ownership passes to someone else. A man remains the beneficial owner of his property, however much the law may restrain the use of it.

In *Livingston's* case [1965] A.C. 644 there was no question of equitable ownership.

Their Lordships took time for consideration.

May 21. LORD DIPLOCK. My Lords, the only question that has been argued in your Lordships' House is whether when a company is ordered to be wound up under the Companies Act 1948 the effect of the winding-up order is to divest the company of the "beneficial ownership" of its assets within the meaning of that expression as it is used in section 17 (6) (*a*) of the Finance Act 1954.

Under the Income Tax Acts a trader who has sustained a trading loss in any year of assessment or has incurred expenditure for which he is entitled to claim capital allowances to an amount which exceeds the taxable profits of the trade for that year, is entitled to carry forward the loss or the excess and set it off against his taxable profits of that trade in subsequent years of assessment; but before the Finance Act 1954 this right of set-off was lost upon his ceasing permanently to carry on the trade. In the case of trading companies section 17 of the Finance Act 1954 allowed some piercing of the corporate veil by providing exceptions to the general rule as to cessation. The effect of the exception that is relevant to this appeal is that where the trade continues to be carried on by a successor that is a subsidiary company of the company that previously carried on the trade, the successor company may avail itself of the right of set-off that would have been available to its predecessor if it had continued to carry on the trade itself.

It is not now disputed that upon the true construction of this section a successor company is only to be treated as a subsidiary company of a parent company as predecessor if and so long as not less than three-quarters of its ordinary share capital is in the "beneficial ownership" of the parent company whether directly or through another company or companies or partly directly and partly through another company or companies. This

makes it unnecessary to set out again and analyse the various subsections and paragraphs which justify this conclusion. They are quoted in the judgment of Templeman J. None of them throws any light upon the sense in which the expression "beneficial ownership" is used in section 17 (6) (*a*) or lends support to the view that it bears any other meaning than that which would have been ascribed to it in 1954 as a term of legal art as descriptive of the proprietary interest in its assets of a company incorporated under the Companies Act 1948 at successive stages of its existence from incorporation to the commencement of winding up and from the commencement of winding up to dissolution.

Nor do I find it necessary to restate the particular facts that give rise to this appeal, beyond saying that it concerns two companies: a parent company which was ordered to be compulsorily wound up and the appellant company of which all the shares were held by the parent company or its nominee. The parent company had carried on a trade. The trade continued to be carried on after the making of the winding-up order until the assets and goodwill of the trade were transferred to the appellant company. After the transfer the shares in the appellant company were sold to a third party and the proceeds of sale distributed in the liquidation of the parent company.

The appellant company relies upon section 17 of the Finance Act 1954 as entitling it to set off against its taxable profits from the trade in two years of assessment after the transfer, the trading losses and claims to capital allowances which had accrued to the parent company in the years of assessment before the transfer. It is common ground between the parties that the appellant company's right to do so depends upon whether its shares were still in the "beneficial ownership" of the parent company at the time of the transfer notwithstanding that by then the parent company had been ordered to be wound up.

My Lords, the making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up. The scheme is now contained in Part V of the Companies Act 1948 and extends to voluntary as well as to compulsory winding up; but in so far as it deals with compulsory winding up its essential characteristics have remained the same since it was first enacted by the Companies Act 1862. The procedure to be followed when a company is being wound up varies in detail according to whether this is done compulsorily under an order of the court or voluntarily pursuant to a resolution of the company in general meeting, and, in the latter case, whether it is a members' voluntary winding up or a creditors' voluntary winding up; but the essential characteristics of the scheme for dealing with the assets of the company do not differ whichever of these procedures is applicable. They remain the same as those of the original statutory scheme in the Companies Act 1862. For the sake of simplicity, in stating the essential characteristics of the statutory scheme I propose to refer only to those sections of the Companies Act 1948 which apply in a compulsory winding up and to omit those sections which have a corresponding effect in the case of a voluntary winding up.

Upon the making of a winding-up order:

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(1) The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to manage its affairs on its behalf, to a liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme (section 243). Any disposition of the property of the company otherwise than by the liquidator is void (section 227).

(2) The statutory duty of the liquidator is to collect the assets of the company and to apply them in discharge of its liabilities (section 257 (1)). If there is any surplus he must distribute it among the members of the company in accordance with their respective rights under the memorandum and articles of association (section 265). In performing these duties in a compulsory winding up the liquidator acts as an officer of the court (section 273); and if the company is insolvent the rules applicable in the law of bankruptcy must be followed (section 317).

(3) All powers of dealing with the company's assets, including the power to carry on its business so far as may be necessary for its beneficial winding up, are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme. The company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds. Upon completion of the winding up, it is dissolved (section 274).

The functions of the liquidator are thus similar to those of a trustee (formerly official assignee) in bankruptcy or an executor in the administration of an estate of a deceased person. There is, however, this difference: that whereas the legal title in the property of the bankrupt vests in the trustee and the legal title to property of the deceased vests in the executor, a winding-up order does not of itself divest the company of the legal title to any of its assets. Though this is not expressly stated in the Act it is implicit in the language used throughout Part V, particularly in sections 243 to 246 which relate to the powers of liquidators and refer to "property . . . to which the company is . . . entitled," to "property . . . belonging to the company," to "assets . . . of the company" and to acts to be done by the liquidator "in the name and on behalf of the company."

The question in this appeal is whether the legal title to its property which remains in the company after the commencement of the winding up still carries with it any beneficial interest in that property, so as to leave the property in the company's "beneficial ownership" within the meaning of section 17 (6) (*a*) of the Finance Act 1954.

My Lords, the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The "legal ownership" of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the "beneficial ownership" in the cestui que trust. But it did not

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follow even in equity that a person could only be the legal owner without being at the same time the beneficial owner in cases where it was possible to identify some other person or persons in whom the beneficial ownership had become vested. Executorship of an estate in course of administration provides one example which does not owe its origin to statute. No one would suggest that an executor, who was not also a legatee, was beneficial owner as well as legal owner of any of the property which was in the full ownership of the deceased before his death. He could not enjoy the fruits of it himself or dispose of it for his own benefit. Yet because an estate while still in course of administration was incapable of satisfying the technical requirement of a "trust" in equity that there had to be specific subjects identifiable as the trust fund, it was impossible to identify, at any rate in the case of residuary legatees, a person or persons in whom the beneficial ownership in any particular property forming part of the estate was vested: see *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 707–708 *per* Viscount Radcliffe. Another example, which owes its origin to statute, is to be found in the law of bankruptcy. The legal ownership of the bankrupt's property becomes vested in the trustee in bankruptcy. Here, while the property is still being administered, not only is there a similar absence of specific subjects identifiable as the trust fund but also the fact that the right to share in the proceeds of realisation of the property is dependent upon the creditor making a claim to prove in the bankruptcy makes it impossible until the time for proof has expired to identify those persons for whose benefit the trustee is administering the property. Both these factors would, in equity, have prevented that property possessing those characteristics of trust properties which have the consequence of vesting the beneficial ownership of any part of the undistributed property in those persons who will eventually become entitled to share in the proceeds of realisation. Nevertheless, as the very word "trustee" used in the statute implies, the beneficial ownership is not vested in him. He cannot enjoy the fruits of it himself or dispose of it for his own benefit. He is under a duty to deal with it as directed by the statute for the benefit of all the creditors who come in to prove a valid claim. It is no misuse of language to describe the property as being held by the trustee on a statutory trust if the qualifying adjective "statutory" is understood as indicating that the trust does not bear all the indicia which characterise a trust as it was recognised by the Court of Chancery apart from statute.

The argument advanced for the appellant company is that it makes all the difference that, upon the winding up of a company, the company does not cease to be the legal owner of its property as does a person who dies or is adjudicated bankrupt. The contention is that so long as a person, in whom the full ownership of property has once been vested, continues to retain the legal ownership he can only be divested of the beneficial ownership as a result of its becoming vested in some other person or persons. This does not occur except where a "trust," in the strict sense as it was recognised in equity, is created in the property. Such a trust is not created by Part V of the Companies Act 1948 upon the making of a winding-up order; since, for the same reasons as apply in the case of bankruptcy, the persons entitled to share in the proceeds of realisation of the

company's property are not invested with the beneficial ownership of that property while it is still being administered by the liquidator.

My Lords, I do not see how it can make any relevant difference that the legal ownership remains in the person in whom the full ownership was previously vested instead of being transferred to a new legal owner. Retention of the legal ownership does not prevent a full owner from divesting himself of the beneficial ownership of the property by declaring that he holds it in trust for other persons. I see no reason why it should be otherwise when an event occurs which by virtue of a statute leaves him with the legal ownership of property but deprives him of all possibility of enjoying the fruits of it or disposing of it for his own benefit.

The nature of a company's interest in its assets after a winding-up order had been made first fell to be considered by the Court of Chancery under the Companies Act 1862. It was, perhaps, inevitable that the court should find the closest analogy in the law of trusts. In one of the earliest reported cases, *In re Albert Life Assurance Co., The Delhi Bank's case* (1871) 15 S.J. 923, 924 Lord Cairns puts it:

> "... the assets of the company from the moment of winding up, ... become fixed and inalienable; the executive and the direction of the company are unable to alienate them or to part with them for any purpose; they become fixed and impressed with the trust declared by section 98,"—(which corresponds to section 257 (1) of the Act of 1948)—"a trust by which all the assets of the company are to be applied in discharge of the liabilities of the company."

In the following year one finds Mellish L.J. equiparating the status of a company's assets under a winding-up order with the assets of a debtor in bankrupty or under a decree of the Court of Chancery in an administration suit: *In re General Rolling Stock Co.* (1872) 7 Ch.App. 646, 649.

The question of the beneficial ownership of the company's property was dealt with explicitly by both James L.J. and Mellish L.J. in *In re Oriental Inland Steam Co.* (1874) 9 Ch.App. 557:

> "The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; ..." (*per* James L.J. at p. 559).
>
> "No doubt winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in section 95 is, that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them

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for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, . . ." (*per* Mellish L.J. at p. 560).

The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years. It has been repeated in successive editions of *Buckley on the Companies Acts* from 1897 to the present day. Nevertheless your Lordships are invited by the appellant company to say that it was wrong because it was founded on the false premise that the property is subject to a " trust " in the strict sense of that expression as it was used in equity before 1862.

My Lords, it is not to be supposed that in using the expression " trust " and " trust property " in reference to the assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. Some respects in which it differed were similar to those which distinguished the administration of estates of deceased persons and of bankrupts from an ordinary trust; another peculiar to the winding up of a company is that the actual custody, control, realisation and distribution of the proceeds of the property which is subject to the statutory scheme are taken out of the hands of the legal owner of the property, the company, and vested in a third party, the liquidator, over whom the company has no control. His status, as was held by Romer J. in *Knowles* v. *Scott* [1891] 1 Ch. 717 differs from that of a trustee " in the strict sense " for the individual creditors and members of the company who are entitled to share in the proceeds of realisation. He does not owe to them all the duties that a trustee in equity owes to his cestui que trust. All that was intended to be conveyed by the use of the expression " trust property " and " trust " in these and subsequent cases (of which the most recent is *Pritchard* v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons.

My Lords, the expression " beneficial owner " in relation to the proprietary interest of a company in its assets was first used in a taxing statute in 1927. Section 55 of the Finance Act 1927 provided for relief from capital and transfer stamp duty in cases of reconstruction or amalgamation of companies where shares in a transferee company were issued as consideration for the acquisition of the undertaking of the transferor company. Subsection (6) (*a*) (*b*) and (*c*) made provision for three exceptions to the right to this relief. The exception provided for in paragraph (*b*) is expressed to depend upon whether within a period of two years from a specified date the " . . . [transferor] . . . company ceases, otherwise than in consequence of reconstruction, amalgamation *or liquidation*, to be the beneficial owner of

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the shares so issued to it." From this can be inferred a recognition by Parliament that when a company is in liquidation it ceases to be the " beneficial owner " of its assets within the meaning of that expression as used by the draftsman in a taxing statute.

The expressions " beneficial owner " and " beneficial ownership " appear again in section 42 (2) (*b*) of the Finance Act 1930 in connection with what companies were to be treated as associated companies for the purpose of relief from transfer stamp duty, and in section 42 of the Finance Act 1938. This dealt with grouping of profits of parent and subsidiary companies for the purpose of national defence contribution. The definition of subsidiary company, which incorporates the reference to the requirement of " beneficial ownership " of its shares by its parent company, is in the same words as the corresponding definition in section 17 (6) of the Finance Act 1954.

So when those words were repeated in the Finance Act 1954 not only was there a consistent line of judicial authority that upon going into liquidation a company ceases to be " beneficial owner " of its assets as that expression has been used as a term of legal art since 1874, but also there has been a consistent use in taxing statutes of the expressions " beneficial owner " and " beneficial ownership " in relation to the proprietary interest of a company in its assets which started with the Finance Act 1927, where the context makes it clear that a company upon going into liquidation ceases to be " beneficial owner " of its assets as that expression is used in a taxing statute.

I would dismiss this appeal.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and that this appeal should be dismissed.

LORD KILBRANDON. My Lords, I have the advantage of reading the speech prepared by my noble and learned friend, Lord Diplock. I agree with his conclusions, and would therefore dismiss this appeal.

LORD EDMUND-DAVIES. My Lords, for the reasons appearing in the speech of my noble and learned friend, Lord Diplock, I too would dismiss this appeal.

Appeal dismissed.

Solicitors: *Masons; Solicitor of Inland Revenue.*

F. C.

Exhibit 30

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

2000 CanLII 22482 (ON SC)

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**

[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

> (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
>
> (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
>
> (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

(d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and

(e) and for other ancillary relief.

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[2] In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

> …and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.

[3] Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

> …enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

[4] In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

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[5] La Forest J in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws…

[6] In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

> Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:
>
> > The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional

enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the slate where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

Certainly the substantive and procedural aspects of the U.S. Bankruptcy Code including its 1994 amendments are not so different and do not radically diverge from our system.

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[7] After reviewing La Forest J.'s definition of comity, I went on to observe at p. 316:

> As was discussed by J.G. Castel, *Canadian Conflicts of Laws,* 3rd ed. (Toronto: Butterworths, 1994) at p. 270, there is a presumption of validity attaching to a foreign judgment unless and until it is established to be invalid. It would seem that the same type of evidence would be required to impeach a foreign judgment as a domestic one: fraud practiced on the court or tribunal: see *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619, 117 A.P.R. 619 (T.D.), Sopinka, supra, at p. 992.

La Forest J. went on to observe in *Morguard* at pp. 269-70:

> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
>
> . . .
>
> Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

See also *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.), at p. 39.

[8] While *Morguard* was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in *Arrowmaster* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), and *ATL* respectively. Indeed the analysis by La Forest J. was on an international plane. As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.

[9] In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd., Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817];

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Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.,* 1997 WL 423075 (S.D.N.Y. 1997).

[10] In *Roberts,* Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the *Dow Corning* litigation [*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.)] as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> *…I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding… (emphasis added)

[11] The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[12] David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to

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> make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: “I would think that this Protocol demonstrates the ‘essence of comity’ between the Courts of Canada and the United States of America.” *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor’s reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra,* in regard to

its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

"Foreign proceeding" is defined in s. 18.6(1) as:

> In this section,
>
> > "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;…

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

> s. 267 In this Part,
>
> > "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;… (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding

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under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a "foreign proceeding" for the purposes of s. 18.6 of the CCAA.

[14] It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a "debtor company" initiated pursuant to the CCAA and the foreign legislation.

> s. 18.6(2). The court may, in respect of a *debtor company,* make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

[15] The definition of "debtor company" is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a "debtor company" since only a "debtor company" can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions "[w]here a compromise or arrangement is proposed in respect of a debtor company…". I note that "debtor company" is not otherwise referred to in s. 18.6; however "debtor" is referred to in both definitions under s. 18.6(1).

[16] However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

> s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons,* from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

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BW Canada would fit within “any interested person” to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

[17] Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

[18] Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

[19] The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has

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been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

[20] To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

[21] In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
>
> (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
>
> (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis

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of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as

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requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

[23] I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

[24] Order to issue accordingly.

Application granted.

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Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY

FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

THIS MOTION made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of

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Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any properly of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

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7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the

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fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule "A" hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days' notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

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province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule “A”

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES’ CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the “CCAA”)

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise’s long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

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Court File No. 00-CL-3667

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

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Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
AWB Geneva SA v. North America Steamships Limited [2007] 2 Lloyd's Rep 31	Canada	8
Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825	United Kingdom	11
Bilta (UK) Ltd v. Nazir [2014] Ch 52 (CA)	United Kingdom	12
Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
In re C (A Bankrupt) BVIHC 0080/2013	British Virgin Islands	15
Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852	United Kingdom	18
Jyske Bank (Gibraltar) Ltd v. Spjeldnaes [2000] BCC 16	United Kingdom	19
Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

Exhibit List

	Jurisdiction	Exhibit Number
Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
Picard v. Bernard L Madoff Investment Securities LLC BVIHCV140/2010	British Virgin Islands	22
Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
Stichting Shell Pensioenfonds v. Krys [2015] AC 616; [2014] UKPC 41	United Kingdom	25
Other Authorities		
McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
Cases Cited by *Amici Curiae*		
A, B, C & D v. E , HCVAP 2011/001	Anguilla	28
Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 31

[1992–93 CILR 591]
BLUM v. BRUCE CAMPBELL AND COMPANY and CAMPBELL CORPORATE SERVICES LIMITED

GRAND COURT (Smellie, J.): October 20th, 1993

Trusts—foreign-appointed trustee—recognition and enforcement of appointment—foreign order appointing trustee is judgment in rem—prima facie entitled to recognition in Cayman Islands but no direct enforcement if terms of appointment unknown to Cayman law and legal effect and consequences uncertain

Family Law—property—appointment of receiver—trustee of missing person's assets appointed by foreign court on petition of wife may be appointed receiver in respect of assets in Cayman Islands if beneficial to estate and just to defendants and creditors

Family Law—property—appointment of receiver—Rules of Supreme Court, O.30, r.1 allows ex parte application for appointment of receiver of missing person's assets—court has discretion to grant application in proceedings already in progress without fresh pleadings or affidavit of fitness to act

The plaintiff applied for (a) declarations recognizing and enforcing a foreign order which appointed him trustee over the assets in the Cayman Islands of a person whose whereabouts were unknown; and (b) injunctions to facilitate disclosure from the defendants.

A Pennsylvania court appointed the plaintiff as trustee of the assets in the Cayman Islands of a person who had disappeared two years earlier while on a solo sailing trip. Death was not presumed, as the statutory seven-year period had not then expired. By the terms of the order, the trustee was empowered *inter alia* to "recover and take possession of any assets which . . . the absentee has or has the right to possess."

The plaintiff brought the present proceedings in the Cayman Islands seeking (a) declarations recognizing his authority at large to seek and recover any assets within the jurisdiction belonging to the absentee; and (b) mandatory injunctions directing the defendants to disclose to him all information in their possession concerning the property of the absentee and to deliver up all such property in their possession, custody or control. There was no evidence before the court of any identified property or of any involvement of the absentee with the second defendant but the first defendant admitted that the absentee was a client and there was affidavit evidence from the absentee's wife setting out her belief that the defendants or others might be holding assets on behalf of her husband.

The trustee submitted *inter alia* that (a) since the Pennsylvania order of appointment was a final order made by a court of competent jurisdiction it was in effect a judgment *in rem* and as such was conclusive and binding in the Cayman Islands, as against all the world; (b) accordingly, the defendants were obliged to recognize the order in the Cayman Islands and the present application was in fact strictly unnecessary; (c) recognition and enforcement of the order would be in the best interests of the estate and beneficiaries and, in particular, would properly result in the fair treatment of the absentee's dependants and his creditors; (d) as a practical solution, in the alternative, he could be appointed a receiver by the court over the absentee's assets; and (e) he was entitled to the costs of the application.

The defendants, while adopting a neutral stance on the general merits of the trustee's position and his claim for recognition, submitted that whatever order was made, it should not result in the direct enforcement of the US order against them since that order did not as a matter of Cayman law guarantee them an effective and complete discharge against any later claims by the absentee (should he reappear) or by others in respect of property or information handed over to the trustee.

Held, granting the application in part:

(1) Since the Pennsylvania court was of competent jurisdiction, its final order appointing the plaintiff as the trustee of the missing person amounted to a judgment *in rem* entitled to recognition in the Cayman Islands. The declaration of his status *vis-à-vis* the missing person and the general assignment of his property and rights to property together constituted the *res*. There was nothing to suggest that the rules of the *lex situs* in respect of any assignment of real property or indeed any other rules of law or public policy justified refusing recognition of the order. Even the fact that the appointment of a trustee to act for a missing person was a concept unknown to Cayman law did not preclude its recognition when the compelling practical reasons for doing so were taken into account. The court would therefore grant a declaration recognizing the appointment (page 594, line 39 – page 595, line 4; page 598, lines 24–30; page 600, lines 20–28).

(2) Nevertheless, despite the order of appointment being a judgment *in rem*, the defendants had properly objected to its direct enforcement in the Cayman Islands since there were matters of Cayman law which had to be considered before they could be certain that they were acting properly

in relying on it. In particular, the defendants would have had no way of knowing whether in responding to the trustee they would have been obtaining an effective and complete discharge in relation to the missing person (should he reappear) and as against others at large, in respect of any property or information handed over to the trustee. It would also clearly be wrong in principle and bad policy directly to enforce a foreign procedure which had no known parallel in the Cayman Islands—especially when there was insufficient evidence before the court to allow it to make a full assessment of the relationship between

the missing person and the defendants (page 596, lines 15–23; page 597, line 31 – page 598, line 5; page 598, lines 10–24).

(3) In the circumstances, to avoid freezing the assets of the missing person, to the detriment of his dependants and creditors, until he could be presumed dead after seven years had elapsed, the court would exercise its discretion exceptionally to appoint the trustee as a receiver. It was just and convenient to do so and the appointment would be beneficial to the estate. Moreover, since a receiver could stand in the place of a principal for the purposes of obtaining confidential information under the Confidential Relationships (Preservation) Law, the plaintiff would then be able to obtain full disclosure of the missing person's confidential affairs from the defendants and others (page 600, line 36 – page 601, line 3; page 602, lines 15–30; page 603, lines 3–8).

(4) Since, by the Rules of the Supreme Court, O.30, r.1, the application could have been made *ex parte* and notwithstanding the absence of an express prayer, the court would make the order appointing the trustee as receiver without fresh pleadings. It would also dispense with the usual requirement of an affidavit of fitness to act. In the circumstances, costs would be awarded to the defendants since (a) they had been correct in not responding to the trustee's demands for enforcement in the absence of an order from the Cayman court, and (b) in the case of the second defendant no evidence had been presented to show that it was involved with the absentee in any way—a circumstance which made it not unreasonable for this defendant to refuse to recognize the order or comply with its terms (page 603, lines 12–22; page 603, line 32 – page 604, line 7).

Cases cited:

(1) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414, distinguished.

(2) *Didisheim* v. *London & Westminster Bank*, [1900] 2 Ch. 15, distinguished.

(3) *Kilderkin Invs.* v. *Player*, 1984–85 CILR 63.

(4) *Pélégrin* v. *Coutts & Co.*, [1915] 1 Ch. 696, distinguished.

(5) *Salvesen or Von Lorang* v. *Administrator of Austrian Property*, [1927] A.C. 641; [1927] All E.R. Rep. 78, *dicta* of Viscounts Haldane and Dunedin applied.

Legislation construed:

Rules of the Supreme Court, O.30, r.1:

"(1) An application for the appointment of a receiver may be made by summons or motion.

(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.

(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he must do so *ex parte* on affidavit.

(4) The Court hearing an application under paragraph (3) may

grant an order restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons returnable on such date as the Court may direct, to be issued."

O. Watler for the plaintiff;
S. McCann for the defendants.

SMELLIE, J. The plaintiff is an attorney-at-law in Pennsyl-
10 vania, United States, and brings this action as trustee appointed by the Orphans' Court of Common Pleas of Westmoreland County, in the State of Pennsylvania, over the estate of Dr. Robert Holst, an absentee.

The absentee was resident and domiciled in Pennsylvania where he practised as a neurosurgeon. From the evidence presented to the Pennsylvania court it appears he was last seen on Long Island, in the Bahamas, on December 1st, 1991 where he had stopped over during a solo sailing voyage. He was an avid and accomplished sailor who frequently undertook solo voyages. His unexplained and prolonged absence led to the petition by his wife to the Pennsylvania court for the appointment of the trustee over his assets.

On that petition the trustee was appointed pursuant to various provisions of Pennsylvania law which also defined the trustee's duties, powers and responsibilities. He is empowered, among other things, "to recover and take possession of any assets which Robert Allen Holst, the absentee, has or has the right to possess." Under Pennsylvania law he has all the powers and discretion of a personal representative appointed over a decedent's estate but it must be noted that as the Pennsylvania court was not persuaded to grant a decree of presumption of death, the trustee is not strictly speaking acting as the personal representative of a deceased on the basis of a foreign grant of probate or administration. Exactly what the range and incidents of all his powers and responsibilities are have not been fully explained. It is also noted that he has not yet been required to post a bond for the due execution and it is unclear whether he is required to file accounts.

From the affidavit evidence placed before this court on this application, including independent expert evidence on the effect and meaning of Pennsylvania law and of the orders of the

Pennsylvania court, I am satisfied that the Pennsylvania court is a court of competent jurisdiction and that its decree of appointment of the trustee is its final order in the sense that it is not provisional or conditional. On the face of the order and from the expert evidence, it appears, and has been explained, that the order may be set aside in one of three circumstances, including the reappearance and application of the absentee, but I accept the expert's submission that none of those circumstances would be regarded, as a matter of Pennsylvania law, as rendering the order provisional or conditional.

In the context outlined above, Mr. Watler on behalf of the trustee, by originating summons, seeks declarations recognizing the trustee's authority, at large, to seek and recover any assets within this jurisdiction belonging to the absentee. He also seeks mandatory injunctive orders directing the present defendants to disclose to the trustee all information in their possession concerning property of the absentee and to deliver up to the trustee all such property as may be in their possession, custody or

control. By the latter category of orders he would seek, therefore, not only to recognize but also directly to enforce the trustee's appointment and powers within this jurisdiction.

This application notwithstanding, Mr. Watler has submitted on behalf of the trustee that as a matter of Cayman law the application was not strictly necessary. He has proceeded on the basis that the Pennsylvania decree is a judgment of a foreign court *in rem* and as such, he submits, is conclusive and binding in the Cayman jurisdiction, not only between parties, as in the case of a judgment *in personam*, but as against all the world.

As authority for the proposition that a foreign judgment *in rem* is recognized and enforceable *per se*, he cited 8 *Halsbury's Laws of England*, 4th ed., para 739, at 486 which in turn cites the *locus classicus*, *Castrique* v. *Imrie* (1)—the decision of the House of Lords which applied that principle in circumstances involving the sale of a British ship lying in a foreign port. Accordingly, it was submitted, the trustee's appointment, being a foreign judgment *in rem*, was an appointment which the present defendants were obliged to recognize and as they had not done so, the trustee was obliged to bring this application. He should, further, as a result, be entitled to his costs.

At an early stage in these proceedings it was also submitted by analogy that the trustee's foreign appointment should be regarded

and recognized in the same way this court would, at common law, recognize the appointment by a competent foreign court of a trustee in bankruptcy over property in the Cayman Islands of a foreign debtor. At common law such an appointment would be recognized *prima facie*, as an assignment of the movable assets of the debtor located within this jurisdiction (see rr. 165 and 166 of Dicey & Morris, 2 *The Conflict of Laws*, 11th ed., at 1117–1121 (1989)).

As attractive an analogy as that may appear to be, it is not one which this court is persuaded to rely upon for the effect advanced by the trustee. In the first place, no authority was cited for the proposition itself. Moreover, those principles relate to the established concept at common law of the assignment of a bankrupt's estate to a trustee in bankruptcy with all its attendant consequences. Research has shown that there are no provisions in this jurisdiction which directly parallel those of Pennsylvania for the appointment of a trustee for an absentee. That concept is therefore entirely foreign to our law. While similarity of law is not a prerequisite to the recognition and enforcement of foreign orders, I think that it would be wrong in principle and bad in policy to grant an order which would give effect, by direct enforcement, to the terms of a foreign order of which there is no known parallel in the Cayman Islands.

At a later stage in these proceedings (which required a number of sittings and adjournments for the presentation of the arguments) the trustee sought to rely by further analogy on the position at common law of foreign decrees made in respect of the assets of mentally disordered persons. In this regard Mr. Watler cited the case of *Pélégrin* v. *Coutts & Co.* (4) in which a Frenchman domiciled and resident in France had deposited securities for safe custody with the defendant in London. He afterwards became a person of unsound mind and was so found by the French court. A provisional administrator of his property was appointed by the French court with express power to receive the securities in question. The defendants, however, when requested to do so refused to act on the order of the French court and insisted (as have the defendants in the present case in this court) on an action being brought in the English court, in which case they would agree to act as the court should direct but claimed to retain their costs of the action. It was held that having regard to the decision of the Court of Appeal in *Didisheim* v.

London & Westminster Bank (2) the defendants, in refusing to act on the order of the French court, had shown an undue and unreasonable excess of caution and ought to bear their own costs of the action.

There are obvious and valid reasons why the *Pélégrin* case would not serve simply by analogy as authority for Mr. Watler's submissions in the present case. These are:

(a) The defendants had the benefit of the authority of *Didisheim's* case (2), directly on point, which made it clear that a foreign decree of the type propounded was enforceable in England and that those responding to it would obtain a valid and effective discharge for the property handed over. The law on the subject had been fully recognized ever since that earlier case. Hence the finding that the defendants had "displayed an unreasonable excess of caution in the attitude which they adopted."

(b) The expert evidence on the French law put before the court was to the effect that it was the same in all substantial particulars as the English law.

(c) The nature of the property and nature of the relationship between the defendants and the lunatic was clear. The defendants were found to be gratuitous bailees and commercial agents of the lunatic in respect of specified property. In the present matter those issues are unclear, the trustee has not been able to specify any property or indeed even assert just what property there is nor has he been able to establish in what capacity either defendant may hold property on behalf of, or on the instructions of the absentee. That the position could be different if the defendants

were themselves trustees as distinct from mere bailees was recognized in *Pélégrin's case* (4) itself ([1915] Ch. D. at 701).

There is therefore no evidence before this court that would enable me fully to assess the nature of the relationship between the absentee and the defendants, as regards any property of the former. There is only the admission of the first defendant that the absentee is a client and affidavit evidence from the absentee's wife setting out her belief that the defendants or others might hold assets on behalf of the absentee. The more one analyses Mr. Watler's submissions in this regard, the clearer becomes the inappropriateness of seeking to arrive at the resolution of this matter simply by analogy; the matter involving, as it does, principles of the conflict of laws, and in particular, as I think is

demonstrably clear from the factual issues, several potential difficulties. While the analogies drawn may be helpful to the court in advising itself on the exercise of its discretion as to what order it shall make in this matter, they can provide no complete answer to the defendant's concerns and objections.

The defendants, while adopting a neutral stance on the general merits of the trustee's position and his claim for recognition, have submitted that whatever order is made, its result should not be the direct enforcement, within this jurisdiction as against them, of the trustee's appointment by the Pennsylvania court. As justification for that submission Mr. McCann cited the defendants' concerns at having to respond to the trustee by virtue of the Pennsylvania decree without being certain, as a matter of Cayman law, what would be the incidents and necessary consequences of the powers and authority vested in him by the foreign decree. For instance, he raises the concerns of the defendants whether, in responding to the trustee, they would be obtaining an effective and complete discharge *vis-à-vis* the absentee (should he ever reappear) and as against others at large in respect of any property or information handed over to the trustee. I accept in principle the validity of those objections.

The result is that the orders herein will not operate so as to allow the direct enforcement (as distinct from recognition) of the Pennsylvania decree within this jurisdiction. In coming to that result it was necessary also to take a decision as to the nature of the Pennsylvania decree—whether it is to be regarded as a judgment *in personam* or, as Mr. Watler submits, as a judgment *in rem*. As the authorities reveal, the question whether a foreign judgment is *in personam* or *in rem* is sometimes a difficult one on which judges have been divided in opinion (see Dicey & Morris, 1 *The Conflict of Laws*, 11th ed., at 456 (1989)).

Mr. Watler has further submitted that the decree here is to be regarded as a judgment *in rem* on the basis that it is a judgment

which determines the status of a person, namely the trustee *qua* trustee for the absentee. If that is so, he submits, then its recognition and enforceability is conclusive and binding having regard to the authorities earlier cited, in particular *Castrique* v. *Imrie* (1).

The primary authority relied upon for the proposition that the foreign decree is a judgment *in rem* as being one declaratory of status was *Salvesen or Von Lorang* v. *Administrator of Austrian*

Property (5). In *Salvesen's case* the subject-matter was a foreign decree of nullity of marriage pronounced by the competent German court but which was later challenged by a respondent in the British proceedings where the entitlement of the plaintiff/appellant to certain property depended on her status as a party to the marriage which had been decreed a nullity by the German court. Viscount Haldane made the following observations ([1927] A.C. at 654–655):

> "I am unable as matter of principle to see how its [the German court's] competence as the Court of the domicil can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the question raised that status must be taken to have been a res and the judgment was therefore one in rem. . . ."

Viscount Dunedin made these observations (*ibid.*, at 622):

> "The other point on which I want to say a few words is the question of what is a judgment in rem. All are agreed that a judgment of divorce is a judgment in rem, but the whole argument . . . turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a 'res,' as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the Court such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such. . . . I notice that in the Oxford dictionary the word 'status' is defined (inter alia) as 'The legal standing or position of a person . . . condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority.' The judgment in a nullity case decrees either a status of marriage or a status of celibacy."

8 *Halsbury's Laws of England*, 4th ed., paras 739 and 742, at 486 and 487, cites other examples of judgments *in rem* relating to

personal status.

However, it appears from the absence of authorities on it that the question whether a judgment appointing a trustee is one

declaratory of a status has not been finally decided. There is some authority to the effect that a judgment vesting movable assets in an administrator or trustee in bankruptcy, with the power of sale, is a judgment *in rem* (see 8 *Halsbury's Laws of England*, 4th ed., para. 739, at 486).

Unsettled though the status of the appointment of the trustee may be in this regard, there are, on the other hand, obvious impediments to any conclusion that the Pennsylvania decree appointing the trustee is instead a judgment *in personam*. Notwithstanding that the Pennsylvania law requires that the absentee be made a party to the proceedings there, it is not a requirement of the Pennsylvania law that the decree should be regarded as creating a judgment debt between the trustee and the absentee. For the purpose of recognition and enforcement at common law and therefore as a matter of Cayman law (in the absence of statutory provision) the Pennsylvania decree might not, therefore, be recognized or enforced as a judgment *in personam* (see 8 *Halsbury's Laws of England*, 4th ed., para. 731, at 482–483).

For the foregoing reasons and in the special circumstances of this case, I am persuaded to the view that the trustee's decree of appointment should be regarded as a judgment *in rem* as being declaratory of his status *vis-à-vis* the absentee in respect of the latter's property. By virtue of the doctrine of obligation (as to which see Dicey & Morris, 1 *The Conflict of Laws*, 11th ed., at 418 *et seq.* (1989)) and as there are compelling practical reasons as well, I regard the trustee's status as deserving of recognition in this jurisdiction.

As to the practical reasons, they are these. Part of the trustee's charge is to pay or expend, with the approval of the Pennsylvania court, so much of the absentee's property or income therefrom as may be necessary for the support of the absentee's wife and minor children. The Pennsylvania court has granted the decree appointing the trustee for the absentee, instead of a decree of presumption of death; because the absentee has not been missing for the statutory period of seven years. In those circumstances the trustee has submitted, and I accept, that the denial of access to the absentee's assets for so long a period pending a decree of presumption of death would visit injustice upon his dependants. The same considerations may well hold true in the case of the just creditors of the absentee, of whom, it appears from the evidence,

there are several. Furthermore, and in general, I accept that the recognition of the trustee's status in this jurisdiction would be in the best interests of the estate and beneficiaries.

Recognition in itself, without enforcement, would not, however, enable the trustee to fulfil his charge in respect of any property in this jurisdiction which might have been assigned to him by virtue of the Pennsylvania decree.

Direct enforcement would be inappropriate for reasons already explained, including those raised in the defendants' objections and considerations of public policy. Direct enforcement may also be impermissible, in this case for the same and other reasons, expressed strictly in terms of the rules of the conflict of laws. Further comments from *Dicey & Morris*, *op. cit.*, at 456 are relevant to this question of enforcement:

> "Foreign judgments *in rem* are freely recognised in England but rarely call for enforcement. . . . [I]f the person entitled under a foreign judgment *in rem* vesting in him the title to some movable thing brings an action for wrongful interference in England [Cayman Islands] against a person who denies that title, he is in reality relying on his title rather than the source of it—the judgment. He is, in other words, relying on the foreign judgment *qua* an assignment rather than *qua* a judgment. . . . All that is involved is, at most, recognition of the foreign judgment [not enforcement], and, at that, recognition *qua* an assignment."

That I regard to be the case here in terms of this court's recognition of the status of the trustee. The "res" which is the subject of the order being recognized is his status and the general rights of assignment, not, as in *Castrique* v. *Imrie* (1), the immediate entitlement to a specific chattel such as the ship, nor as in *Pélégrin's case* (4) to specified securities of an ascertained value. In the absence of any specified property, the nature of the trustee's appointment in itself begs the question of the subject-matter over which it is to be enforced.

The learned authors of *Dicey & Morris* go on to observe (*op. cit.*, at 457):

> ". . . [T]he validity of an assignment of property depends almost entirely upon the *lex situs*; though it is conceivable that recognition [and hence the enforcement] of a foreign judgment *qua* an assignment may also be refused on grounds of public policy."

The rules which determine the *lex situs* of the property at common law are set out at rr. 119–120 of Dicey & Morris, 2 *The Conflict of Laws*, 11th ed., at 942 *et seq.* (1989) and depending on whether the movable property of the absentee was located here

or elsewhere abroad when the Pennsylvania assignment was decreed to the trustee, those rules might present further obstacles to the enforcement of the trustee's appointment *qua* an assignment of the absentee's assets. Still further obstacles could arise if the property comprises immovables.

It is likely that the subject property was situated here and not in Pennsylvania at the time of the decree there. Thus, that court's jurisdiction could become an issue in so far as its judgment purports to operate as an assignment and the rules may prevent the trustee from invoking even his appointment *qua* an assignment as against any person who may seek to deny his title. Thus the bare recognition of the foreign decree, in this case, as a judgment *in rem* declaring the trustee's status, may serve no useful purpose in itself.

To meet the obstacle these considerations presented and to overcome the potential injustices, counsel for the trustee, at the invitation of the court, invoked this court's jurisdiction and discretion to appoint the trustee as a receiver over such of the assets as may be within this jurisdiction. The court's discretion to appoint a receiver is expressed to be properly exercised where it is "just and convenient" so to do and both counsel have agreed it would be appropriate so to do in this case. While it is not the usual course that the court would appoint a trustee to be a receiver, where such an appointment would be beneficial to the estate, as I am satisfied is the case here, the court will make the appointment. For this last proposition and the general power of the court to appoint receivers, see the *Rules of the Supreme Court*, O.30 and *Kerr on Receivers*, 17th ed., at 3 and 105 (1989).

I am also persuaded to this view of things by the consideration that had the absentee been resident in this jurisdiction, the remedy available to his dependants and creditors would have been to seek the appointment of a receiver by the court to preserve and protect his property, pending litigation to decide the rights of the parties or pending the grant of probate or administration (see *Kerr on Receivers*, *op. cit.*, at 6).

I have touched upon some of the difficulties which the principles of the *lex situs* might present notwithstanding the basic

principle that a trustee, under Cayman law, has full title to the property vested in him.

A further issue as a matter of Cayman law is the question of entitlement to confidential information. It is now settled that a receiver stands in the place of a principal for the purposes of the Confidential Relationships (Preservation) Law in so far as confidential information relating to property under his charge is concerned (see *Kilderkin Invs.* v. *Player* (3)). Subject to such directions as the court might give, the appointment of the

receiver in this case involves the further benefit of avoiding any such difficulties which may be presented by the local law.

As a matter of procedure, I am prepared to grant the application of the receiver on the originating summons as it stands, notwithstanding the absence of an express prayer as I consider the summons is sufficiently widely worded. This is an application which could have been made *ex parte* and I see no point in the present circumstances in requiring fresh pleadings (see *Kerr on Receiver*, *op. cit.* at 114 and Rules of the Supreme Court, O.30, r.1). In light of the material already before me, so far as the appointment of the trustee is concerned, I also dispense with the usual requirement of an affidavit of fitness to act as a receiver. I will, however, require that security for the discharge of his functions and for costs be given.

Accordingly, the order is that the decree of the Pennsylvania court appointing the trustee *qua* trustee for the absentee is hereby recognized and along with it his *locus standi* and that the trustee be appointed receiver over the property of the absentee within this jurisdiction. The terms and details of the order are to be set out in a formal order to be settled upon directions of the court and to be filed herein. They will ensure the accountability of the receiver to this court as appointee and officer of the court.

It follows from this judgment that the defendants were correct in not responding to the trustee's demands for enforcement of his appointment based on the Pennsylvania decree, in the absence of an order from this court. In the case of the second defendant no evidence has been presented as yet to show it was involved in any way with the absentee notwithstanding the admission that the absentee was a client of the first defendant. I am also guided by the observation of the court in *Didisheim's case* (2) ([1900] 2 Ch. at 51) where it was found at the time that—

> "the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—that is without proving his title in such a way as to make it unreasonable for the bank to refuse to recognise it."

In those circumstances I find that the defendants are entitled to their costs incurred in this application, to be taxed, if not agreed, and I so order.

Order accordingly.

Attorneys: *Maples & Calder* for the plaintiffs; *Bruce Campbell & Co.* for the defendants.

Exhibit 32

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 270 of 2017 (IMJ)

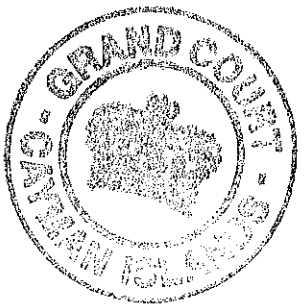
IN THE MATTER OF CHANGGANG DUNXIN ENTERPRISE COMPANY LIMITED

AND IN THE MATTER OF AN APPLICATION FOR RECOGNITION OF JOINT PROVISIONAL LIQUIDATORS APPOINTED BY THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATION REGION

IN CHAMBERS

Appearances: **Mr. Peter Hayden and Mr Jonathan Moffatt of Mourant Ozannes on behalf of the Applicants**

Before: **The Hon. Justice Ingrid Mangatal**



Heard: **11 January 2018**

Draft Judgment Circulated: **5 February 2018**

Judgment Delivered: **8 February 2018**

Judgment released For Publication: **1 March 2018**

HEADNOTE

Company Law - Application for recognition and assistance at common law by foreign provisional liquidators - Hong Kong provisional liquidators of a Cayman company seeking an order from the Cayman Court permitting them to act in the name and on behalf of the Company for the purpose of making an application to the Cayman Court for the winding up of the Company and to seek the Hong Kong provisional liquidators appointment as joint provisional liquidators of the Company in the Cayman Islands

JUDGMENT

Introduction

1. This is the hearing of an application brought by way of ex parte originating summons (the "**Summons**"). The Summons is filed on behalf of Kennic Lai Hang LUI and LAU WU Kwai King Lauren of KLC Corporate Advisory & Recovery Limited, Hong Kong, who were appointed as joint and several provisional liquidators (the "**HK JPLs**") of Changgang Dunxin Enterprise Company Limited (the "**Company**") by an order of Harris J, sitting in the Hong Kong Special Administrative Region, (the "**HK Court**") dated 5 June 2017 (the "**HK JPL Order**").

2. The Summons, seeks the following relief (as modified in the draft order provided):

> "*1. That the HK JPL Order and that the HK JPLs be recognised by the court, including recognition of the power and authority of the HK JPLs to act in the name and on behalf of the Company in the Cayman Islands for the purpose of making an application to the court for the winding up of the Company and to seek the HK JPLs' appointment as joint provisional liquidators of the Company in the Cayman Islands.*
> *2. That there be liberty to apply generally.*
> *3. That the second affirmation of LAU WU Kwai King Lauren with its exhibits filed in support of this summons be sealed and not made available for inspection by any person other than by order of the court pursuant to O. 63, r. 3 of the Grand Court Rules.*
> *4. Such further or other orders as the court considers necessary.*
> *5. That costs be provided for."*

3. Paragraph 3 of the Summons was considered on a paper application and granted in advance of the hearing. The HK JPLs seek to further extend that sealing order.



Background

4. The HK JPLs seek recognition of their powers as foreign liquidators by this Court for the limited purpose of applying in the name and on behalf of the Company to wind it up in the Cayman Islands while concurrently applying to be appointed as joint provisional liquidators in the Cayman Islands (the "**Proposed Cayman JPLs**"). If the Proposed Cayman JPLs are appointed, they will seek to have that order recognised by the HK Court. It is envisaged that if the Proposed Cayman JPLs are recognised in Hong Kong, the HK JPLs in Hong Kong will be discharged and the proposed Cayman JPLs will pursue parallel restructuring proceedings in both the Cayman Islands and Hong Kong, subject to the supervision of the respective courts.

5. The HK JPLs say that they are proceeding in this manner as they have been advised that the powers that may be granted to joint provisional liquidators of a Cayman Islands company in its home jurisdiction are broader than those which can be conferred on joint provisional liquidators of a foreign company in Hong Kong. In particular, the HK JPLs have been advised by their Hong Kong legal counsel, Messrs. Mayer Brown JSM, that the appointment of joint provisional liquidators solely to restructure a company is impermissible by virtue of a 2006 decision of the Hong Kong Court of Appeal.

6. Mr. Hayden, who appears for the HK JPLs, indicates that the application is brought ex parte on the basis that should any of the Company's stakeholders have any objection to the proposed course of action, they will have an opportunity to be heard. To ensure that the Company's stakeholders are given notice and (if they so wish) an opportunity to challenge the orders currently being sought, the Court may give directions for the orders and documentation filed with the Court (save for Lau Two and its exhibit), to be sent to them with liberty to apply.

The Hong Kong Provisional Liquidation and Restructuring

7. The Company is a Cayman Islands investment holding vehicle which was incorporated in the Cayman Islands on 27 August 2012 as an exempted limited company. It was registered in Hong Kong as a non-Hong Kong company under part XI of the former

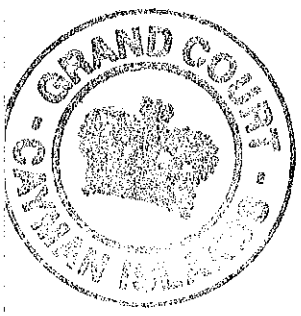
Companies Ordinance on 6 December 2012. At all material times its principal place of business was situated in Hong Kong and the Company's principal activities, and those of its subsidiaries, consist of manufacturing, production and sale of upstream paperboard products in the People's Republic of China ("**PRC**"). Its shares were listed on the Hong Kong Stock Exchange (the "**SEHK**") on 26 June 2014; however trading of its shares was suspended on 20 January 2016.

8. A creditor of the Company, Wang Tao, issued a petition to wind up the Company on 31 May 2017 in the HK Court on the grounds that it was unable to pay its debts as they fall due (further to a statutory demand which had gone unsatisfied) or, in the alternative, on just and equitable grounds. The petitioning creditor sought the appointment of the HK JPLs by an application of the same date.

9. The Order appointing the HK JPLs gave them very broad powers including, amongst others, the power to preserve the Company's assets and manage its affairs for the purposes of preserving its assets and the power to do all things and enter into such commitments as the HK JPLs considered fit.

10. The HK JPLs have confirmed that the Company is hopelessly insolvent on a cash flow basis, and since their appointment have been considering various restructuring proposals and appointed Yu Ming Investment Management Limited as financial advisors to the Company to assist in the investor negotiations (the "**Financial Advisors**"). Having received a number of restructuring proposals from potential investors, the HK JPLs were advised by the Financial Advisors that the proposed restructuring was the most viable restructuring option available to the Company. This restructuring proposed follows the practice which has developed in Hong Kong effectively to "*monetize*" the Company's listing.

11. The Applicants seek the appointment of the HK JPLs, as JPLs in the Cayman Islands, as it is submitted that their appointment is required due to a lacuna in the laws of Hong Kong, as a result of the lack of any restructuring powers vesting in provisional liquidators appointed over companies (both foreign and domestic). By seeking their appointment, the HK JPLs seek to navigate this lacuna. It is a route they say which has been followed



in Bermuda in respect of at least one Bermuda Company which undertook business in Hong Kong, with both the Bermudian and Hong Kong courts making similar orders to those now sought. Reference was made to the decision of Kawaley CJ in ***Re Z Obee Holdings Ltd*** [2017] SC (Bda) 16 Com (21 February 2017).

12. Counsel points out that the HK Court has also sanctioned the HK JPLs' intended course of action to petition to wind up the Company in the Cayman Islands and obtain their appointments as provisional liquidators by this Court.

13. Mr. Hayden readily conceded that this is an unusual application and that it would have been preferable if these proceedings had started in the Cayman Islands rather than Hong Kong.

14. Counsel also submitted this is a developing area of law but that, however, the Court's jurisdiction to make orders such as those sought on this application has recently been confirmed in the decision of Segal J, ***In the matter of China Agrotech Holdings Limited – FSD 157 of 2017 (NSJ),*** unreported judgment of 19 September 2017. He submits that the Applicants do not ask the Court in this application to go beyond what was ordered in ***China Agrotech***. In fact, he explains that what is being asked for here carries greater safeguards for the Company's stakeholders than was the position in ***China Agrotech***, because if the orders sought are made, the winding up and restructuring proceedings will both be subject to the supervision of this Court.

15. There are a number of matters of note set out in the affirmations of Ms. Lau. In her Third Affirmation, she indicates that Mr. Wang Tao, the creditor who petitioned to wind up the Company, supports this application and the HK JPLs' plan to petition to wind the Company up in the Cayman Islands (and to apply to be appointed as provisional liquidators in those proceedings). He has also confirmed that he does not intend to bring insolvency proceedings against the Company in the Cayman Islands and that he supports, in principle, a restructuring of the Company which will seek to secure the Company's solvency and which will include a proposal for the resumption of trading of the Company's shares on the SEHK. Ms. Lau also indicates that a further two bond holders, who are creditors of the Company, have confirmed their support in similar terms. The

support from these three bond holders represents approximately 25% of the total debt in value.

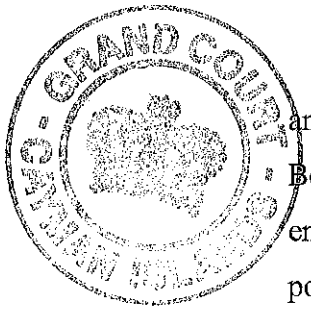
16. The HK JPLs indicate that they have reached out to another creditor which supports the petition to wind up in Hong Kong regarding its support for the actions to be taken in this jurisdiction, but they have not yet had a reply.

17. Ms. Lau informs that the HK JPLs have not contacted all of the Company's creditors individually regarding the steps to be taken in the Cayman Islands and the restructuring itself at this early stage because they are not yet able to present the Company's remaining creditors with a detailed and sanctioned restructuring plan and the proposed schemes of arrangement for their approval. It is relevant to note however, that whilst the precise commercial terms of the Framework Agreement are confidential, their general terms were announced to the market on the SEHK by the Company acting through the HK JPLs by an announcement dated 4 October 2017. No objection to the proposed restructuring following its announcement has been received from any of the Company's creditors or its members.

18. Ms. Lau also notes that a further creditor of the Company, (an executive director and chief executive officer of the Company), who presented a separate petition to wind up the Company, on the basis of unpaid salary (which has since been dismissed by consent) has made no objection to the proposed restructuring. Thus, the HK JPLs have inferred that he will not take any steps in the Cayman Islands.

19. In her First Affirmation, Ms. Lau indicates that she is not aware of any creditor (or member) who intends to commence liquidation proceedings in the Cayman Islands in respect of the Company or who intends to procure the appointment of provisional liquidators in this jurisdiction.

20. She also indicates that it is doubtful that the Company, acting through its Board, will seek to commence liquidation proceedings in the Cayman Islands. That is because there is a dispute between various members of the Board, including as to the validity of appointments. This dispute has spilled over into the public arena, with competing



announcements made to the SEHK. In her Third Affirmation, Ms. Lau confirms that the Board is unable to speak with one voice and that this has meant that the usual level of engagement with the Board on a proposed restructuring of this type has not been possible. In any event, no objection has been received by the HK JPLs to the proposed restructuring from the Board following the Company's announcement to the market. However, importantly, Ms. Lau notes that despite the difficulties at Board level the Company was, at least, able to instruct Counsel to appear at the application to appoint joint provisional liquidators, but appears to have taken a neutral stance in light of the Company's insolvency.

21. Whilst as a matter of Hong Kong law the appointment of provisional liquidators in Hong Kong may well have displaced the function of the Board, as a matter of Cayman law the appointment of provisional liquidators in Hong Kong has no effect and the Board has not as a matter of Cayman law been displaced.

22. On this point I have noted that what the HK JPLs seek is recognition to act on behalf of the Company. The HK JPL Order was made in respect of a petition filed on behalf of a creditor of the Company, and not a petition filed by the Company's directors. Therefore, in these circumstances, this Court has no need to ascertain whether a special resolution had been passed by the Company's shareholders, or need to examine the Company's articles to see whether they allow for the directors to have the authority to present a winding up petition on behalf of the Company without the sanction of a resolution passed at a general meeting. Thus, no policy considerations arise in respect of the decision to initiate the proceedings in Hong Kong, as opposed to the Cayman Islands, and whether it was a means of avoiding the provisions of Cayman Law, specifically section 94 of the ***Companies Law (2016 Revision)***. We are here, as discussed at the hearing, in unusual, but without more, quite different territory. Mr. Hayden indicates his understanding that the petition was presented in Hong Kong by Mr. Tao, who is a Hong Kong creditor, and dealt with the Company in Hong Kong, hence the commencement of proceedings in Hong Kong.

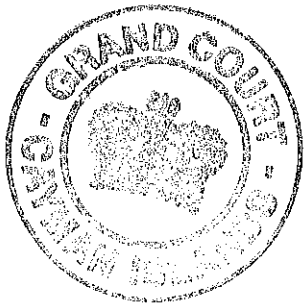
23. It is also to be noted that in the instant case, unlike in the ***China Agrotech*** decision, there is no Letter of Request from the HK Court addressed to this Court. However, in my judgment there is no necessity for a Letter of Request in the circumstances of this case. This is particularly so since the HK JPLs are essentially seeking to be recognized for the specific purposes of bringing the proceedings here, which will be under the control of this Court and this jurisdiction, which is the place of incorporation of the Company.

The Authorities

24. Mr. Hayden has very helpfully cited a number of cases that discuss the law in this rather complicated area of the law. This includes the well-known decisions in ***Rubin v Eurofinance SA*** [2012] UKSC 46, and ***Singularis Holdings Limited v Pricewaterhouse Coopers*** [2014] UKSC 36. Reference has also been made to the instructive decision of Kawaley CJ in ***In the Matter of Dickson Group Holdings Ltd.*** [2008] SC (Bda) 37 Com (9 May 2008).

25. I have found paragraphs 14-16 (inclusive) of the judgment of Kawaley J in the ***Dickson Group*** case particularly helpful. Those passages read as follows:

> *"14. In Lawrence Collins (ed.), 'Dicey and Morris on the Conflict of Laws', 12th edition, Rule 160 provides as follows: "The authority of a liquidator appointed under the law of the place of incorporation is recognized in England." The learned authors caution against regarding this statement as representing the global position:*
>
> > *"Rule 160....merely states the position which has been established to date. First, and generally, in determining whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in the country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised*

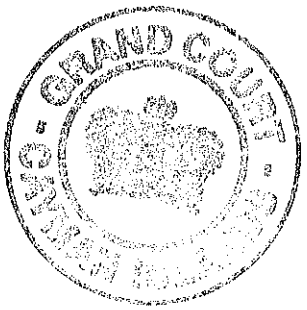


under the law of incorporation of the company. More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom…This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of a liquidation in the country of incorporation."

15. *The tentative nature of the foregoing views is perhaps understandable in the context of a text which does not focus on the insolvency terrain. Writers specifically addressing insolvency may be expected to be more instructive to present concerns. Nevertheless in Phillip R. Wood, 'Principles of International Insolvency Law' 2nd edition, writing after Britain adopted the UNCITRAL Model Law on Cross-Border Insolvency, the learned author reflects (for the benefit of other common law countries) on what used to be the position under English common law in equally tentative terms:*

> *"A liquidation at the place of incorporation would always be recognized in England…But, it was possible that a liquidation at the principal place of business abroad would be recognized in England in an appropriate case, eg where the company was a mere brass-plate at its place of incorporation, but England would probably not have recognized a foreign liquidation of an English-incorporated company….*
>
> *The disadvantage of recognizing a liquidation only at the country of incorporation is that many companies are*



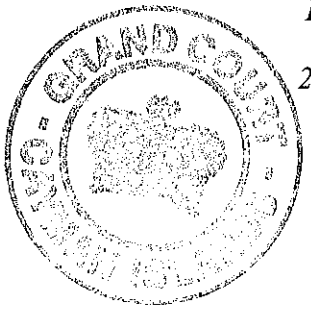
incorporated in one jurisdiction, but carry on their principal business elsewhere. This is true of tax-haven countries, such as Cayman, or shipping jurisdictions such as Panama and Liberia. It would seem odd therefore to refuse recognition of liquidation where the main assets are located.

16. *A more positive statement of principle may be derived from Ian F Fletcher, 'Insolvency in Private International Law', where the learned author opines as follows:*

> *"Where the foreign liquidation has been commenced in a country other than that in which the company's incorporation occurred, there is considerable uncertainty with regard to the prospects of such proceedings being recognized in England, and as to the principles on which such recognition might be based. The lack of explicit authority on this matter in reported cases is regretted. Clearly, the possible circumstances in which such foreign liquidations may take place can vary considerably, so that it is important that a flexible approach should be adopted. One situation in which the English position seems to be reasonably predictable is where the foreign liquidation concerns a company actually formed and registered in England. The primacy of the law of the country of incorporation is likely to form the basis of the English court's reaction to such a case...However, if no winding- up proceedings are taking place in England, despite the company having been formed here(as may be the case if there are no assets in this country, and perhaps no English creditors with interests to defend), it may be that the foreign proceedings can be considered to be the most appropriate way in which to wind up the company, although it is possible that the final process of effecting the dissolution might be reserved by English law to itself, using the power of the Registrar of companies to strike it off the register as a defunct company."*
>
> (My emphasis)

26. I have also found paragraphs 28, 30, 31, 33 and 34 of the decision enlightening. In deciding whether he was required to recognize the liquidators and if he was, whether he should in fact do so, Kawaley CJ discussed the matter eloquently as follows:

"Does the Scheme application require the Court to recognize the Hong Kong winding-up order and the order appointing the Joint Liquidators?



28. Ms. Fraser's submission that no need to recognize the foreign winding-up order nor the appointment of the Joint Liquidators truly arises because the directors who remain in place as a matter of Bermuda law support the application is an elegant yet highly technical point. This sort of point, I believe, is sometimes referred to in the barrister's trade as "a Temple point". It would in my judgment be completely artificial to hold that this Court can grant leave to promote the Scheme without implicitly recognizing (a) the validity of the Hong Kong winding-up order; and (b) the validity of the Hong Kong order appointing the Joint Liquidators. This conclusion is inevitable for the following reasons.

.....

30. Secondly, it is clear that this Court is being asked to permit the Joint Liquidators appointed in Hong Kong to promote the Scheme. There is no suggestion that the directors have any material control over the Company in liquidation in Hong Kong, or are intended to promote the Bermuda version of the Scheme. ....

31. So it is clearly legally and/or factually impossible to grant leave to convene the Scheme meeting intended to be chaired by a Joint Liquidator without implicitly recognizing the validity of his appointment. More substantively still, the Scheme is unequivocally being promoted by the Hong Kong Joint Liquidators.

.....

33. In all the circumstances granting the application under section 99 of the Companies Act 1981 unarguably required this Court to implicitly



recognize the Hong Kong winding-up order and the subsequent appointment of the Joint Liquidators.

Should this Court recognize the Hong Kong winding-up and permanent liquidator appointment orders in the exercise of this Court's well-established common law discretion to cooperate with a foreign restructuring court?

34. *When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting the parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any cogent reasons why this assistance may properly be declined."*

(My emphasis)

27. In *Dicey, Morris & Collins* (15th Edition, Sweet & Maxwell), Rule 179 is discussed as follows at paragraphs 30R-100 to 30-104 as follows:

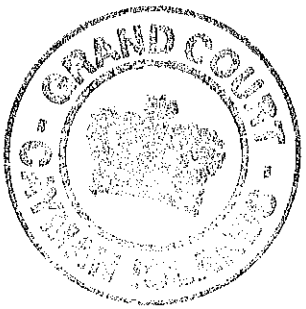
"C. Effect of a Winding Up Order

Rule 179 - Subject to the Insolvency Regulation, the authority of a liquidator appointed under the law of the place of incorporation is recognised in England.

COMMENT

Rule 179 will only apply in cases which do not fall within the Insolvency regulation. Accordingly, it will, in the case of an insolvent company, be applicable where the centre of main interests of that company is located in a State which is not a Regulation State.

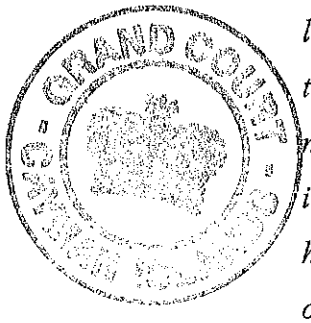
The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a



corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.

Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law. It merely states the position which has been established to date. First, and generally, in determining whether to exercise its jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation of the company. More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.

30-104 Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that "it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves." However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognized as extending to those affairs of the company which are local to the country where the appointment was made. Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the



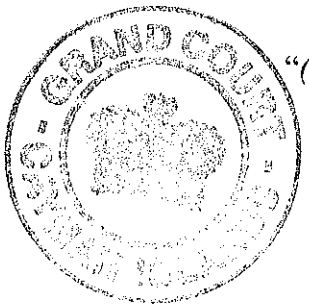
liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English Courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of a liquidation in the country of incorporation."

28. The question in the instant case is whether this Court should exercise its common law powers to recognize and assist the HK JPLs so as to allow them to proceed as intimated in the Summons. As Segal J ably discussed the issue in the ***China Agrotech*** case, and as he stated at paragraph 29(b) of the judgment:

> *"**The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation***
>
> ……
>
> *(b) under Cayman law, having regard to the Company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the Company are the Company's directors and shareholders. The Winding Up Order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the Company. The Winding Up Order is not, as an order of a foreign court, of itself binding and enforceable in Cayman (see **Felixstowe Dock Co. v U.S.Lines Inc.** [1989] 1 Q.B. 360 AT 375)....."*

29. In considering whether to exercise its power and discretion to recognize the HK JPLs, as was the case in ***China Agrotech***, the Court is in substance dealing with a governance

question. I find extremely useful, the analysis provided by Segal J at paragraphs 30(a), (f) (iii) and (g) where he stated:



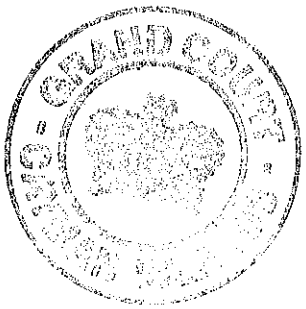
"*(a) it seems to me that the power to recognise and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognise and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.*

....

(f) it seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

....

(iii) in the present case the Court is in substance dealing with a governance question, namely whether to permit the Liquidators to act on behalf of the Company in presenting an application under section 86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the Company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the Company (in the context of a corporate rescue or reorganization albeit not one that involves all creditors being paid in full). No issues arise involving competing claims by creditors which would result in different levels of recovery or returns depending on



whether the Liquidators were granted the relief they seek. It appears that currently the Company's board and its directors are unable or unwilling to act and (while the directors could I assume act, and support or authorize the making by the Company of an application under section 86(1), with the consent of the Liquidators they) have shown no sign that they will take any steps to support or oppose the Liquidators' plans or this application....."

.....

(g) ....I note that the Company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNICITRAL Model Law, is probably in Hong Kong and that seems to me to be a consideration of considerable weight to be taken into account when deciding whether the foreign, non- place of incorporation, liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative....."

(My emphasis)

30. In my judgment, it is appropriate to grant the HK JPLs recognition to act in the name and on behalf of the Company for the purpose of making an application to the Court for the winding up of the Company and to seek the HK JPLs' appointment as joint provisional liquidators of the Company in the Cayman Islands. As Mr. Hayden pointed out in oral submissions, in this case there is no competition between the place of incorporation and the foreign jurisdiction. Here we have foreign representatives who want to bring the focus of the provisional liquidation back to the place of incorporation. Not only do they have that aim, but they are proceeding with the support of the HK Court which is supervising them in Hong Kong. The centre of main interests of the Company seems to be in Hong Kong, and it is also in the interests of comity for the Cayman Court to recognize the HK JPLs who have been appointed by a Court in a jurisdiction with which the Company has substantial ties.

31. Although the Order made by Harris J does indicate that the Company was represented at the hearing in which the HK JPLs were appointed, I think Mr. Hayden was wise not to push forward too heavily on the alternative ground that recognition should be granted because of submission by the Company to the jurisdiction in Hong Kong. I also think that, as Counsel indicated, there is no sufficient basis upon which I can consider the effect of the registration of the Company in Hong Kong under Part XI of the former Companies Ordinance in Hong Kong as providing a foundation for recognition.

Notice

32. Whilst I am prepared to grant the relief requested by the HK JPLs, I am concerned that notice should be given to the directors, shareholders and creditors of the relief that has been sought in the Summons, and that they be given an opportunity to notify the HK JPLs and the Court of any objections, to make submissions and to apply to the Court to reopen the issue should they wish to do so. I am content to adopt the approach as to Notice set out in paragraphs 35-37 (inclusive) of ***China Agrotech*** as there is also some urgency in this case, given that the Company is currently in the process of being delisted on the SEHK. In a sense, in these circumstances, the recognition is really an interim recognition, which will cease to be interim in nature if there are no objections to the Order that I have made.

33. The HK JPLs have indicated that they will give notice by way of an announcement on the SEHK. That should be supplemented with notice to all members who appear on the Register. The Notice should also indicate that if anyone wishes to have a copy of the relevant paperwork they can obtain the same from the HK JPLs.

34. I will therefore make an order in the terms discussed in this Judgment, the precise terms of which Counsel is to submit for my approval and signature.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

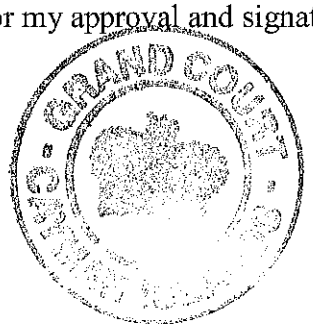


Exhibit 33

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 5 OF 2017 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF CHC GROUP LTD

Appearances:	**For the Company/Applicant for JPLs:**
	Mr. Daniel Bayfield, QC
	Instructed by:
	Mr. Tony Heaver-Wren and Mr. Sebastian Said of Appleby
	For Petitioning Creditor:
	Mr. Sam Dawson, Carey Olsen
	For First set of Creditors:
	Mr. Neil Lupton, Walkers
	For Second set of Creditors:
	Mr. Christopher Harlowe, Mourant
	Mr. Christopher Levers, Mourant
Before:	**The Hon. Mr. Justice Robin McMillan, In Chambers**
Heard:	**10th January 2017**
Judgment Delivered:	**24 Jan 2017**

GRAND COURT · CAYMAN ISLANDS

HEADNOTE

Scope of section 104 (3) (a) and (b) of Companies Law (2016 Revision) – Circumstances in which a company may apply for appointment of provisional liquidators - Relationship of such application to extant creditor's winding up petition – Emmadart case considered.

REASONS FOR JUDGMENT

1. On 10th January 2017 the Court heard an application on behalf of CHC Group Ltd. ("the Company") made pursuant to Section 104 (3) of the Companies Law (2016 Revision) ("the Law") for the appointment of Joint Provisional Liquidators ("JPLs") on the grounds that the Company (i) is or is likely to become unable to pay its debts within the meaning of section 93 of the Law and (ii) intends to pursue a compromise or arrangement with its creditors.

2. The Company, and the group of companies of which it is the holding Company, is promoting a restructuring plan of reorganization in the United States of America to bring about a restructuring of the fundamental liabilities of the group, having sought bankruptcy protection in the State of Texas under Chapter 11 of the US Bankruptcy Code.

3. It is important to note that quite apart from the instant application there is also an outstanding creditor winding up petition in respect of the same Company, brought by CHC Helicopters SA, a company duly organized and existing upon the laws of Luxembourg. The application by the directors of the Company for the appointment of JPLs is, however, unsupported by a shareholders' resolution nor is it expressly authorised by the Articles of Association.

GRAND COURT · CAYMAN ISLANDS ·

4. Having reviewed the evidence and the applicable law in addition to considering the submissions of counsel, the Court has granted the application and has appointed Mr. Stuart Sybersma and Mr. Neville Khan as JPLs.

5. In the course of considering its decision the Court was invited inter alia to review statutory provisions in relation to the issue of how under section 104 (3) (a) and (b) provisional liquidators may validly come to be appointed.

6. The Court also examined a number of authorities, both Cayman Islands authorities and English authorities.

7. In *In re China Milk Products Group Ltd.* [2011] (2) CILR 61 Jones J held that directors of insolvent companies, on a proper interpretation of the Company Law, (2010 Revision), s. 94 (1) b), would be allowed to present winding up petitions on behalf of their companies without approval by the shareholders or authorization in the Articles of Association.

8. However, more recently in *In the Matter of China Shanshui Group Limited [2015]* (2) CILR 255, Mangatal J appears to have come to a divergent conclusion. The headnote states in part:

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"(1) The directors did not have standing to petition for the winding up of the company or the appointment of joint provisional liquidators and the petition would therefore be struck out. Section 94 of the Companies Law (2013 Revision) clearly stated that an application to wind up a company was to be made by a company and not its directors, unless they were expressly authorized to do so by the company's articles of association."

9. Mangatal J states at paragraph 81 of her Judgment that the directors of the company in that case had no authority or standing to present the winding up petition nor did they have power or authority to apply for the appointing of JPLs. Clearly the latter assumed power had flowed from the former.

10. It is entirely clear from her Judgment that Mangatal J was concerned only with the circumstances where in any event the directors of an insolvent company had claimed entitlement in the first place to present a winding up petition on behalf and in the name of a company without reference to the shareholders and with no other authority or capacity being present.

11. It is the view of this Court that neither the Judgment of Jones J nor the Judgment of Mangatal J. has any bearing on the situation where there is a separate creditor winding up petition in existence and where in those limited circumstances there an application by the Company, through its directors, for the appointment of JPLs.

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12. This fundamental distinction becomes absolutely clear when one looks at the reasons relies upon by the learned Judge, who explicitly followed the case of *In re Emmdart Ltd.* [1979] Ch 540.

13. In the *Emmadart* case, Brightman J affirmed, based on established law, that the objective of management is the working of the company's undertakings, while the objective of a winding up is its stoppage.

14. Brightman J at page 546 G-H makes the comment that the board of directors can resolve to present a petition in the name of the company but such action by the board must be authorised or ratified by the company in general meeting. Obviously, if the articles confer such a power on the board of directors then the position would be entirely different.

15. Unlike those situations where a company presents a winding up petition to bring the company to an end, the purpose of the application in the present case is an intention to present a compromise or arrangement to the Company's creditors.

16. Indeed such an approach has been approved in *In the Matter of Fruit of the Loom* (Grand Court, unreported, 30 October 2000). There Smellie CJ. aptly refers at page 3,

GRAND COURT CAYMAN ISLANDS

lines 12-14, to a "*fresh start*" and further at page 7, lines 20-23, to "*the basis for the rescue of a company*".

17. It is obvious that such a potentially beneficial procedure is the complete opposite of what was contemplated in both the *Emmadart* case and the *China Shanshui* case and in light of that reality there is no conceivable basis for inferring that the application for the appointment of joint provision liquidators made on behalf of the Company itself is contrary to law or contrary to good practice. Accordingly the application is granted.

The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court

Exhibit 34

[2015 (2) CILR 255]
IN THE MATTER OF CHINA SHANSHUI CEMENT GROUP LIMITED

GRAND COURT, FINANCIAL SERVICES DIVISION (Mangatal, J.): November 25th, 2015

Companies—compulsory winding up—petition—locus standi to petition—director not entitled to petition without express authorization of shareholders or articles of association—general terms in articles giving director all powers of company insufficient as Companies Law (2013 Revision), s.94 clearly states petition to be presented by company not directors—case law to contrary not followed as clearly wrong—legislative amendment necessary to allow directors to present petitions without authorization

Courts—Grand Court—precedent—court to follow previous Grand Court decisions unless convinced they are incorrect

The directors of the company petitioned for the appointment of joint provisional liquidators ("JPLs").

The company was incorporated in the Cayman Islands as a holding company for a group of Chinese companies; it issued a number of senior notes which were repayable in 2020, with biannual interest payments in March and September of each year. Interest payments were duly made until September 2015, but the company subsequently became cash-flow insolvent (though it remained balance-sheet solvent) and was unable to make any further interest payments. The board of directors of the company resolved to wind up the company and to present a petition seeking the appointment of JPLs.

The petition was opposed by the company's majority shareholders and a number of noteholders, who applied for it to be struck out as an abuse of process as the Companies Law (2013 Revision), s.94 did not allow directors to present winding-up petitions unless authorized to do so by the company or its articles of association.

The majority shareholders submitted that (a) English case law concerning the Companies Act 1948, s.224(1) (the equivalent of s.94) indicating that directors could not present petitions without authorization had been followed in the Cayman Islands; (b) judgments of the Grand Court suggesting the contrary had not been subsequently followed and were wrongly decided, as s.94 clearly indicated that directors could not present winding-up petitions without authorization; (c) the Companies Law had

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been comprehensively reviewed in 2007 and the legislature had made a clear decision not to alter the unambiguous wording of s.94, unlike in England where legislation had been enacted in order to alter the rule; (d) the company's articles did not grant authorization to present the petition as they did not expressly stipulate that directors were empowered to present winding-up petitions; and (e) a creditor should not be substituted as petitioner as it was necessary that a creditor petition be substituted, and no creditor had done so.

The company submitted in reply that (a) the English case law supporting the proposition that directors could not present winding-up petitions without authorization had only been reluctantly endorsed in the Islands; (b) the judgments of the Grand Court which had held that directors could present winding-up petitions should be followed as they were judgments of courts of co-ordinate jurisdiction, which should not be overturned unless they were clearly erroneous; (c) it was settled practice in the Islands, England and the Commonwealth that directors could present winding-up petitions; (d) in any event, the company's articles of association authorized the directors to present the petition as they were granted all powers that could be exercised by the company; and (e) the court should not strike out the petition if it concluded that the directors had no standing to present the petition, but should instead allow the substitution of a creditor as petitioner as CWR, O.3, r.10(1) should be read disjunctively in order to allow substitution either (i) when a creditor presented a petition and was found not to be entitled to do so; or (ii) when one of the grounds in paras. (a)–(e) was established (*e.g.* by showing that a petitioner consented to his petition being withdrawn (CWR, O.3, r.10(1)(b)).

Held, striking out the winding-up petition:

(1) The directors did not have standing to petition for the winding up of the company or the appointment of joint provisional liquidators and the petition would therefore be struck out. Section 94 of the Companies Law (2013 Revision) clearly stated that an application to wind up a company was to be made by a company and not its directors, unless they were expressly authorized to do so by the company's articles of association. The section had not been amended when the Companies Law was considered by the legislature in 2007, indicating a deliberate legislative decision that directors should continue to be required to seek authorization before presenting a winding-up petition. Further, it did not appear that prohibiting directors from presenting winding-up petitions

without authorization produced impracticable results, as was confirmed by the fact that this prohibition had applied in the Islands for a significant period of time prior to 2011 (paras. 69–70; paras. 72–74; paras. 81–82; para. 84).

(2) Judgments of the Grand Court indicating that directors were entitled to present winding-up petitions without authorization if the company was balance-sheet solvent would not be followed, as there was no evidence that they had subsequently been applied by the court, and prior to 2011 the case law had held that directors were prohibited from presenting

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winding-up petitions without authorization. Though the court was generally to follow previous decisions of the Grand Court in the interest of certainty, it was entitled to depart from such decisions if convinced that they were incorrect. As the wording of the legislation clearly established that directors were not to present winding-up petitions without authorization, contrary case law would not be followed, although such a rule was no longer applied in many Commonwealth jurisdictions. The foregoing was also confirmed by the fact that the English courts had continued to apply the rule prohibiting presentation of a winding-up petition by a director without the company's authorization until the Insolvency Act 1986 was enacted, suggesting that legislative amendment was necessary in order to discontinue application of the rule (paras. 37–39; paras. 64–65; para. 71; paras. 77–79).

(3) The company's articles of association did not specifically authorize the directors to present a winding-up petition as they merely stated in general terms that the directors were vested with the same powers as the company (paras. 75–76).

(4) A creditor would not be substituted pursuant to CWR, O.3, r.10 as petitioner in place of the directors, as no petition had been presented indicating that any of the creditors was prepared to take their place, and no creditor had otherwise indicated an intention to be substituted. CWR, O.3, r.10(1) was not to be read disjunctively so as to permit substitution either (a) when "a creditor petitions and is subsequently found not to have been entitled to do so"; or (b) when one of the grounds specified in paras. (a)–(e) was established. It was necessary, therefore, for a creditor's petition to be presented in order for a petitioner to be substituted (para. 83).

Cases cited:

(1) *Alibaba.com, In re*, 2012 (1) CILR 272, referred to.
(2) *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp*, 1998 CILR 102, followed.
(3) *China Milk Products Group Ltd., In re*, 2011 (2) CILR 61, not followed.
(4) *Dyxnet Holdings Ltd.* v. *Current Ventures II Ltd.*, 2015 (1) CILR 174, referred to.
(5) *Emmadart Ltd., In re*, [1979] Ch. 540; [1979] 2 W.L.R. 868; [1979] 1 All E.R. 599, followed.
(6) *Fernlake Pty. Ltd., Re* (1994), 13 ACSR 600, considered.
(7) *First Virginia Reinsurance Ltd., Re* (2003), 66 WIR 133, referred to.
(8) *Global Opportunity Fund Ltd., In re*, 1997 CILR *N*–7, followed.
(9) *Inkerman Grazing Pty. Ltd., Re* (1972), 1 ACLR 102, referred to.
(10) *Interchase Mgmt. Servs. Pty. Ltd., Re* (1992), 9 ACSR 148, referred to.
(11) *Lornamead Acquis. Ltd.* v. *Kaupthing Bank HF*, [2013] 1 BCLC 73; [2011] EWHC 2611 (Comm), referred to.

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(12) *Miharja Dev. Sdn. Bhd.* v. *Heong*, [1995] 1 MLJ 101, referred to.
(13) *Siebe Gorman & Co. Ltd.* v. *Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 142, considered.
(14) *Spectrum Plus Ltd., In re*, [2004] 2 W.L.R. 783; [2004] 1 All E.R. 981; [2004] BCC 51; [2004] 1 BCLC 335; [2004] EWHC 9 (Ch), followed.
(15) *Trans Pacific Corp., Re* (2009), 72 ACSR 327, referred to.
(16) *Xinhua Sports & Entertainment Ltd., In re*, Grand Ct., Fin. Servs. Div., Case No. FSD 48 of 2011, unreported, considered.

Legislation construed:

Companies Law (2013 Revision), s.94: The relevant terms of this section are set out at para. 26.

Companies Winding Up Rules 2008, O.3, r.10(1):

"This Rule applies where a creditor petitions and is subsequently found not to have been entitled to do so or where the petitioner—

(a) fails to advertise his petition;
(b) consents to his position being withdrawn;
(c) fails to appear on the hearing of his petition;
(d) allows his petition to be adjourned or dismissed; or
(e) appears, but does not apply for an order in terms of the prayer of his petition."

M. Crawford and *Ms. A. Perry* for the company;
S. Moverley-Smith, Q.C, *U. Payne*, *O. Payne* and *M. Kish* for the majority shareholders;
G. Manning, *G. Cowan*, *N. Lupton*, *Ms. F. McAdam*, *J. Golaszewski* and *Ms. A. Dixon* for the creditors.

1 **MANGATAL, J.:** China Shanshui Cement Group Ltd. ("the company") was incorporated in the Cayman Islands on April 26th, 2006 as an exempted non-resident company limited by shares under the Companies Law (2004 Revision), with a registered office situated at PO Box 309, Ugland House, South Church Street, George Town, Grand Cayman.

2 The company's headquarters are situated at Sunnsy Industrial Park, Gushan Town, Changqing District, Jinan, Shandong, in the People's Republic of China ("PRC").

3 The authorized share capital of the company is US$100m. divided into 100 bn. ordinary shares of US$0.01 each.

4 The objects for which the company was established are unrestricted and are more particularly set out in its memorandum of association. The company's principal business activity is acting as the holding company of an international group of companies whose operating subsidiaries are located in the PRC ("the Group"). The Group is one of the leading

producers of cement in the PRC with a dominant market position in the Shandong and Liaoning provinces.

5 The company's shares are publicly listed on the Stock Exchange of Hong Kong ("SEHK") under the short stock name "Shanshui Cement."

6 The company's main asset is its shares in a wholly-owned, Hong Kong incorporated subsidiary, China Shanshui Cement Group (Hong Kong) Co. Ltd. ("CSHK"). CSHK is in turn also a holding company, its main asset being its shares in another wholly-owned, Hong Kong incorporated subsidiary, China Pioneer Cement (Hong Kong) Co. Ltd. ("Pioneer"). Pioneer's primary assets are its direct shareholdings in Shandong Shanshui Cement Group Co. Ltd. ("Shandong Shanshui"), American Shanshui Development Inc. and Continental Cement Corp.

7 The company claims its principal creditors are the holders ("the 2020 noteholders") of US$500m. of 7.5% senior notes, due in 2020 ("the 2020 notes"), issued by it in around March 2015 pursuant to an indenture governed by New York law dated March 10th, 2015 between itself, Citicorp Intl. Ltd. ("the trustee") and CSHK, Pioneer and Continental Cement Corp. as guarantors.

8 The 2020 notes were initially allocated to around 300 institutions and are listed on the SEHK. For that reason, the company states, it does not have details of the current ultimate holders of the 2020 notes.

The petition and claims of insolvency

9 On November 10th, 2015, the company filed a winding-up petition ("the petition") in which it stated that the 2020 notes are currently repayable on March 10th, 2020, with biannual interest payments to be made on March 10th and September 10th of each year. The company states that it has duly met all such interest payments through to September 10th, 2015. However, the petition pleads that a debt arising under the 2020 notes is imminent and/or immediately due and payable, which debt the company is unable to pay within the meaning of s.92(d) of the Companies Law (2013 Revision) ("the Law"). Particulars are set out in para. 13 of the petition.

10 The company indicates that it has an excess of assets over its liabilities and is seeking, contemporaneously with the petition, the appointment of joint provisional liquidators ("JPLs") under s.104(3) of the Law. Additionally, that it is otherwise just and equitable for the company to be wound up. On the company's evidence, it has a market capitalization of over US$2.7bn., and while the company is cash-flow insolvent, it is considerably balance-sheet solvent.

11 The company states that its board of directors has unanimously resolved to present this petition.

The *ex parte* summons for the appointment of provisional liquidators

12 The *ex parte* summons seeks to have David Walker of PwC Corporate Finance & Recovery (Cayman) Ltd., Man Chun "Christopher" So of PricewaterhouseCoopers in Hong Kong, and Yat Kit "Victor" Jong of PricewaterhouseCoopers in Shanghai, in the PRC, appointed as JPLs.

13 The summons also seeks for the JPLs to be authorized to develop and propose any compromise or arrangement with the company's creditors or any class thereof.

The majority shareholders

14 China Shanshui Inv. Co. Ltd. ("CSI") and Tianrui (Intl.) Holding Co. Ltd. ("Tianrui") (together "the majority shareholders"), are shareholders of the company, together holding 53.27% of its issued share capital.

The 2020 noteholders who have come forward to date

15 Taconic Opportunity Master Fund LP ("Taconic"), Claren Road Asset Management ("Claren Road"), and ASM Connaught House Fund LP ("ASM") are said to form part of an *ad hoc* group ("the AHG") of beneficial interest 2020 noteholders. The parties either in, or supporting, the AHG indicate that they hold 21.30% of the notes.

16 Clearwater Capital Partners ("Clearwater") is another 2020 noteholder which is said to represent another group of 2020 noteholders ("Clearwater Group"). On his first appearance on November 18th, 2015, Mr. Golaszewski, who appears for Clearwater, indicated to the court that the Clearwater Group consisted of a group of 2020 noteholders, said to hold 18% of the value of the 2020 notes, but that number was likely to increase. On November 19th, 2015, the court was informed that the Clearwater Group now consists of a 31.66% interest.

17 Asia Cement Corp. ("ACC") holds 3.6% of the 2020 notes and also holds 20.96% of the company's total issued shares and controls the voting rights attached to a further 4.22% of the total issued shares. In the aggregate, ACC controls the exercise of 25.18% of the voting rights at general meetings of the company.

The *ex parte* hearing of the summons for appointment of JPLs

18 The *ex parte* summons was listed for hearing before me on the morning of November 11th, 2015. Although s.104(3) of the Law permits the company to make an *ex parte* application for the appointment of JPLs on certain grounds, the rules of the SEHK required that the company announce the filing of the winding-up petition and the application for the appointment of JPLs. This announcement was made by the company on

the SEHK a matter of hours before the hearing was scheduled to take place.

19 On that morning, leading counsel for the company attended. In addition, counsel for Tianrui, CSI and Taconic attended the hearing, seeking to have the matter heard *inter partes* and for the matter to be adjourned for that purpose. This application was vehemently opposed by counsel for the company, who was insistent that s.104(3) allowed the application to be made *ex parte*, that the matter was urgent, and that the company wished to proceed with the application right away.

20 Having considered the arguments made, I granted a short adjournment until November 18th, 2015, to have a hearing where all interested parties could be heard. The hearing date was announced on the SEHK.

The summons filed by CSI seeking to strike out the petition and the preliminary point taken as to jurisdiction—the arguments of the majority shareholders

21 This matter has, understandably, been unfolding rapidly, with numerous affidavits, submissions and authorities being filed over a matter of hours and days. On November 17th, 2015, CSI and Tianrui filed a joint summons seeking to have the petition struck out as being an abuse of the process of the court.

22 I wish to thank counsel for the very high quality of the submissions and preparation. This has been of invaluable assistance to the court throughout the proceedings.

23 In summary, the majority shareholders say that the Law allows only a limited category of persons to apply to wind up a company, the company being one of them. However, whilst a company acts through its directors, directors have no authority to present a winding-up petition absent—

(a) a resolution of the shareholders of the company resolving that the company present a winding-up petition; or

(b) an express provision in the articles of association of the company authorizing the directors to present a winding-up petition on behalf of the company (a general provision giving the directors all of the powers of the company being insufficient).

24 In the present case, the directors of the company ("the directors") presented the petition without (a) having obtained any resolution of the shareholders of the company, which would not in any event have been obtained (for reasons that I need not go into for this application); or (b) there being any express provision in the articles of association ("the articles") authorizing such conduct.

25 The argument therefore continued that the directors accordingly have no standing to present, and the court accordingly has no jurisdiction to hear (a) the petition, or (b) the application to appoint the JPLs.

26 Mr. Moverley-Smith, Q.C. for the majority shareholders undertook an admirable tracing of the evolution of the Law in relation to the relevant section, which is s.94(1). Section 94 of the Law reads as follows:

"(1) An application to the Court for the winding up of a company shall be by petition presented either by—

(a) the company;
(b) any creditor or creditors (including any contingent or prospective creditor or creditors);
(c) any contributory or contributories; or
(d) subject to subsection (4), the Authority pursuant to the regulatory laws.

(2) Where expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting."

27 Reference was made to s.224(1) of the English Companies Act 1948, which, leaving aside sub-s. (d) (which is of no relevance), is in identical terms, merely paragraphed differently.

28 Section 224(1) was the subject of consideration by Brightman, J. in *In re Emmadart Ltd.* (5). The case involved an application by a receiver to wind up a company on the grounds of insolvency. The receiver contended that he possessed all the powers of the directors of the company and that they had the authority to apply for the winding up of the company on the grounds of insolvency on their own motion, without the sanction of a resolution of the company. Brightman, J. concluded ([1979] 1 Ch. at 546–547):

"It would be theoretically possible for the articles of association of a company to be drawn in terms which confer power on the board of directors to present a winding up petition, but an article on the lines of article 80 of Table A is not so drawn. The board of directors can resolve to present a petition in the name of the company but such action by the board must be authorised or ratified by the company in [a] general meeting. Clearly the board can cause a petition to be presented in the name of the company if a special resolution has already been passed resolving that the company be wound up by the court, because that is expressly covered by section 222(a). The board

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can also properly act on an ordinary resolution of the shareholders conferring the requisite authority on the board provided that this does not contravene any provision in the articles.

. . . The practice which seems to have grown up, under which a board of directors of an insolvent company presents a petition in the name of the company where this seems to the board to be the sensible course, but without reference to the shareholders, is in my opinion wrong and ought no longer to be pursued, unless the articles confer the requisite authority, which article 80 of Table A does not."

29 It was submitted that the principles in *Emmadart* (5) have been applied in the Cayman Islands, notably in the decision of Smellie, J. (as he then was) in *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.* (2).

30 Reference was also made to the decision of Jones, J. in *In re China Milk Products Group Ltd.* (3). That decision has become the fulcrum of the discussion and submissions in respect of this application to strike out, and rightly so. This is because in that case Jones, J. decided that, upon the true interpretation of s.94(1)(a) of the Companies Law (2010 Revision), the directors of an insolvent company were entitled to present a winding-up petition on behalf of and in the name of the company without reference to the shareholders and irrespective of the terms of the articles of association. It is to be noted that s.94 of the 2010 Revision is identical to s.94 of the Law. Jones, J. further held that s.94(2) only applied to solvent companies.

31 It is the majority shareholders' submission that *In re China Milk* was wrongly decided, in that Jones, J. wrongly construed the meaning and effect of s.94(1)(a).

32 It was asserted that, as s.94(1) has remained unchanged, the issue of agency recognized in *Emmadart* (5) by Brightman, J., *i.e.* that the directors do not have the authority to bring the petition, has not been addressed in s.94(1) at all. Further, reference was made to the fact that, on the face of it, s.94(1) and (2) do not make any distinction between solvent and insolvent companies.

33 Reference was made to the fact that there has been no amendment to the relevant sub-section such as has occurred in England, where s.124(1) of the Insolvency Act 1986 now empowers an additional category of persons, *i.e.* directors, to petition for the winding up of the company.

34 It was also further submitted that, even if Jones, J.'s reasoning was correct, his logic could not apply where a company is balance-sheet solvent but suffering cash-flow difficulties, as is the company.

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35 It was the learned Mr. Moverley-Smith, Q.C.'s position that this point as to the lack of authority of the directors to bring the petition needs to be decided *in limine.*

The arguments in response by the company and by the AHG and ACC

36 Essentially, Mr. Crawford, on behalf of the company, as would be expected, took the lead in opposing the application to strike out. He submitted that the court should not entertain the

submission that *China Milk* (3) was wrongly decided as it was decided by an experienced Judge of the Grand Court with "an unmatched knowledge of this area, including the effect of the 2007 Law." Further, that it has not been doubted in any subsequent case. AHG and ACC supported the submission of the company. Clearwater, on the other hand, which was seeking an adjournment of the summons for appointment of the JPLs, has adopted no position, one way or the other, on the strike-out application.

37 Counsel submitted that the decision of Jones, J. has been acted upon numerous times since the decision was made, is settled law, and that it is an important part of the corporate insolvency rescue operation landscape. However, no cases were cited to me in this regard. It is also not clear to me whether what counsel are saying is that Jones, J. has continued to apply the same interpretation, or that other Grand Court Judges have, after consideration of the relevant issues, also adopted this position.

38 It is in that context that the majority shareholders' counsel referred me to an article, written by the law firm Maples & Calder (who incidentally, are counsel for the company), giving a critique of *China Milk* (3). It is also in that context that I think it permissible to refer to this article briefly, since I have not had any authorities handed to me to show there is settled practice since *China Milk* endorsing the approach of Jones, J. The article, entitled "*Litigation and Insolvency Update*," was written in the summer of 2011, and does raise some issues in relation to the reasoning in *China Milk.* Interestingly, the article states that until the decision in *China Milk*—

"it was generally accepted that, while directors could make a recommendation to the shareholders (or the creditors), they could not by themselves cause the company to file a winding up petition unless the company falls within the specific parameters of s.94(2)."

Further, the article concludes that "with all the above in mind, it is not entirely clear whether another Grand Court Judge (or the Court of Appeal) in a future contested proceeding would reach the same conclusion as did Jones, J. in *China Milk.*"

39 Whilst I appreciate that this article is not evidence, at the same time the statements by counsel that *China Milk* is settled law, without the accompaniment of authorities, were not of great probative value either. They can both therefore be put side by side for consideration as to whether any settled practice has been established.

40 It was also submitted that the established practice is that a Judge of the Grand Court should follow a decision of another Judge of the Grand Court unless convinced that the first decision is wrong. Reference was made to principles of judicial comity and certainty and to 11 *Halsbury's Laws of England*, 5th ed., at para. 98, and the cases of *In re Alibaba.com* (1) (2012 (1) CILR 272, at para. 63), *In re Spectrum Plus Ltd.* (14) ([2004] 2 W.L.R. 783, at paras. 8 and 9) and *Lornamead Acquis. Ltd.* v. *Kaupthing Bank HF* (11) ([2013] 1 BCLC 73, at para. 52).

41 It was posited that it would be highly unsatisfactory to have different views at first instance on a point of this sort, which is relied upon by companies seeking relief in the Cayman Islands.

42 In response to questions from me regarding the principles of co-ordinate jurisdiction, judicial comity and their applicability to the decision in *Banco Economico* (2), it was Mr. Crawford's submission that, in the first place, *Banco Economico* was decided when the Law had not yet undergone major reform. His second response was that Smellie, J. had, in the circumstances of that case, indicated that it was by parity of reasoning, as opposed to it being a central issue in the case before him, that he had come to the view that *Emmadart* (5) was applicable in this jurisdiction.

43 It was, further, Mr. Crawford's submission that even if I were to conclude that the reasoning in *China Milk* (3) was wrong, the relevant article in this case (art. 18.1) is broader in terms than the issues covered in *Emmadart*, and than the terms of art. 80 of Table A.

44 A more far-reaching submission was made to me in the further alternative. It was put forward that, even if it were to be found that the reasoning in *China Milk* was wrong, this court should not in any event follow *Emmadart.* Reference was made to numerous factors, such as the fact that *Emmadart* had gone against what had become a practice in England. Further, that, by way of the English Insolvency Act 1986, *Emmadart* was put to rest and the earlier prevailing practice revived. But, in addition, it was pointed out that there are a number of jurisdictions where *Emmadart* has been rejected or not followed.

45 Mr. Crawford argued that *Emmadart* (5) has not been followed in Australia, and he referred me to *Re Inkerman Grazing Pty. Ltd.* (9), *Re Interchase Mgmt. Servs. Pty. Ltd.* (10), and *Re Trans Pacific Corp.* (15).

46 It was asserted that *Emmadart* has been rejected in Malaysia—see *Miharja Dev. Sdn. Bhd.* v. *Heong* (12)—and in Bermuda—see *Re First Virginia Reinsurance Ltd.* (7).
47 Counsel rounded off his submission on this point by saying that, in like fashion, *Emmadart* should not be followed in the Cayman Islands.

Substitution of a creditor for the company

48 Mr. Crawford, at the later stages of the submissions being made before me, has submitted that, in the event that the preliminary point succeeds, instead of striking out the petition by the company the court should instead allow for substitution of a creditor who wishes to be so substituted.
49 Mr. Moverley-Smith's submission in response was that substitution was only possible in relation to a creditor's petition, and reference was made to CWR, O.3, r.10.
50 Mr. Crawford then made further submissions that CWR, O.3, r.10 is not limited to creditors' petitions, and he referred to the winding-up order made on July 11th, 2011 and the amended winding-up petition in *In re Xinhua Sports & Entertainment Ltd.* (16), a decision of Jones, J., referred to in *China Milk* (3) (2011 (2) CILR 61, at para. 16). In *In re Xinhua*, the order expressly stated that the substitution for the company of a party that counsel say was a creditor was being made under CWR, O.3, r.10. Counsel asked the court to read CWR, O.3, r.10(1) disjunctively so that any petitioner may be substituted either "where a creditor petitions and is subsequently found not to have been entitled to do so" or "where the petitioner (creditor or not) falls within one of the grounds specified in sub-paragraphs (a) through (e)." Reference was also made to the Australian decision in *Re Fernlake Pty. Ltd.* (6), where it was submitted that an individual who was a contributory, director and creditor was substituted as petitioner in relation to a petition originally presented by an insolvent company.
51 It was submitted by Mr. Crawford that, in the alternative, if the court were to find that no power of substitution exists under CWR, O.3, r.10, then the court retains an inherent power to allow for substitution. Reference was made to a number of cases, including a decision of the Court of Appeal in *Dyxnet Holdings Ltd.* v. *Current Ventures II Ltd.* (4) (2015 (1) CILR 174, at para. 35).
52 I asked counsel why the court should be considering the issue of substitution of a creditor when no creditor had to date indicated any interest in being substituted as petitioner. At this stage, Mr. Manning, on behalf of the AHG, indicated that in the event that the court were to find that the petition ought to be dismissed, he had prepared a draft application

in which one of his clients would be seeking, as creditor, to be substituted as petitioner. Mr. Manning also made reference to *Re Fernlake* (6) (13 ACSR at 609).
53 Mr. Moverley-Smith has indicated that until he has seen any such application he would not be in a position to say much more upon this subject. Learned Queen's Counsel did however foreshadow that there are, in his view, certain contractual bars that exist in relation to the AHG seeking to bring a petition for the winding up of the company.

Discussion and analysis

54 As previously discussed, the principles enunciated in *Emmadart* (5) have been followed and applied in the Cayman Islands at a particular point in time. In *Banco Economico S.A.* (2), a decision which was, of course, made long before the Companies (Amendment) Law 2007, which became the Companies Law (2009 Revision), Smellie, J. (as he then was) had before him a case in which a petitioning creditor had obtained the appointment of provisional liquidators over the company. A director of the company, a Mr. Donnelly, sought to discharge that appointment. At that time, by virtue of GCR, O.102, the English Insolvency Rules 1986 applied in the Cayman Islands to applications to wind up companies. An application to discharge the appointment of a provisional liquidator could only be made by persons entitled to apply for the provisional liquidator's appointment. Those persons did not include directors but did include the company. The director claimed he was making the application on behalf of the company. Smellie, J., having been referred to *Emmadart*, concluded (1998 CILR at 108):

"... [E]ven if Mr. Donnelly is in fact the sole director of the company and therefore exercises the full powers of the board, in the absence of any express powers in the articles the result must be the same under the current Cayman Islands law: He may not stand to resist the petition without the sanction of the company in general meeting.

Having regard to that conclusion, I should specifically note that to the extent that there is disagreement between them, I have accepted as being more persuasive the later decision in *In re Emmadart Ltd.* [[1979] Ch. 540] instead of that in *in re Union Accident Ins. Co. Ltd.* [[1972] 1 W.L.R. 640]. I do so for the obvious reason that *In re Emmadart Ltd.* is more fully researched and reasoned, and also because it had clearly been regarded in the United Kingdom as carrying the day and so necessitating legislation there to reintroduce the earlier prevailing and more convenient but impugned practice evidenced in *In re Union Accident Ins. Co. Ltd.*

Whatever, against that historical background, may be the practical strictures of that construction of the present state of the Cayman law and rules governing *locus standi*, I consider that this court is obliged to apply them in the present state of our legislation. Accordingly, my decision is that Mr. Donnelly has no *locus standi* (whether he be a director or the sole director) to apply to discharge the provisional liquidators, nor *locus standi* to appear to oppose the petition and therefore the ordinary application must be dismissed as presently framed."

55 I now turn to look at *China Milk* (3). In the judgment, Jones, J. discusses (2011 (2) CILR 61, at paras. 7–9) the "directors' standing to present a winding-up petition prior to March 1st, 2009." He specifically acknowledges (*ibid.*, at paras. 8–9) that *Emmadart* (5) has been applied in this jurisdiction, and in that regard discusses *In re Global Opportunity Fund Ltd.* (8) as well as *Banco Economico* (2). He acknowledges (*ibid.*, at para. 9) that Smellie, J. held that the rule in *Emmadart* constituted good law in this jurisdiction. He describes Smellie, J., based on his comments in the judgment, as seeming to have reached that conclusion "somewhat reluctantly."

56 Jones, J. discusses (*ibid.*, at paras. 10–13) the Companies (Amendment) Law 2007, which became the 2009 Revision. He starts with the statement: "The Companies Law, Part V has been the subject of a major policy review lasting over several years." Jones, J. then discusses (*ibid.*, at paras. 14–20) his interpretation of s.94(1)(a) and 94(2).

57 It is difficult to avoid extensive quotation from the judgment in order to discuss the issues at hand. Jones, J. states the following (*ibid.*, at paras. 10–13):

"**Amendment of Part V of the Companies Law**

10 The Companies Law, Part V has been the subject of a major policy review lasting over several years. It was reviewed by a private sector committee sponsored by the Law Society, whose report was, in large part, adopted by the newly created Law Reform Commission. The ultimate result of this review was the enactment of the Companies (Amendment) Law 2007. The provision establishing the Insolvency Rules Committee came into force immediately and the remainder of the Law was brought into force on March 1st, 2009, together with the Companies Winding Up Rules 2008 and the Insolvency Practitioners' Regulations 2008. *The rule in In re Emmadart Ltd. was one of many matters to which consideration was given as part of this policy review.* It was generally agreed that, in principle, the directors of a solvent company should not have the power to present a winding-up petition in the name of the company on the just and equitable ground unless authorized to do so either by

an express provision in the articles of association or by an ordinary resolution passed by the shareholders in a general meeting. *In other words, it was felt that the rule in In re Emmadart Ltd. should be restricted to circumstances in which the directors of a solvent company seek to present a winding-up petition on the just and equitable ground, as was the case in In re Global Opportunity Fund Ltd. However, it was generally accepted that different considerations come into play if a company is insolvent or of doubtful solvency*.

11 In my view, there are sound policy reasons why the board of directors of an insolvent company should be allowed to present a winding-up petition (either on behalf, and in the name, of the company, or in their own right), whether or not they are empowered to do so by the articles of association or an ordinary resolution passed by the shareholders in a general meeting. When a company becomes insolvent, its shareholders cease to have any economic interest and the directors must act in the interests of its creditors. In my view, it is wrong in principle that the directors' ability to commence insolvency proceedings, and seek the protection of the automatic stay imposed by s.97, should be dependent upon the terms of the company's articles of association or the co-operation of shareholders who no longer have any economic interest. For these reasons, it was proposed by the review committee that the rule in *In re Emmadart Ltd.* should be abolished, at least in so far as it is capable of preventing the directors of an insolvent company from presenting a winding-up petition in the name of the company. *As Smellie, C.J. observed in Banco Economico S.A.* v. *Allied Leasing & Fin. Corp., the position in England was subsequently changed by the Insolvency Act 1986, s.124(1), which empowered the directors to present a petition on grounds of insolvency in their own right, which is another way of producing the same result.*

12 *The contrary argument was made by capital market lawyers who pointed out that countless transactions have been conducted through Cayman Islands incorporated companies on the basis that their directors would have no power to present a petition on grounds of insolvency and that the law should not be changed in this regard with retrospective effect.* It is relevant to understand that this argument was made in relation to companies incorporated for the sole purpose of entering into

conventional off-balance-sheet bond issue transactions. Invariably, such companies are owned by a charitable trust, the trustee of which is a licensed trust corporation which specializes in this type of work. In such cases, the power to present a winding-up petition is vested in (a) the bondholders as creditors (usually acting through a trustee); and (b) the trustee of the special purpose charitable trust as sole shareholder (which will be a licensed

trust corporation). *In these particular circumstances, there may be sensible commercial reasons for restricting the directors' right to present a winding-up petition (or some other form of insolvency proceeding in a foreign jurisdiction) on their own initiative and it was said that the rating agencies took this factor into account when rating Cayman Islands bond issues.* However, it must be noted that China Milk is not a special purpose bond issuing vehicle of this type.

13 *It was proposed by the review committee that these conflicting arguments should be resolved by amending the law in the following way. First, it would be amended to empower the directors of all the companies then in existence to present a winding-up petition on behalf of, and in the name of, the company on the grounds of insolvency, whether or not authorized to do so by their articles of association. Secondly, new companies incorporated after the amendment Law came into force would have the ability to adopt articles of association which expressly reserve to the shareholders the right to present a winding-up petition (or any other kind of insolvency proceeding in any other jurisdiction) on grounds of insolvency. Companies would have no power to amend their articles in this way. Only newly incorporated companies would be able to adopt articles in this form. A review of the memorandum of objects and reasons contained in the Companies (Amendment) Bill suggests that this recommendation was accepted by Government, but the language of what became s.94(2) does not, by itself, come close to enacting the intention stated in the Bill. However, when read with ss. 91–95, s.104, and the Companies Winding Up Rules, Part II, O.4, I think that the overall intention of what was actually enacted becomes clear.*" [Emphasis supplied.]

58 Jones, J. conducted (*ibid.*, at para. 17) a very helpful and useful analysis of all the changes that were brought into the Law after the review process. He then conducted a contextual analysis of the legislation, comparing what was in the Law previously with what was now there.

59 Jones, J. then sets out (*ibid.*, at paras. 18 and 20) his conclusions as follows:

"18 *Having regard to this overall legislative objective, it is clear that the legislature must have intended to abolish or circumscribe the rule in In re Emmadart Ltd., because it does not distinguish appropriately between solvent and insolvent companies.* As I have already said in para. 11 above, it is wrong in principle that the ability of the directors of an insolvent company to present a winding-up petition on the ground of insolvency should vary according to the language of its articles of association or be dependent upon the co-operation of shareholders whose economic interest has disappeared. *I remind*

myself of the rule that the court should seek to avoid a construction of [a] statute that produces an unworkable or impracticable result, since this is unlikely to have been intended by the legislature. The difficulties which have arisen both in this case and in the recent case of *In re Xinhua Sports & Entertainment Ltd.* demonstrate only too clearly how such a result would be unworkable and impracticable*. The court should also seek to avoid a construction that causes unjustifiable inconvenience to persons who are subject to the statute, since this is unlikely to have been intended by the legislature.* Bearing in mind that the directors of an insolvent company . . . owe duties to safeguard the interests of creditors (whereas the shareholders . . . do not), the legislature cannot have intended to inconvenience their ability to seek the protections which flow from the presentation of the winding-up petition. *In my judgment, upon the true interpretation of s.94(1)(a), the directors of an insolvent company . . . are entitled to present a winding-up petition on behalf [of] and in the name of the company/partnership without reference to the share-holders . . . and irrespective of the terms of the articles of association.* The directors of China Milk were empowered to present this petition." [Emphasis supplied.]

Approach to decisions of co-ordinate courts

60 In 11 *Halsbury's Laws of England*, 5th ed., at paras. 98 and 99, as quoted in *In re Alibaba.com* (1), the following guidance is provided:

"**98. Decision of co-ordinate courts.** There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a

judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions.

99. Decisions followed for a long time. A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision is wrong. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the

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formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before which the matter arises afterwards might not have given the same decision had the question come before it originally."

61 In *In re Spectrum Plus Ltd.* (14) ([2004] 2 W.L.R. 783, at paras. 8–9), the consideration of certainty is raised as follows by Morritt, V.-C.:

"8 In some of them the reason why a judge should follow the decision of a judge of co-ordinate jurisdiction unless convinced it is wrong has been described as 'judicial comity'. I do not doubt that comity is one reason for the rule or convention. In my view there is another, more compelling, reason, namely certainty. Unless the second judge is convinced that the first was wrong his, contrary, decision merely creates uncertainty. If, by contrast, he leaves the issue to the Court of Appeal the decision of that court, whichever way it goes, will (subject to any further appeal to the House of Lords) bind all lower courts as well as the Court of Appeal itself. Thus, in *In re Hotchkiss's Trusts* (1869) L.R. 8 Eq. 643, 647 Sir William James V.-C. said:

'In this case, if the words of the will had been the same as the words in *In re Potter's Trust* (1869) L.R. 8 Eq. 52, I should, without expressing any opinion of my own, simply have followed the decision of Sir R. Malins V.-C. in that case; because I do not think it seemly that two branches of a court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, and encouraging as it were a race, by inducing persons who wish one construction to go to one court, and those who wish for another construction to go to another. I should simply have affirmed the Vice-Chancellor's decision, with the intimation of my wish that the whole matter should be brought before a Court of Appeal.'

9 Some might think that statement has a rather dated ring to it, given the extremely high cost of litigation and the present emphasis on case management and expedition. But, in my view, on a point of general importance such as the correctness or otherwise of *Siebe Gorman* . . . the approach of Sir William James V.-C. remains valid because of the overriding need, going beyond the interests of the parties, for certainty."

62 It is to be noted, however, that, unlike in the instant case, in *In re Spectrum* numerous subsequent cases were cited to the Vice-Chancellor where the decision of the judge of co-ordinate jurisdiction, Slade, J. in *Siebe Gorman & Co. Ltd.* v. *Barclays Bank Ltd.* (13), had been applied,

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accepted without qualification or distinguished (*ibid.*, at para. 17). Significantly, Morritt, V.-C. elected not to follow the decision of Slade, J., despite the fact that the decision was said to have stood for 25 years, with little criticism, and was said to be the basis on which contracts had been entered into and the general conduct of affairs had been ordered (*ibid.*, at paras. 26–27). Indeed, the learned Vice-Chancellor stated (*ibid.*, at para. 27):

"It is pointed out that the *Siebe Gorman* case has stood for 25 years with little criticism. It is suggested that most bank's [*sic*] standard forms are drafted on the assumption that *Siebe Gorman* was correctly decided and that thousands of liquidations have been conducted on the same assumption. It is emphasised that notwithstanding numerous legislative opportunities the Crown has not sought to reverse its effect until the decision of the Privy Council in *Agnew's* case."

63 Nevertheless, because he felt that the decision in *Siebe Gorman* was wrong, Morritt, V.-C. declined, with the greatest of regret, to follow it (*ibid.*, at paras. 39–41).

Resolution of the issues

64 I have, therefore, the uncommon, unwelcome and uninvited task of having to look at another judge's judgment in order to see what I make of its correctness. This in circumstances where I sit as a judge of co-ordinate jurisdiction and not as an appellate judge. I appreciate that, in the interests of judicial comity and certainty, I would be inclined to follow the judgment, unless I am convinced

that it is wrong. I am also, on the other hand, cognizant that if I am convinced the decision is wrong, I cannot shy away from not following it.

65 In relation to the issue of certainty, as I indicated earlier in this judgment no specific cases were cited to me or referred to indicating that the decision of Jones, J. has been applied generally in this jurisdiction. In any event, the *Spectrum* (14) decision demonstrates that a judge may, even in the face of longstanding practices and ordering of persons' affairs based upon the decision, if convinced that the decision is wrong, not feel bound to follow the decision of the co-ordinate court.

The judgment in *China Milk*

66 It is to be noted that although in *China Milk* (3) Jones, J. had heard extensive submissions on the issue of standing, there was really no party before the court, such as the majority shareholders are in the case before me, contending for an opposite conclusion, ventilating numerous additional arguments, and testing the position. In other words, it was not a decision arrived at after an opposed argument or application.

67 It is also of passing note, although Jones, J. made it clear that this did not form part of his *ratio*, and that he would have made the decision he did even if no power were included in art. 162(1) of China Milk's articles in fact empowering the directors to bring a winding-up petition in the name of the company.

68 I appreciate that Jones, J. recognized that there were problems with coming to the conclusions that he did in relation to s.94(1) and (2) if one only had regard to the language of those sub-sections themselves (2011 (2) CILR 61, at para. 13). Hence, he sought, as is perfectly permissible, if I may say so, to analyse the general legislative scheme. Jones, J. reached the conclusion that, under s.94(1)(a), directors of an insolvent company or a company of doubtful insolvency can present a winding-up petition on behalf of the company without reference to the shareholders and irrespective of whether the articles of association permit them so to do.

69 However, the difficulty is that the 2007 amendments did not make any change of substance to s.94(1)(a) or s.94(1). A materially similar section was in place when it was decided in *Banco Economico* (2) that *Emmadart* (5) applied in the Cayman Islands. It is therefore in my judgment hard to see why the common law position, being the rule in *Emmadart*, would not continue to apply to the materially similarly worded section.

70 Looking to s.94(2) really also does not assist, as I agree with Mr. Moverley-Smith's submission that, whatever the intention of the legislature may have been, all s.94(2) did was to provide statutory confirmation that, as was previously held in *Emmadart*, where the articles of association of a company expressly authorize its directors to present a winding-up petition on its behalf, the directors do not also need to obtain the sanction of a resolution passed in general meeting.

71 Jones, J. reached the conclusion that sub-s. (2) only applied to solvent companies. There is nothing on the face of the section that points to such a conclusion. However, even if s.94(2) only applied to solvent companies, that does not explain why it would follow that directors of an insolvent company have standing to petition, given the lack of change in wording of s.94(1)(a). In any event, for the purposes of the instant case s.94(2) would be irrelevant to the company because the company was incorporated in 2006 and it also did not have the requisite article in its articles of association.

72 The fact that other material legislative changes were made cannot, in the circumstances, with all due respect, assist in interpreting what are substantially the same clear and unambiguous words in s.94(1)(a). The other legislative changes made could also not themselves, and did not, thereby make the words of s.94(1) ambiguous or render their previous interpretation unworkable or impracticable. Reference has been made by

Jones, J. to all of the material that the review committee had before it, and which would have been before the legislators, including the English Insolvency Act's way of eliminating *Emmadart.* Jones, J. also recounts (2011 (2) CILR 61, at para. 12) that there were contrary arguments against eliminating *Emmadart.* All of these are pointers in the opposite direction from that which was taken. There is on the face of it, in my judgment, no reason to assume that this was not a deliberate decision on the part of the legislature not to adopt that course. Section 94(2) does not assist either because all it does is confirm the *Emmadart* position.

73 Jones, J. was of the view that he should seek to avoid a construction of s.94(1)(a) that would produce "an unworkable or impracticable result." However, the interpretation of s.94(1)(a) up to the time of his decision had been producing workable results previously, even if there are persons who did not like those results or considered them impracticable by the application of the *Emmadart* rules.

It was not unworkable when it was held applicable in *Banco Economico* (2). Even if the rule is or was inconvenient, the point is that it was held to apply in the Cayman Islands. I agree with Mr. Moverley-Smith that *Emmadart* was fundamental to the decision in that case, and not just incidental. Smellie, J. made that quite clear in the passage quoted at para. 54 above.

74 I appreciate that the way in which Jones, J. decided *China Milk* (3) may well have allowed the court to reach the best commercial result in the circumstances of that particular case. However, this preliminary point in the circumstances of this case involves the construction of statutory provisions where there cannot be said to be any ambiguity. Therefore, in all of the circumstances, it is with great hesitation and reluctance that I disagree with the interpretation of s.94 arrived at by Jones, J. It is with regret, and with the greatest of respect, that I find myself convinced that his construction of the statutory provisions was wrong and feel obliged to differ.

75 I now turn to deal with Mr. Crawford's submission that, even if I conclude that the reasoning in *China Milk* is wrong, art. 18 is in wider terms. I assume that counsel is saying that this article therefore permits the directors to present the petition. I have examined the terms of art. 18.1. They are as follows:

"Subject to any exercise by the Board of the powers conferred by Articles 19.1 to 19.3, the management of the business of the Company shall be vested in the Board which, in addition to the powers and authorities by these Articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done or approved by the Company and are not hereby or by the Law expressly directed or required to be exercised or done by the Company in general meeting, but subject nevertheless to the

provisions of the Law and of these Articles and to any regulation from time to time made by the Company in general meeting not being inconsistent with such provisions or these Articles, provided that no regulation so made shall invalidate any prior act of the Board which would have been valid if such regulation had not been made."

76 Whilst the wording in art. 18.1 is not identical to the wording considered in *Emmadart* (5), *i.e.* art. 80 of Table A, I agree with counsel for the majority shareholders that it is clear that no significant distinction can be drawn between the operative provisions of art. 18.1, which describes the powers conferred for the purpose of managing the company's business, and the operative parts of art. 80, to the same effect. The provisions of art. 80 were in *Emmadart* held to be insufficient to authorize the directors in that case to present a winding-up petition. In my view, the provisions of art. 18.1 are equally insufficient in this case.

77 As his most sweeping submission, Mr. Crawford invited this court, if it came to the conclusion that the reasoning in *China Milk* (3) was wrong, in any event not to follow *Emmadart.* In that regard numerous authorities have, as discussed earlier, been cited to me from all over the Commonwealth.

78 Whilst it is clear that *Emmadart* has been a remarkably unpopular decision, in certain ways and in numerous jurisdictions, I am afraid I must decline to enter that arena. This is not because I have any personal view in relation to the correctness of *Emmadart*, and nor would that matter. Indeed, one can think of more compelling causes to inspire a chivalrous defence of the common law. However, I am really quite convinced that, in the Cayman Islands, given all the reforms and express discussions that took place not many years ago when the 2007 amendments came into being, and which, as I have opined, have left the common law position with regard to the ruling in *Emmadart* intact, it would be wrong of me now, as a judge, to take it upon myself to sweep all of that away. This is particularly so given that similarly worded sections of the Law that existed in the earlier Revisions of the Companies Law have been judicially considered by a court of co-ordinate jurisdiction in *Banco Economico* (2). This decision in *Banco Economico* has not been questioned, and could not be questioned as being correct, given the wording of the legislation in this jurisdiction at the time, and as it remains. Indeed, from the background recounted by Jones, J. in *China Milk* there are persons who have ordered their commercial and business affairs and contracts on the basis of the existence of the rule in *Emmadart* being applied in this jurisdiction.

79 I am bolstered in that view because it is clear from the background described in *China Milk* (3) that those reviewing the law, as well as the legislature, were well aware of the English legislation that eliminated *Emmadart* (5) in England. In England, it was plainly felt necessary to

override *Emmadart* by legislation. The legislature was no doubt aware of the treatment of *Emmadart* in other parts of the Commonwealth as well. Based upon Jones, J.'s description of the contrary arguments put forward by capital market lawyers about countless transactions conducted in reliance on the existence of these rules, and, indeed, even the statement that rating agencies took this factor

into account when rating the Cayman Islands, plainly the legislature had a number of different and inconsistent views to consider. The important point is that I have to construe the relevant provisions based upon the ordinary principles of statutory construction in relation to the statutory provisions as they do in fact exist.

80 As Michael Fordham, Q.C. eloquently describes the position in his well-known work *Judicial Review Handbook*, 5th ed., at para. 13.1 (2008): "In constitutional terms, just as judicial vigilance is underpinned by the rule of law, so judicial restraint is underpinned by the separation of powers."

81 In all of the circumstances, the preliminary point succeeds. My ruling is that the directors of the company had no authority or standing to present the winding-up petition and nor did they have the power or authority to apply for the appointment of the JPLs.

82 In the circumstances, the majority shareholders are in my judgment entitled to the striking-out order sought, unless I am persuaded that an order substituting a creditor as petitioner can and should be made.

Substitution of creditor

83 The company had asked me to consider whether a substitution of a creditor could be made. Having re-read the Companies Winding Up Rules 2008 in their entirety, and specifically O.3, r.10, it does appear to me that the rule really ought not to be read disjunctively, and that substitution is specifically contemplated by the CWR only in relation to creditors and creditors' petitions. However, I am not, as presently advised, able to say that definitively. Nor am I able to say that the court is without inherent power to substitute a creditor for the company in this case. The case of *Re Fernlake* (6) is helpful on the question of substitution on a petition commenced by a company. I would in the circumstances wish to hear further argument on this. However, if any such argument is to be made it would have to be in the context of an existing creditor stepping forward and confirming its present and settled intention to apply to be substituted. The proceedings before me have not yet reached that stage so I intend to enquire of counsel now before proceeding further.

84 In the event, there was no application made for substitution, and thus the petition is struck out.

Costs

85 I will hear submissions from the parties as to costs.

Orders accordingly.

Attorneys: *Maples & Calder* for the company; *Ogier* and *Harney Westwood & Riegels* for the majority shareholders; *Campbells*, *Walkers* and *Carey Olsen* for the creditors.

Exhibit 35

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wishes to obtain the information can if he chooses subpœna the person who can give it, and if his evidence is relevant it will be admitted at the trial. But, as my brother Rigby has pointed out, it is no part of the duty of the plaintiffs to assist the defendants in getting up evidence in support of their case. When once you grasp the fundamental principle, that the answer of the company's officer is the answer of the company and not of the individual, the whole thing follows logically. I think, therefore, that the decision of Byrne J. was erroneous, and must be overruled.

Solicitors: *Faithfull & Owen; M. Abrahams, Sons & Co.*

W. L. C.

DIDISHEIM *v.* LONDON AND WESTMINSTER BANK.

[1899 D. 442.]

Private International Law—Lunacy—Foreign Lunatic—English Property—Movables—Personal Estate—Curator—Administrateur Provisoire—Right to Sue in England—Order of Foreign Court—Jurisdiction—Detinue—Trover—Practice—Lunatic not so found, Action by—Next Friend—Maintenance—Scheme—Creditors—Priority—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 134—*Form of Judgment—Stock—Vesting Order.*

An action brought in a proper case in the name of a lunatic not so found by his next friend, for the recovery of his property may, in the absence of any lunacy proceedings, be maintained without the sanction of the Court in Lunacy.

The Court in Lunacy, having property of a lunatic under its control, will, as between the lunatic and his creditors, see that proper provision is made out of the property for his maintenance, as the first and paramount consideration; but, subject to that, the Court will not withhold a creditor from exercising his legal rights (see note, post, p. 54).

A foreign curator or administrateur provisoire of a lunatic, not so found judicially, domiciled and resident abroad, is not necessarily an improper person to sue in this country as next friend for the recovery of the lunatic's personal property here, though, if such next friend is resident abroad, he may be required to give security for costs.

The Court in Lunacy has no jurisdiction under s. 134 of the Lunacy Act, 1890, to order the transfer of securities in this country standing in the name of or vested in a person of unsound mind, not so found, residing out of the jurisdiction of the High Court, unless his status has been altered

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DIDISHEIM v. LONDON AND WESTMINSTER BANK.

by his being judicially declared lunatic according to the law of the place where he is residing.

G., domiciled and resident in Belgium, deposited with an English bank for safe custody, in his name, certificates and scrip for securities of great value. On his death in 1892 his widow, then also domiciled and resident in Belgium, took out administration in England to his estate, and had the securities then standing to his account, and also a sum of cash representing dividends thereon collected by the bank on his account, transferred to a new account opened by her at the bank in her own name.

In 1897 she became lunatic, though she was not so declared judicially, and was placed in a foreign lunatic asylum. D., a Belgian, was appointed by the Belgian Court her "administrateur provisoire," with power to collect and get in her personal estate, and subsequently D. obtained in England letters of administration de bonis non to G.'s estate, whereupon he brought an action in England against the bank in the names of himself and of Madame G. (the writ not stating that she was of unsound mind or that he was suing as her next friend) claiming, in his double capacity of legal personal representative of G. and of administrateur provisoire of Madame G., to have the certificates, scrip and cash standing in her name delivered up to him. North J., upon the action coming on before him for trial, took the preliminary objection that it was improperly constituted in that Madame G., being of unsound mind, could not sue without a next friend, whereupon D. was appointed next friend, and the title of the action was amended accordingly. The trial having then proceeded on that footing, North J. held that the defendants, the bank, could not safely deliver the property to the plaintiff D. without the authority of an order of the Court in Lunacy; and also that as the action was not one for the protection of the lunatic's person or property, but in the nature of detinue, it was not a form of action in which the lunatic could sue by her next friend. The plaintiff D. appealed, having first obtained from the Belgian Court an order giving him leave to appeal with a view to recovering the property:—

Held, by the Court of Appeal (Lindley M.R., and Rigby and Vaughan Williams L.JJ.), (1.) that as D. and Madame G. had together a clear legal title to the property sought to be recovered, D. was entitled, suing in his own name and as next friend of Madame G., to demand the delivery of her property to him and could give the bank a good discharge; and (2.) that, in the absence of lunacy proceedings in this country, the Court was bound, on general principles of private international law, to recognise the order of the Belgian Court giving D. leave to prosecute the appeal and to obtain and give a good discharge for the property.

Scott v. *Bentley*, (1855) 1 K. & J. 281, considered and approved.

In re Barlow's Will, (1887) 36 Ch. D. 287, discussed.

Form of judgment, including vesting order as to stock in Madame G.'s name.

ON October 16, 1866, Benedict Leopold Goldschmidt and Marie Woog, spinster, were married at Geneva. The husband was of German nationality, a merchant resident at Mainz.

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The wife was of Swiss nationality. It had been agreed between the parties that they should marry under the legal system of community of goods prescribed by the civil code in force at Geneva; and to carry out that agreement a marriage contract dated October 15, 1866, the day before the marriage, was executed by the parties and duly registered at Geneva.

In the year 1867 M. Goldschmidt and his wife, he having given up business, took up their residence in Brussels, and resided there continuously till his death, both thus acquiring a Belgian domicil.

M. Goldschmidt made a will, valid according to Belgian law, dated April 23, 1891, by which, after reciting the marriage contract, he gave one-fourth part of his estate in ownership and one-fourth in usufruct to his wife, appointing her "legatee by universal title," without the obligation of investing the portion of which she would only have the usufruct. He died on June 10, 1892, leaving his widow and four children—two sons and two daughters. On July 2, 1892, his marriage contract was duly registered at Brussels.

Under the marriage contract and the law of Belgium the "community" became dissolved by the death of M. Goldschmidt, and thereupon the "community" property belonged, as to one-half to his widow, Madame Goldschmidt, beneficially and absolutely, and as to the other half to her deceased husband's estate; and under her husband's will and the law of Belgium Madame Goldschmidt became, upon his death, entitled beneficially and absolutely, subject only to the due administration of his estate, to one-fourth of his personal estate, and to the usufruct during her life of another fourth, the remaining two-fourths belonging to the four children in equal shares.

M. Goldschmidt had deposited for safe custody with the defendants, the London and Westminster Bank, where he had been in the habit of keeping a current account, certificates of stocks and shares registered or inscribed in his name, and scrip of bonds and shares payable to bearer, the certificates and scrip representing a very large sum of money in value.

On February 9, 1893, English letters of administration with her late husband's will annexed were granted to Madame

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Goldschmidt, who thus became his legal personal representative in England, whereupon a large balance of cash, representing income collected by the bank on M. Goldschmidt's securities, and placed to his account, was transferred by her, as administratrix, to a new account opened in her name in her private personal capacity, and her late husband's account was then closed. The scrip of the securities payable to bearer remained by her direction in the custody of the bank at her order and on her account. Of the inscribed securities, some were transferred into her own name, and the rest remained in that of her late husband, but the certificates for the whole continued by her direction in the custody of the bank on her account. Madame Goldschmidt subsequently sold some of the inscribed stocks and shares and applied the proceeds in payment of the shares of her three eldest children under her late husband's will. The share of the fourth child, Robert Goldschmidt, she did not pay, by reason of his infancy, he being at the date of his father's death in 1892 sixteen years of age.

In March, 1897, Madame Goldschmidt, who down to that time had continued to reside at Brussels, became of unsound mind, and in April, 1897, was placed in a private asylum at Bonn, in Germany, where she was now remaining. A family council, duly convened and held on December 20, 1897, gave the opinion that there was cause to appoint an "administrateur provisoire" for Madame Goldschmidt for the purpose of receiving and managing her property; and accordingly, by a judgment, made December 24, 1897, the Court of First Instance in Brussels, upon the application of the Procureur du Roi, after finding that Madame Goldschmidt was then under detention in a lunatic asylum, and that she had neither been placed under "interdiction" nor under guardianship, and that it was necessary that she should be provided with an administrateur provisoire, appointed the present plaintiff Charles Didisheim her administrateur provisoire. Shortly afterwards another family council was held, at which it was determined to exempt the administrateur provisoire from giving security for his administration, and no such security was ever in fact given or required.

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By an order of the Probate Division made on August 5, 1898, letters of administration with the will annexed of the deceased, M. Goldschmidt, to his personal assets left unadministered by Madame Goldschmidt, were granted to the plaintiff, Charles Didisheim, the "provisional administrator" of Madame Goldschmidt, for her use and benefit so long as she should remain of unsound mind and so long only as he should remain provisional administrator; and the letters of administration granted to Madame Goldschmidt were directed to be impounded, which was done.

At this time the defendants, the bank, held on behalf of Madame Goldschmidt cash to a large amount, and also stock and share certificates and scrip of great value. The bulk of the cash and of the certificates and scrip formed part of her late husband's estate under the circumstances above stated, the remainder being her own private property. As she kept but one account at the bank, namely, her own private personal account, there appeared to be considerable difficulty in distinguishing which part of the cash and of the certificates and scrip belonged to her late husband's estate and which to herself.

Under the letters of administration granted to him by the Probate Division the plaintiff, Charles Didisheim, being desirous of paying Robert Goldschmidt, who had only recently attained twenty-one, his share of his father's estate, and of discharging his duties both as legal personal representative of M. Goldschmidt and as provisional administrator of Madame Goldschmidt, applied to the bank to hand over to him the cash and securities then in their custody or possession on her account, but the bank declined to recognise his title to give a proper discharge, or to recognise the title of any one other than Madame Goldschmidt herself. Thereupon Didisheim, on February 8, 1899, obtained an order from the Belgian Court authorizing him to represent Madame Goldschmidt in legal proceedings in England for the purpose of entering the action he proposed to bring against the bank. Then, on March 6, 1899, he issued the writ in this action, in the names of himself and of Madame Goldschmidt, against the bank (Robert Goldschmidt being joined as a defendant), claiming declarations to

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the effect that the plaintiff Didisheim, in his double capacity of legal personal representative of the late M. Goldschmidt and of administrateur provisoire of the person and property of the plaintiff Madame Goldschmidt, or partly in the one capacity and partly in the other, was entitled to call for the delivery and payment of, and to receive and give the defendant bank a good discharge for, the certificates, scrip and cash in their custody or possession, and for the income received or to be received by the defendant bank from the securities, and consequential relief. Among the certificates in the custody of the bank was a certificate for 500 shares in the bank itself, of which shares Madame Goldschmidt was the inscribed holder; and one of the claims in the writ was for a declaration that the plaintiff Didisheim, as her administrateur provisoire, was entitled to call for a transfer of these shares and payment of the dividends, or that the plaintiff Madame Goldschmidt was so entitled.

The action came on for trial before North J. on June 21, 1899. At the outset of the argument his Lordship called attention to the title of the action, pointing out that Madame Goldschmidt, being a person of unsound mind, could not sue without a next friend. He accordingly appointed the plaintiff Didisheim her next friend, subject to his consent to act being obtained, and the trial proceeded on that footing. Didisheim duly accepted the appointment, and the plaintiffs' title on the record when amended stood thus: "Charles Didisheim and Marie Goldschmidt (widow), a person of unsound mind not so found, by the said Charles Didisheim her next friend."

There was evidence that in Belgium there are two modes of proceeding for the legal protection of persons of unsound mind, namely, by "interdiction" or by "administration." The former is the more formal and public; if that mode of procedure is adopted the patient can be placed under interdiction and guardianship. In proceedings by "administration," the course adopted in the case of Madame Goldschmidt, and usually preferred, when possible, in order to avoid publicity, a provisional administrator may be appointed of the person and property of the patient; but under the Belgian statutes the appointment

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ceases at the end of three years, or upon release from confinement of the patient within that period, though it may be extended by the Court. According to the law of Belgium the powers of the administrateur provisoire extend to all movable or personal property wherever situate, whether in or out of Belgium, and include the power, on behalf of the person for whom the administrateur has been appointed, to receive and give a good discharge for all personal property and moneys, whether capital or income, due at the commencement or to become due during the period of such administration, to indorse cheques, to demand and settle accounts, to sell investments and receive and give a good discharge for the proceeds, and to represent the lunatic in legal proceedings; but the power to sell investments and to represent the lunatic in legal proceedings may only be exercised under the authority of the President of the Court of First Instance.

The Courts of Belgium, in respect of questions depending on the status and capacity of a person, including the administration of his property, apply the law of the nationality of the person. According to the law of Germany, a German residing out of Germany for more than ten years loses his nationality. A person may lose his nationality and acquire no other nationality: in such case he is described as "sans patrie." Experts in Belgian law expressed their opinion that Madame Goldschmidt was "sans patrie" though domiciled in Belgium. Although the Code Napoleon, which is the basis of the law of Belgium, contains no express provision to that effect, the experts were of opinion that, if a person sans patrie were "domiciled" in Belgium, the Courts of Belgium would apply the law of Belgium to determine questions concerning the status and capacity of such person. "This," the experts deposed, "is the opinion of our greatest jurisconsults, and is the effect of a decision of the Court of Appeal of Belgium sitting at Liège." Thus, they said, in the case of an alien sans patrie domiciled in Belgium, though not naturalized, who becomes of unsound mind, imbecile or insane, it is within the competency of the proper Court to intervene by interdiction, or, where the patient is already in an asylum, by the appointment

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of an administrateur provisoire as fully as if the alien had been previously naturalized.

G. I. F. C.

Haldane, Q.C., and *H. Fellows*, for the plaintiffs. As to the property in the hands of the bank belonging to Madame Goldschmidt in her own right.

In the first place, as matter of fact, the domicil of Madame Goldschmidt is Belgian. In the second place, the law recognised by the Courts of this country as regulating her status and the status and rights of her curator or custodian of her personal property, in this case the administrateur provisoire, is the law of the country of her domicil. So that the right of the administrateur to sue in regard to personal estate, stands on the same footing as his right to sue in Belgium. On the evidence it is made out that, if this property were in Belgium, the administrateur would have had it handed over to him. Assuming that the title is perfect, this is a simple action in detinue substantially undefended. Westlake's Private International Law, 3rd ed. p. 49; *Newton* v. *Manning* (1); *Scott* v. *Bentley* (2); *Hessing* v. *Sutherland*. (3)

So in Scotland the title of an English curator to movable property of a lunatic is recognised: *Gordon* v. *Earl of Stair*. (4) Where there is a statutory jurisdiction under the Lunacy Regulation Act, or the Court is administering a fund in which a lunatic is interested, the Court has a discretionary power, and the right of a foreign curator is not always treated as absolute. Cases relating to circumstances of that kind do not apply, and nothing is to be found in any of them tending to limit the right of the administrateur to possess himself of the lunatic's property in this country. In some of those cases, the lunatic's whole property seems to have been handed over to the foreign curator or similar officer as matter of course; in others only a part. Instances of such cases are: *In re Barlow's Will* (5); *In re Brown* (6); *In re De Linden* (7); *In re Elias* (8); *Re*

(1) (1849) 1 Mac. & G. 362.
(2) 1 K. & J. 281.
(3) (1856) 25 L. J. (Ch.) 687.
(4) (1835) 13 S. 1073.
(5) 36 Ch. D. 287.
(6) [1895] 2 Ch. 666.
(7) [1897] 1 Ch. 453.
(8) (1851) 3 Mac. & G. 234.

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Tarratt (1); *In re Mitchell* (2); *In re Garnier* (3); *In re Chatard's Settlement.* (4) If any of the property in the hands of the bank belongs to the estate of the testator, the plaintiff Didisheim has the legal title to it as administrator of the testator; so that, in one or other capacity, he is entitled to receive, and can give a good discharge for, the whole of the securities now in the hands of the bank.

Alfred Fellows, for the defendant Robert Goldschmidt.

H. Terrell, Q.C., and *MacSwinney*, for the defendant bank. The plaintiff Didisheim claims in three capacities. He claims suing as next friend of the lunatic in her name; an action of this kind for delivery up of property cannot be brought by a lunatic by a next friend; neither the lunatic nor the next friend, as such, can give a receipt; that form of action is proper where an injunction to preserve the property is required on administration of an estate in which the lunatic is interested is sought; but the Court itself will take care of the lunatic's property, and not entrust it to the next friend: *Beall* v. *Smith.* (5)

In the second place, the plaintiff Didisheim claims to have some of the property handed over to him as administrator of the testator. If there were any such property, not got in by the lunatic while sane, in the hands of the defendant bank, he might be entitled to have that handed over to him; but this property has been got in by the lunatic and appropriated; moreover, the property is so mixed that without an inquiry it could not be said which part, if any, is the property of the testator and which is that of the lunatic.

The more important claim is for delivery over of the property of Madame Goldschmidt to the plaintiff Didisheim as the officer of a foreign tribunal. His claim is founded on the allegation that the domicil of the patient is Belgian; that fact he has failed to establish, and on that ground alone the action fails. Again, he is suing, as he alleges, under the order of the Belgian Court; the effect of the order produced is by no means clear. But the main objection stands on a higher ground.

(1) (1884) 51 L. T. 310.
(2) (1881) 17 Ch. D. 515.
(3) (1872) L. R. 13 Eq. 532.
(4) [1899] 1 Ch. 712.
(5) (1873) L. R. 9 Ch. 85.

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The proper jurisdiction over the property in this country of a lunatic of whatever nationality, whether resident in or domiciled in this country or abroad, is that of the Queen acting by the duly constituted Lunacy Court, who will protect the property of a lunatic and apply it so far as is necessary and right for the benefit of the lunatic. The only person from whom the defendant bank—who are not trustees, and cannot, therefore, discharge themselves under the Trustee Relief Act—could safely take a discharge would be a receiver appointed by the Master in Lunacy. The only proper course for Didisheim to deal with the property is to take proceedings in Lunacy in this country: *Ex parte Southcote* (1); *In re Stark* (2); *In re Princess Bariatinski* (3); *In re Houstoun* (4); *Gordon* v. *Earl of Stair* (5); Dicey's Conflict of Laws, p. 507, r. 135.

In addition to the ancient jurisdiction of the Crown, the Lunacy Court has statutory jurisdiction (now under s. 134 of the Lunacy Act, 1890), without other lunacy proceedings in this country, on petition to hand over property of a lunatic to a curator duly appointed by a foreign Court. But even in that case the status of the lunatic must have been altered by a judicial decision of a foreign Court; and, secondly, there must have been an order of the foreign Court vesting within the meaning of the section the property of the lunatic in the curator; and, thirdly, the power is discretionary, and will not be exercised except so far as the property is actually wanted for the benefit of the lunatic: *In re Barlow's Will* (6); *In re Brown* (7); *In re Knight* (8); *In re Elias* (9); *Re Tarratt* (10); *In re Mitchell.* (11) There have been some cases, such as *In re Garnier* (12), where the Court of Chancery, in administering an estate in which a lunatic has an interest or money of a lunatic has been paid into court, has applied the whole of the lunatic's property for his benefit. These cases have nothing to do with the position of a mere debtor to or trustee for a lunatic.

(1) (1751) Amb. 109.
(2) (1850) 2 Mac. & G. 174.
(3) (1843) 1 Ph. 375.
(4) (1826) 1 Russ. 312.
(5) 13 S. 1073.
(6) 36 Ch. D. 287.
(7) [1895] 2 Ch. 666.
(8) [1898] 1 Ch. 257.
(9) 3 Mac. & G. 234.
(10) 51 L. T. 310.
(11) 17 Ch. D. 515.
(12) L. R. 13 Eq. 532.

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Three cases were particularly relied on for the proposition that a foreign officer in the nature of a receiver in Lunacy is entitled to possess himself of the personal estate of the lunatic. *Scott* v. *Bentley* (1) was founded on a misapprehension of a decision in the House of Lords referred to as *In re Morison's Lunacy*, which will be found reported *nomine*, *Bayne* v. *Earl of Sutherland*. (2) *Newton* v. *Manning* (3) was an application in Lunacy, in which the Court exercised its statutory jurisdiction under the 34th section of the then Lunacy Act, while in *Hessing* v. *Sutherland* (4) an order was practically taken by consent.

Haldane, Q.C., in reply.

NORTH J. stated the facts, and, with regard to the order of February 8, 1899, by which the Belgian Court gave authority to the plaintiff Didisheim to represent Madame Goldschmidt in the present action, said he had great difficulty in construing it, there being a doubt as to whether it empowered Didisheim to claim the certificates, scrip and moneys belonging to Madame Goldschmidt, or was limited to empowering him to enter an action to obtain them. His Lordship then continued:—But I have no doubt that a further clearer order can be obtained, and I will assume for the present purposes that that authority, or one that could be obtained in the place of it, would give the plaintiff Didisheim a right to sue here.

Then he comes as provisional administrator thus armed to sue the bank. He takes proceedings against them to recover the property, some of which certainly belongs to Madame Goldschmidt, and some of which is said to belong to the estate of her husband; it is admitted it would be extremely difficult to say which was which. It cannot be decided now which is which, and it could not be said which was which unless some further inquiry took place. In other words, it would be necessary to administer this property in order to find out what part of the property belonged to each category. But this action is an action in the nature of a common law action for detinue,

(1) 1 K. & J. 281.
(2) (1750) 1 Cr. St. & P. 454.
(3) 1 Mac. & G. 362.
(4) 25 L. J. (Ch.) 687.

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and the provisional administrator asserts his right to sue in this country and to have the judgment of the Court that the bank shall deliver up to him all the property that the bank holds on behalf of Madame Goldschmidt in her own right, or as representing the estate of her deceased husband.

Now, I do not see my way to give judgment in his favour. There are many cases no doubt in this country where, when a man has been found lunatic abroad and a curator has been appointed by a foreign Court, the Court here has recognised his status and has handed over property of the lunatic to the curator. In some cases it has, in the exercise of a discretion which ss. 133 and 134 of the present Lunacy Act gives to the Court, and which the Court had under the earlier Acts—it has in some cases under that authority said that it will not part with the whole capital money, but will hand over a portion; sometimes the Court has refused to part with any of the capital money, but has given part or the whole, as the case might be, of the income of the property to the curator applying for it. A similar view has been adopted by the Court, not only in a case of lunacy, but where the Court has been administering trust funds part of which belonged to a lunatic, or such funds have been in the hands of a trustee. But the case of *In re Barlow's Will* (1), which lays down the law very clearly and simplifies what I, at any rate, have to do, points out that that has only been done in cases where there has been an ascertainment of the status of the lunatic by a foreign Court—that is to say, the person has been found lunatic, and, further, where the property has been vested in the curator or other official acting under the order of a foreign Court. *In re Barlow's Will* (1) and *In re Brown* (2) seem to me to lay down the law clearly for my purpose. [His Lordship read the head-note to *In re Barlow's Will* (1), and continued:—]

That seems to me to be a case very much in point, and, further, it points out not only what the position is of the Court acting as trustee, but in what position a trustee here would be who was applied to direct, by the Master in Lunacy in New South Wales, for payment over to him. It seems to me a

(1) 36 Ch. D. 287. (2) [1895] 2 Ch. 666.

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statement by the Court of what the position of such trustee would be if that trustee was sued by the master direct for the money just as the bank is sued here. It is quite true in that case the claim was made against a trustee; in this case the bank is not a trustee, and cannot do what the trustee there did, namely, pay the money into court under the Trustee Relief Act. But whether there was a person sued at law or in equity, as distinguished from an application to the Court to deal with a fund in court—the right of a person applying to the Court and suing a trustee out of court was treated as being the same; and the reasons which the Court gave for refusing to do more than it did, as the judge pointed out, would also be reasons for a trustee who was applied to refusing to do more himself than the Court itself thought fit to do. That is to say, the judges, by way of illustration, dealt with the case where the money was not subject to the control of the Court. No doubt if the person applied to was a trustee, there would be a proceeding in the Chancery Division; if he was not a trustee, there might be a proceeding at common law. It seems to me that it was laid down that the rights of a master appointed in New South Wales against a person in this country holding property of a lunatic were the same whether he held the money as trustee, or whether he held it in a capacity such that he could be sued in detinue. [His Lordship read from the judgment of Cotton L.J. (1), from the judgment of Bowen L.J. down to the passage "we cannot accede to the view that he" (the Master in Lunacy in the Colony) "is here presenting a petition for something which he is entitled to claim as of right," and from the judgment of Fry L.J. down to the passage, "I think his position would have been materially different if there had been a declaration of lunacy by the competent Colonial Court, and he had been invested with the estate of the lunatic as a consequence of that declaration," and continued:—]

It was not so there, and nothing was done except to confirm Kay J.'s view in the exercise of a discretion as to what payments should be made for the benefit of the lunatic.

In *In re Brown* (2) a lady had been found lunatic in the

(1) 36 Ch. D. 292, 293. (2) [1895] 2 Ch. 666.

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Colony of Victoria, the lunatic had been declared lunatic by the Supreme Court of the Colony sitting in Lunacy, and the Master in Lunacy in the Colony was manager of her property, which consisted of English stocks standing in her name. [His Lordship read the judgment of the Court delivered by Lindley L.J. from the bottom of page 671 to the end, and continued:—]

In that case there were the two things—the judicial finding of lunacy altering the status of the lunatic, and the vesting of the property in the Master in Lunacy of the Colony. Those appear to me to be the two leading cases on the subject; others were referred to indicating the same view. I will only refer to one: *In re Knight.* (1) [His Lordship read the head-note, and continued:—]

So that the Court refused to recognise the absolute right of the committee or curator or other foreign official, but recognised that it had a discretion under the statute which it could exercise under proper circumstances. The Court was considering whether there could be dealing in England with respect to the property of a lunatic who was not here. [His Lordship read from Lindley M.R.'s judgment (2) down to the sentence, "The real truth is that the jurisdiction of the Court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in s. 134." His Lordship read s. 134 of the Lunacy Act, 1890, and continued:—]

So that the enactment applies only where the patient has been found formally to be a lunatic. In the present case there has been no finding of any sort that this lady is a lunatic. There are in Belgium, it appears, two modes of administering the estate of a person of unsound mind, one by interdiction, the other without resorting to that jurisdiction, and the family, for reasons which one can quite understand, have declined to resort to that jurisdiction. That being so, they must take the consequence, and, in my opinion, it is impossible to say that the officer appointed by the Belgian Court, under the circumstances stated, has power to sue here to recover from a debtor

(1) [1898] 1 Ch. 257. (2) [1898] 1 Ch. 261.

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to the patient, or from a trustee for the patient, or from the Court; if the Court holds funds belonging to the estate it is impossible for him to come here and sue in respect of that title. If he could, his doing so would have the effect of depriving this Court of the jurisdiction, which the last passage I read shews it has, over the property in this country of a person who is what is called a foreign lunatic. In my opinion, therefore, it is impossible to say that I can do what I am asked to do.

I should say that there were three cases relied on particularly by Mr. Haldane in support of his view: *Newton* v. *Manning* (1), *Scott* v. *Bentley* (2), and *Hessing* v. *Sutherland*. (3)

Now, *Newton* v. *Manning* (1) does not seem to me to go far enough to support the plaintiffs' case. *Scott* v. *Bentley* (2) no doubt does, but it proceeded upon, and was based upon, a decision of the House of Lords which on investigation turns out to have been totally different from what was supposed in that case. The Scottish Court had refused to allow an English curator to sue there, and the House of Lords reversed their decision, not because the curator had a right to sue, but upon the ground that the lunatic, who was joined, had a right of action. It seems to me, therefore, that *Scott* v. *Bentley* (2) is no authority in the present case.

Then *Hessing* v. *Sutherland* (3), the other case relied upon, is a peculiar case. The defendant there was, as the defendant here is, not claiming anything beneficially, but claiming to be made safe. And no doubt in that case a judgment was made—not by his consent, because he refused to consent, but without opposition by him—under which a trustee in this country, who had become the trustee of a certain investment made in the name of that trustee and the curator, the curator was allowed to recover the money here against his co-trustee. But in each of these cases the lunacy had been found by a competent tribunal. That, in my opinion, takes the present case entirely outside the principle of those decisions.

There are subordinate difficulties in the plaintiffs' way which

(1) 1 Mac. & G. 362.
(2) 1 K. & J. 281.
(3) 25 L. J. (Ch.) 687.

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I do not dwell on in detail. As regards the construction of the order made in February, 1899, I have assumed that a more complete order can be obtained if necessary.

Then there was the question as to domicil. The plaintiffs' case here depends entirely upon the proof of domicil in Belgium. The question arises out of the fact of this lady being domiciled in Belgium, and therefore subject to Belgian law; and of the existence of the general rule, "Mobilia sequuntur personam"; and therefore would have to be dealt with according to Belgian law. I am not satisfied that there is sufficient proof that she is domiciled in Belgium. When she and her husband married twenty-five years ago, they were neither of them Belgians; they had nothing to do with Belgium. They seem to have gone to Belgium soon afterwards, and to have lived there ever since. That in itself is not sufficient to prove domicil; and as the whole basis of the plaintiffs' case is rested upon the footing that the domicil is Belgian, I think that further evidence ought to have been produced to shew it, and I cannot assume now that all the evidence that can be produced has been produced. What might be the case if it were clear that nothing further could be produced need not be considered, because I am satisfied that further evidence can be produced. But I do not dwell on this, because, although I think it is a defect in the plaintiffs' way at present, yet if, on the rest of the case, I decided the matter in favour of the plaintiffs, subject only to the question of domicil, I should give the plaintiffs the opportunity of giving further evidence to shew that the domicil, the foundation of their right to sue, was such as is alleged. I do not think it necessary to do that, because there is a larger question behind, and I feel it is impossible for me, looking at the authorities, to say that this is a case in which the plaintiff is entitled to succeed; neither can the co-plaintiff, the lunatic, suing by a next friend, obtain judgment in such an action as this. I call her lunatic for convenience: it is a word which describes her condition. I do not see how a person of unsound mind can sue in this form of action by her next friend. If it were necessary to protect the person of the lady of unsound mind, or to protect her property, no doubt she might sue by

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her next friend. But here there is not a case of protecting the person or the property. The person is perfectly safe, and the property is perfectly safe. There is no doubt about that. The object is not to keep the property safe, but to take it away from where it is and hand it over to this curator. I do not see how an action of that sort can be brought by a lunatic and her next friend. It is quite impossible that the money should be handed over to the lunatic, and it is equally impossible that it should be handed over to the next friend.

Then, further, the provisional administrator claims as the husband's administrator. I do not see how any relief in this action could be given on that footing. It is clear that the lady did direct the transfer from her name as administratrix into her own name in her private personal capacity of a considerable portion of the husband's property. That has been got in by her, received by her, and then put into her own name. I do not see how the legal personal representative here of property not administered can claim to recover that now. It is quite true that, inasmuch as one of her sons has not been paid, he might possibly take proceedings for the purpose of having what is due to him raised out of that property and follow the property; but his right in that respect would be a totally different right from that of administrator de bonis non to recover from the person who has administered it what is no longer held by the bank as agent for or debtor to the husband, or the husband's legal personal representative, but has been paid to the widow in her own right.

Under these circumstances, I think that my course is clear in regard to the points I have decided, and therefore I must dismiss the action.

D. P.

In consequence of the difficulty felt by North J. in his judgment as to the meaning and extent of the above-mentioned order of the Belgian Court of February 8, 1899, the plaintiff Didisheim, on November 25, 1899, obtained from the Belgian Court an order authorizing him to submit to the Court of Appeal and, if necessary, to the House of Lords in England,

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the judgment of North J., and also to enter any other legal proceedings which he might think proper before the English Courts with a view to recovering, in his capacity of provisional administrator of the person and property of Madame Goldschmidt, the whole of the certificates of registered investments, the securities to bearer, the sums in cash, and all other securities deposited with the bank, or due from the bank, "without exception or reservation." Acting under the authority of that order the plaintiff Didisheim appealed from the judgment of North J. In order to meet the objection raised by his Lordship in his judgment, further evidence was subsequently obtained as to Madame Goldschmidt's domicil. This evidence, which was read on the appeal, appeared to establish beyond doubt that she had acquired a Belgian domicil.

C. A. The appeal was heard on March 15, 16, and 19, 1900.

Haldane, *Q.C.*, and *H. Fellows*, for the plaintiff Didisheim. The further evidence obtained since the decision of North J. clearly establishes that Madame Goldschmidt's domicil is Belgian. Moreover, the further order obtained since that decision from the Belgian Court confers on the plaintiff as administrateur provisoire a complete title to the possession of the movable property of the lunatic. This action is in substance an action of detinue, and in such an action the Court will, in accordance with international law, give effect to the title asserted here of the foreign curator of a lunatic domiciled abroad.

It is said in opposition to this that the jurisdiction of the English Court of Lunacy extends to all lunatics whether they are foreigners or not, and that the property of a lunatic can be recovered only by means of an exercise of the discretionary power of that Court. But it is submitted that, if under the law of the domicil the movable property of the lunatic has become vested by assignment in a curator appointed by the Court of the domicil, the English Court will hand that property over to him. *In re Barlow's Will* (1), upon which North J. mainly relied, was a decision upon a petition under the Trustee Relief Act. The Court there came to the conclusion that the

(1) 36 Ch. D. 287.

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statute of the Colony of New South Wales did not provide for the vesting in the master of the property of a lunatic not so found judicially, and that the master could not therefore claim as of right to have the lunatic's property handed over to him; and the Court accordingly exercised its discretion by declining to order the money which was in court to be paid to him. In *In re Brown* (1) a lunatic resident in the Colony of Victoria had been so found judicially, and the Court of Lunacy here directed property of the lunatic in this country to be transferred to the Master in Lunacy in the Colony, being satisfied that the property was required for the maintenance and support of the lunatic. If the title of the foreign curator to movables is clear under the law of the domicil, it is submitted that it ought to be recognised by an English Court where the English Lunacy jurisdiction has not been invoked; and there is no suggestion that any one intends to invoke that jurisdiction in the present case. The right to the possession of the movable property of the lunatic has been conferred on the plaintiff by a competent Court, and that (without proof of ownership) is sufficient to entitle him to recover the property in an action of detinue.

In *Newton* v. *Manning* (2) Lord Cottenham L.C. said he had no jurisdiction to deal with the property of a person found lunatic by a foreign jurisdiction except in conformity with the laws of the foreign country. That proposition applies here. In *Scott* v. *Bentley* (3) a curator bonis had been appointed in Scotland to a lunatic there, and Wood V.-C. held that the curator could recover and give a good discharge for personal property of the lunatic in England. There had not been an inquisition in that case, it not being the practice in Scotland to have an inquisition. The Vice-Chancellor referred to a Scottish case, *In re Morison's Lunacy*, which he said seemed not to have been reported. It seems doubtful whether that case was, as Wood V.-C. thought, an express authority that the English committee of a lunatic could recover personal estate of the lunatic in Scotland. The title of the case appears to have been *Morison* v. *Earl of Sutherland* (4) or *Bayne* v.

(1) [1895] 2 Ch. 666.
(2) 1 Mac. & G. 362.
(3) 1 K. & J. 281.
(4) (1749) Mor. Dict. 4595.

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Earl of Sutherland. (1) In *Hessing* v. *Sutherland* (2) it was held that the Court had jurisdiction to order the transfer of English Government stock, which was held in trust for a lunatic (so declared by a Scottish Court), to his curator bonis appointed in Scotland. So in *Gordon* v. *Earl of Stair* (3) the Scottish Court acted on the broad principle that the title of a committee appointed in England to the movable property in Scotland of a person of unsound mind ought to be recognised in Scotland. As to the power of a foreign curator of a lunatic to sue in this country, see Dicey's Conflict of Laws, pp. 507 et seq.; Westlake's Private International Law, 3rd ed. p. 49.

[LINDLEY M.R. referred to *Alivon* v. *Furnival.* (4)]

All the above cases are in favour of the title of the plaintiffs to sue.

There is another class of cases which seems to have caused some confusion. In *In re Stark* (5) the Court was exercising its discretionary jurisdiction in lunacy, and it refused to order Consols standing in the name of a lunatic to be transferred to her curator bonis in Scotland, but directed the dividends to be paid to him. In *In re Elias* (6) Lord Truro L.C., acting in the same jurisdiction, ordered, "after some hesitation," bank stock to be transferred to the curator of a lunatic appointed according to the law of Holland; and said that he should have had no difficulty in making the order if it had been shewn that the lunatic was a Dutch subject. In *Re Tarratt* (7) the question was whether there was sufficient evidence within the meaning of s. 141 of the Lunacy Regulation Act, 1853, that the lunatic had been so declared by the Scottish Court; and the Lunacy Court, being satisfied that the evidence was sufficient, ordered some debenture stock which stood in the name of the lunatic to be transferred to his Scottish curator bonis. *In re Clyde* (8) was a similar case, and there the Court declined to order the transfer to the guardian (appointed in Ireland) of the person and estate of a lunatic of New Zealand

(1) (1750) 1 Cr. St. & P. 454.
(2) 25 L. J. (Ch.) 687.
(3) 13 S. 1073.
(4) (1834) 1 C. M. & R. 277; 40 R. R. 561.
(5) 2 Mac. & G. 174.
(6) 3 Mac. & G. 234.
(7) 51 L. T. 310.
(8) W. N. (1889) 43.

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stock standing in his name in the books of the Bank of England, on the ground that it had not been shewn that the personal estate of the lunatic had been vested in the guardian within the terms of s. 141 of the Lunacy Regulation Act, 1853. Now, s. 134 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), has taken the place of s. 141 of the Act of 1853, which is repealed by the Act of 1890. And s. 141 did not affect the right of a properly appointed foreign curator of a foreign lunatic to recover movable property of the lunatic in this country, if the property was "vested" in the curator. The word "vested" in s. 134 includes the right to obtain and deal with the lunatic's personal estate, without becoming the actual legal owner of it: *In re Brown*. (1) *In re Garnier* (2) was a case under the Trustee Relief Act. An Englishman while travelling in France was found a lunatic by a French Court, and it was held that the French committee of his estate, or curator bonis, could recover as of right a fund to which the lunatic was entitled, and which had been paid into court under the Trustee Relief Act. The Court having a discretion, and being satisfied that the lunatic was sufficiently provided for, retained the fund in court, and ordered only the payment of the income to the curator. It does not appear that in that case there had been any assignment of the lunatic's property to the curator. Similar observations apply to *In re Barlow's Will*. (3) And in *In re Brown* (1), in which the lunatic had been so declared, the Court exercised its discretion in lunacy by ordering stock belonging to the lunatic to be transferred to the Colonial Master in Lunacy as the guardian of the lunatic. In *In re De Linden* (4) a fund to which a lunatic was entitled was in court under the Trustee Relief Act. The lunatic was a Bavarian subject resident in Bavaria, and she had been adjudged of unsound mind by the Royal Bavarian Court. Under these circumstances Stirling J. ordered the fund to be paid out to the persons who by the Bavarian law were entitled to receive the lunatic's property. *In re Knight* (5) was a case in Lunacy, and turned upon the

(1) [1895] 2 Ch. 666.
(2) L. R. 13 Eq. 532.
(3) 36 Ch. D. 287.
(4) [1897] 1 Ch. 453.
(5) [1898] 1 Ch. 257.

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discretion of the Court. It has no application to the present case.

In the present case the Court is not asked to part with any money which is under its control, or to exercise any discretion, whether conferred by statute or otherwise. This is an action of detinue, and the plaintiff relies on his legal title according to the law of the lunatic's domicil. By the comity of nations, the Court will always give effect to the law of the domicil, when so to do will not lead to any result contrary to natural justice.

No instance has been found of an inquisition of lunacy being held in this country in the case of a person who is domiciled and resident abroad, and who has only movable property in this country. In *In re Houstoun* (1) a lunatic so found in Jamaica, where his property was situated, came to England, and it was held that a commission ought to issue against him here. In *In re Southcote* (2) a commission of lunacy was ordered against an Englishman who was resident in France and had real estate in England. In *In re Princess Bariatinski* (3) a commission was issued against an alien, but she was resident in England and had property in the English funds. Here we have both nationality and residence out of the jurisdiction; and the movable property, which is within the jurisdiction, is regulated by the domicil. To refuse the plaintiffs relief would lead to a deadlock, for the money and stocks in the hands of the bank would remain there, and the defendant Robert Goldschmidt would be left indefinitely without his share. A legal chose in action may be recovered here by the owner, whether he be an alien or a British subject. It is said that the plaintiff Madame Goldschmidt, being incompetent to sue, cannot give a legal discharge, and that Didisheim cannot recover because he is not legal owner of the chose in action. We submit that Didisheim is the assignee of the chose in action, and as such the legal owner; and we have also the equitable owner, Madame Goldschmidt, here; both together are clearly entitled to recover according to the well-settled old practice. That

(1) 1 Russ. 312.
(2) 1 Amb. 109; 2 Ves. Sen. 401.
(3) 1 Ph. 375.

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Didisheim is an assignee of the chose in action is decided by *Alivon* v. *Furnival* (1) and other cases already referred to. As to the contention that the proper course for dealing with this property is by means of lunacy proceedings in this country, there is no authority for the proposition that the Court in Lunacy will, in the case of an alien, grant an inquisition in lunacy and alter his status merely because he may have movables here. In *In re Princess Soltykoff* (2) the Court felt a difficulty about making a lunatic alien a lunatic by inquisition here without the concurrence of the foreign committee, even though the lunatic alien had real estate here. Then it is said that, if it is not the proper course to proceed in lunacy here, the parties should proceed by interdiction in Belgium and have a tuteur appointed who might then come here for relief; but in that case, if the tuteur sued here, he would be met by the difficulty that was raised in *Thiery* v. *Chalmers, Guthrie & Co.* (3) The question is one of mere technicality. Since we have both the legal and equitable title, this Court can recognise the authority of the foreign Court and of the plaintiffs' title now; if not, a tuteur will be appointed, whose title will be recognised by the Court. There is no reason why the Court should decline to recognise the authority of the Belgian Court in the one case, and recognise it in the other.

Alfred Fellows, for the defendant Robert Goldschmidt.

H. Terrell, Q.C., and *MacSwinney*, for the defendant bank. All that the bank requires is to have a sufficient discharge by handing over these certificates, &c., to persons who are the proper hands to receive them. Our first objection to the plaintiffs' claim is that the only Court that can make an order dealing with the property in this country of a lunatic is the Court in Lunacy.

[LINDLEY M.R. But an action relating to the property of a lunatic may be brought in the name of a lunatic.]

We are not aware of any such case.

[VAUGHAN WILLIAMS L.J. I have been in such cases myself, both for plaintiff and defendant.]

(1) 1 C. M. & R. 277, 296; 40 R. R. 561.

(2) W. N. (1898) 77.

(3) [1900] 1 Ch. 80.

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In any such action the defendant might move to dismiss it on the ground that there was no retainer, and that the plaintiff was incompetent to give a retainer.

[LINDLEY M.R. referred to *Re Metcalfe's Trusts*. (1)]

There must be a discretion in the Court to stop a person bringing an action in the name of a lunatic. On principle, inasmuch as a lunatic is incapable of authorizing or instructing a solicitor, if a solicitor takes upon himself to bring an action in the name of a lunatic, the defendant must be able to have the proceedings stayed; otherwise, supposing judgment is given against him and he pays the solicitor, he may find himself liable to be sued a second time: *Reynolds* v. *Howell*. (2)

[LINDLEY M.R. As to the costs of staying an action improperly brought in the name of a plaintiff, this Court now follows *Reynolds* v. *Howell*. (2)]

As in *Fricker* v. *Van Grutten*. (3)

[RIGBY L.J. referred to *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (4) as to commencing an action in the name of a plaintiff without authority.

LINDLEY M.R. In *Porter* v. *Porter* (5) the Court held that a person of unsound mind could bring a partition action by his next friend. A doubt as to the practice had previously been raised in *Wartnaby* v. *Wartnaby*. (6)]

We submit that if it appears on the face of the record that the plaintiff is a lunatic, though suing by a next friend, the Courts have no jurisdiction: *In re Barlow's Will*. (7) A foreign lunatic not so found cannot stand in a better condition than an English lunatic of unsound mind not so found; and though in some exceptional cases a lunatic not so found has been allowed to sue, there is no reported case in which an action of this kind has been brought by an English lunatic. The rule is that the next friend of a lunatic not so found can only sue for the purpose of protecting the lunatic's property, and then only so far as may be necessary for that purpose, and a next friend who

(1) (1864) 2 D. J. & S. 122.
(2) (1873) L. R. 8 Q. B. 398.
(3) [1896] 2 Ch. 649.
(4) (1879) 13 Ch. D. 310.
(5) (1888) 37 Ch. D. 420.
(6) (1821) Jac. 377.
(7) 36 Ch. D. 287.

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brings an action on behalf of a lunatic not so found does so at the risk of the proceedings being subsequently repudiated: *Beall* v. *Smith*. (1) In *Halfhide* v. *Robinson* (2) James L.J. said a bill could not be filed by a next friend on behalf of a person of unsound mind not so found for dealing with his real estate.

[LINDLEY M.R. That observation has been commented on as going too far in *Porter* v. *Porter* (3), where Cotton L.J. said he thought that what James L.J. meant was that the course taken in the case was not the proper course, but that there should have been a petition to the Lords Justices under the Lunacy Regulation Acts.]

The observation by Jessel M.R. in *Jones* v. *Lloyd* (4), to the effect that a suit could be instituted by a lunatic not so found by his next friend, was intended to refer only to a suit for the protection of property, and not to a suit for payment of money. Here the lunacy jurisdiction could have been invoked, and therefore it was not right to put the defendants to the embarrassment of proceedings under a different jurisdiction. The proper course is not to allow this action to proceed until an inquiry has been directed as to the alleged lunacy of the plaintiff Madame Goldschmidt, and whether the action is for her benefit: *Lee* v. *Ryder* (5); *Howell* v. *Lewis* (6); *Waterhouse* v. *Worsnop*. (7) At any rate the defendants cannot be asked to accept the receipt of this lady or her next friend, for neither of them can give a proper discharge.

The real question is whether Didisheim, by virtue of his position as administrateur provisoire, is entitled to sue in this country. We submit he is not. The moment a person becomes lunatic or of unsound mind in this country the Crown is constituted guardian of his property in order that out of it provision may be made for him and his family; and any one desiring to deal with that property must apply to the Crown as represented by the Court in Lunacy: see the old statute De

(1) L. R. 9 Ch. 85, 91.
(2) (1874) L. R. 9 Ch. 373.
(3) 37 Ch. D. 420, 428, 429, 430.
(4) (1874) L. R. 18 Eq. 265, 274.
(5) (1822) 6 Madd. 294.
(6) (1891) 61 L. J. (Ch.) 89; 40 W. R. 88.
(7) (1888) 59 L. T. 140.

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Prerogativâ Regis, 17 Edw. 2, st. 2, s. 9, A.D. 1324, held in *Beverley's Case* (1) to extend to the lunatic's "goods and chattels" as well as "lands and tenements"; also the forms of the old writs in lunacy (2 Fitzh. Nat. Brev. 9th ed. pp. 232–3). Accordingly, upon a lunacy the right of the Crown, or of the Court in Lunacy, immediately ousts the jurisdiction of the ordinary courts over the lunatic. The jurisdiction of the Court in Lunacy, as representing the Crown, to direct an inquisition and to appoint a committee applies even to a person domiciled or resident abroad where he has property in this country: *In re Knight.* (2)

[LINDLEY M.R. That was a case under s. 134 of the Lunacy Act, 1890.]

The provisions of that Act are not limited to persons resident within the jurisdiction; and it is clear from the authorities that domicil of the lunatic within this country is not necessary in order to found the jurisdiction of the Court in Lunacy under the statute De Prerogativâ Regis—in short, that domicil is not material to the question of jurisdiction: *In re Sottomaior* (3); *In re Princess Bariatinski* (4); *In re Houstoun* (5); *In re Garnier.* (6)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Marchioness of Annandale.* (7)]

The only material question is, Where is the property? The statute De Prerogativâ Regis does not deal with the lunatic's person at all—only with his property. The lunacy jurisdiction is founded upon "property": it is the fact of the lunatic having property in this country that alone gives the Court jurisdiction, and this jurisdiction is equally applicable whether the lunatic is an Englishman resident abroad or a foreigner resident here. That this is so is clear from the provisions, which would otherwise be useless, in ss. 96, 131, sub-ss. 2, 3, ss. 134, 149, of the Lunacy Act, 1890. A foreign decree or commission appointing a curator or committee of a lunatic

(1) (1603) 4 Rep. 123 b, 126 a.
(2) [1898] 1 Ch. 257.
(3) (1874) L. R. 9 Ch. 677, 681.
(4) 1 Ph. 375.
(5) 1 Russ. 312.
(6) L. R. 13 Eq. 532.
(7) (1749) Amb. 80.

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resident abroad does not necessarily entitle that curator or committee to obtain an order from the Courts of this country empowering him to deal with the lunatic's property in this country: Dicey's Conflict of Laws, pp. 10, 507. There is no case to be found in the books in which any such right of a foreign curator or committee has been exercised. There being then a jurisdiction in lunacy, there is no authority supporting the plaintiffs' contention that they are entitled to bring this action. As to *Newton* v. *Manning* (1), the basis of that decision was that there had been an actual finding in lunacy by the foreign Court: it was held that if you come here armed with an "order" appointing a curator, in accordance with the authority of the foreign jurisdiction, to deal with the lunatic's property here in the manner desired, the Court in Lunacy will exercise its statutory jurisdiction by ordering a transfer of the property to that curator. So in *In re Brown* (2)—where *In re Barlow's Will* (3) is distinguished on that ground—and *In re De Linden*. (4) As to *Scott* v. *Bentley* (5), Wood V.-C. there proceeded entirely upon an erroneous view of the decision of the House of Lords in *Morison's Case* (6), which, according to the reports, really was that the foreign committee could not sue in this country for the property of the foreign lunatic. We are therefore relieved from the pressure of *Scott* v. *Bentley*. (5) If that decision is right, it altogether ousts the jurisdiction of the Court in Lunacy.

[LINDLEY M.R. mentioned *In re Sir F. Seager Hunt*. (7)]

We submit that, even assuming the order made by the Belgian Court is equivalent to a finding in lunacy, the ordinary English Courts have no jurisdiction to make such an order as is now asked for.

But, secondly, we contend that the order appointing Didisheim administrateur provisoire is not, as is shewn by the expert evidence, an order vesting in him the property of the lunatic so as to empower him to sue in this country. Such

(1) 1 Mac. & G. 362.
(2) [1895] 2 Ch. 666.
(3) 36 Ch. D. 287.
(4) [1897] 1 Ch. 453.
(5) 1 K. & J. 281.
(6) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(7) Post, p. 54.

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an order is not equivalent to an "interdiction" or finding in lunacy. There is no finding here that Madame Goldschmidt is a lunatic, and consequently there is no vesting of property; both these circumstances are necessary to give Didisheim a title to sue. Moreover, the effect of the recent order of November 25, 1899, is merely to authorize Didisheim to take legal proceedings in his capacity of administrateur provisoire, and that is not sufficient for the present purpose. In *In re Barlow's Will* (1) it was held that a Master in Lunacy has not the powers of a committee; the property of the lunatic is not vested in him as it is in the committee. So here, Didisheim's position is something short of that of a committee.

Therefore, even if we are wrong on our first point, we say that Didisheim is not competent to sue in this country in the name of this lady. The incapacity, according to English law, of the curator of a foreign lunatic to receive dividends on, or to transfer, English stocks or funds standing in the name of the lunatic has been the express foundation of the enactments contained in the successive lunacy statutes: 1 & 2 Geo. 4, c. 15, 6 Geo. 4, c. 74, s. 14, and the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

[LINDLEY M.R. referred to *Sylva* v. *Da Costa* (2), and 1 Collinson on Lunatics, p. 290.]

Here it is proposed to hand over personal estate of very large value to a foreigner and a person who has given no security whatever. To allow this would be to establish a dangerous practice, and one entirely opposed to the uniform practice of the Court of Chancery, acting in its administrative capacity, when dealing with the property of persons of unsound mind. For instance, in cases under the Trustee Relief Acts, the Court administers trust funds for the benefit of cestuis que trust, where they are not competent, by directing the application of the income only; it never orders payment over of the capital: see the cases collected in Seton on Judgments, 5th ed. pp. 1012–1014. If a foreign lunatic has property in this country, it must be either this country or the foreign country

(1) 36 Ch. D. 287. (2) (1803) 8 Ves. 316.

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that has jurisdiction; both cannot, and we submit that it is this country that has the jurisdiction in such a case.

Haldane, *Q.C.*, in reply, cited Pope on Lunacy, 2nd ed. pp. 324, 326, 327, and *Lacey* v. *Burchnall* (1), as shewing that a lunatic not so found can sue by his next friend, though as a check on reckless and improper proceedings the Court may direct an inquiry as to the propriety of the suit, or of the conduct thereof, or of the fitness of the next friend; that such an inquiry should be applied for by motion; and that an objection taken at the hearing to the propriety of the proceedings is too late.

Cur. adv. vult.

1900. April 2. The judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.) was delivered by

LINDLEY M.R. In consequence of the arguments addressed to us, we will make a few prefatory observations on actions at law and suits in Chancery by persons of unsound mind not so found by inquisition.

If before the Judicature Acts an action at law had been brought in the name of such a person to enforce a purely legal demand—say an action on a covenant or an action of assumpsit or of debt, detinue or trover—there would have been no defence to the action on the ground that the plaintiff on the record was of unsound mind. No plea in bar or in abatement applicable to such a case is to be found in the books. Such an action might, perhaps, have been stayed on an application shewing that the action was an abuse of the process of the Court—i.e., was brought in the plaintiff's name without his authority: see *Waterhouse* v. *Worsnop* (2), which, however, was since the Judicature Act. Such an action could certainly have been stayed by proceedings in lunacy and the appointment of a committee. Unless the action were stayed it would proceed to trial in the ordinary way, and on proof of the plaintiff's case judgment would have been entered for the plaintiff on the record and execution issued accordingly: see *Dennis* v. *Dennis*. (3) If the plaintiff had sued by attorney, payment or

(1) (1863) 3 N. R. 293. (2) 59 L. T. 140.
(3) (1670) 2 Wm. Saund. 334.

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delivery to him would have discharged the defendant or the sheriff. If the plaintiff had sued in person, a difficulty would obviously have arisen. An application to stay execution on payment into court might, we suppose, have been successfully made; or the Court could, as in *Gleddon* v. *Trebble* (1), have ordered payment to his next friend, and so the necessity of instituting proceedings in lunacy might be avoided: see generally 1 Collinson on Lunacy, 339, &c.

In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition, by a next friend. Applications to stay such suits were also frequently made with success: see generally on such suits *Jones* v. *Lloyd* (2); *Beall* v. *Smith* (3); *Farnham* v. *Milward & Co.* (4); *In re George Armstrong & Sons.* (5) The alleged lunatic could make such application himself if he asserted his sanity; and any one willing to act as next friend could make it in the alleged lunatic's name, as in *Howell* v. *Lewis.* (6) Even the defendant might apply: see *Wartnaby* v. *Wartnaby* (7) and *Porter* v. *Porter* (8), per Cotton L.J. When a lunatic was so found by inquisition, the Court of Chancery would stay a suit instituted in his name until the appointment of a committee: see *Hartley* v. *Gilbert.* (9)

We are not aware of any case in which a foreign curator has been held to be an improper next friend of the person whose curator he is. Security for costs from such a next friend might be required if he were resident abroad; but no suit could be stayed simply because the next friend filled an official position in a foreign country.

The notion that either at law or in equity an action or suit cannot be successfully maintained, if brought in the name of a lunatic not so found by inquisition, without the sanction of the Crown, is not supported by authority or sound principle. If this notion were true, the orders for payment made in *In re Barlow's Will* (10) and other cases, which will be referred to

(1) (1860) 9 C. B. (N.S.) 367.
(2) L. R. 18 Eq. 265.
(3) L. R. 9 Ch. 85.
(4) [1895] 2 Ch. 730.
(5) [1896] 1 Ch. 536.
(6) 61 L. J. (Ch.) 89.
(7) Jac. 377.
(8) 37 Ch. D. 429.
(9) (1843) 13 Sim. 596.
(10) 36 Ch. D. 287.

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presently, would have been clearly wrong. Such orders were not made in lunacy, but by the Court of Chancery, which had no lunacy jurisdiction. It is well settled that until the Crown interferes, or at all events until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical legal effect. In other words, no person can avail himself of that prerogative without taking the proper steps to induce the Crown to exercise it. This point was examined by this Court last summer, when *Seager Hunt's Case* (1) was before it. In the present case no lunacy proceedings have been taken in this country; nor was any attempt made to stay the action.

Having made these preliminary remarks, we pass to the question more immediately before the Court. This action is by M. Didisheim and by Madame Goldschmidt; by him as her next friend. The object is to obtain a large sum of cash and also share and stock certificates and scrip for bearer bonds and shares of great value from the defendants. The defendants are quite ready to pay and deliver these up provided they can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Madame Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Madame Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Madame Goldschmidt's

(1) Post, p. 54.

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property; but they say that, owing to what she did when sane, all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash, certificates and scrip which are the property of Madame Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. North J. has held that, unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Madame Goldschmidt to M. Didisheim, they cannot safely deliver such property to him.

The relations and friends of Madame Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The title of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Madame Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The Court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether, in an action brought by M. Didisheim in his own name and in the name of Madame Goldschmidt and as her next friend, the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is.

In *Scott* v. *Bentley* (1) a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic, and a curator bonis was appointed according to Scottish law. Whether he was judicially declared a lunatic does not distinctly appear; nor does it appear that the owner-

(1) 1 K. & J. 281.

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ship of his personal property was by Scottish law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear, the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Wood V.-C. made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend, we see no ground for doubting the correctness of the decision.

Scott v. *Bentley* (1) has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland, in *In re Morison's Lunacy*. (2) This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone* v. *Beattie* (3) and in *Sill* v. *Worswick*. (4) In *Johnstone* v. *Beattie* (5) Lord Brougham refers to *Morison's Case* (2) as cited in the note to *Sill* v. *Worswick* (4), and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This, it is plain, was also Wood V.-C.'s view of *Morison's Case* (2), as is apparent from his remark (6) that in *Morison's Case* (2) the curator sued alone. But the reports of that case to which we have referred (2) shew that the decision of the House of Lords in *Morison's Case* (2) did not go that length, and Lord Campbell was not satisfied that it did. (7) We understand the decision as

(1) 1 K. & J. 281.
(2) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(3) (1843) 10 Cl. & F. 42.
(4) (1791) 1 H. Bl. 677–8; 2 R. R. 816.
(5) 10 Cl. & F. 97.
(6) 1 K. & J. 285.
(7) 10 Cl. & F. 133.

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shewing that a committee appointed in England of a Scotsman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morison's Case* (1), therefore, did not go so far as Wood V.-C. thought, but it goes a long way to shew that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Madame Goldschmidt and curator of Madame Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott* v. *Bentley* (2) Wood V.-C. did not by any means base his judgment only on the supposed decision in *In re Morison's Lunacy* (1); and after making every allowance for his misapprehension in that case, *Scott* v. *Bentley* (2) was, in our opinion, well decided, although we cannot help thinking that, if Wood V.-C. had known the form of the order made in *Morison's Case* (1), he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend.

In *Alivon* v. *Furnival* (3) Parke B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind.

Scott v. *Bentley* (2) is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *Re Tarratt* (4), *In re De Linden* (5), and *Thiery* v. *Chalmers, Guthrie & Co.* (6) are the most recent and important. In *In re De Linden* (5) an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian Court to take charge of her and her property. The order was made as asked —that is, for payment, not to her, but to the two persons

(1) Mor. Dict. 4595; 1 Cr. St. & P. 454.
(2) 1 K. & J. 281.
(3) 1 C. M. & R. 277, 286; 40 R. R. 561.
(4) 51 L. T. 310.
(5) [1897] 1 Ch. 453.
(6) [1900] 1 Ch. 80.

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appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators.

Thiery v. *Chalmers, Guthrie & Co.* (1) was a similar case. The lunatic there was a French subject declared lunatic in France, and whose property was placed under the care of a duly appointed tuteur. An action was brought in this country by the lunatic by a next friend and by the tuteur as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the tuteur. Kekewich J. thought that the tuteur might have sued alone in his own name. He regarded the decision in *In re Brown* (2) as an authority for so holding, inasmuch as both in *In re Brown* (2) and in *Thiery* v. *Chalmers, Guthrie & Co.* (1) the lunatic had been formally so declared by the foreign Court. But *In re Brown* (2) was not an action; it was an application to the Court in Lunacy under s. 134 of the Lunacy Act, and we doubt whether the action in *Thiery* v. *Chalmers, Guthrie & Co.* (1) would have been rightly framed if brought by the tuteur as sole plaintiff.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by s. 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic, cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight* (3) turned on the discretion which the Court had under s. 134 of the Lunacy Act, and throws no real light on this case.

The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow's Will.* (4) In that case a Colonial statute vested in a Master in Lunacy the care and custody of the property of lunatic patients—that is, of persons confined in lunatic asylums but not judicially declared lunatic. A Colonial lady, confined in a lunatic asylum in the Colony, was entitled to some funds in the hands of trustees in this country, and the

(1) [1900] 1 Ch. 80.
(2) [1895] 2 Ch. 666.
(3) [1898] 1 Ch. 257.
(4) 36 Ch. D. 287.

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Colonial Master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The Colonial master and the lady by her next friend presented a petition for the transfer of the funds in court to the Colonial Master in Lunacy. The Court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the Court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the Colonial Act to the master as an officer of the Colonial Court was not supplemented by any order giving the master any express authority, as the lunatic's attorney, to get in any property not locally within the jurisdiction of the Court; and, as we understand Cotton L.J.'s judgment, he was much influenced by the omission of any such order. If the master's authority derived from the Colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case, the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the Court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them; and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier* (1), where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the Court as unsatisfactory. But where it is not, the considerations which weighed with the Court in *In re Barlow's Will* (2) do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the Court acting for them have no discretion to

(1) L. R. 13 Eq. 532. (2) 36 Ch. D. 287.

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refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the Court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the Court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark* (1), other considerations at once arise. If, as in *In re Garnier* (2), the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the Courts of this country were bound to recognise the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the Courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the Court here has to do is to see that the person claiming it is entitled to have it.

In this case the order of the Belgian Court of November 25, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on him by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on that subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—that is, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognise it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could

(1) 2 Mac. & G. 174. (2) L. R. 13 Eq. 532.

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have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognise: see per Blackburn J. in *Hollins* v. *Fowler* (1) and the cases there cited. But in practice, if in such a case the plaintiff proved his title to the satisfaction of the Court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and, in a proper case like this, giving the defendants the costs of the action—that is, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title: see *Gleddon* v. *Trebble*. (2) If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering delivery to the plaintiffs and ordering them to pay the costs. However tried, any other result would be very unjust.

Mr. Terrell suggested that the order of the Court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this Court now declares it ought to have made; and this Court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian Court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.

The judgment of the Court of Appeal was in the following form:—

"Upon motion by way of appeal from the judgment of the 4th July, 1899, &c. This Court doth order that the said judgment be reversed: and doth

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(1) (1875) L. R. 7 H. L. 766. (2) 9 C. B. (N.S.) 367.

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declare that the plaintiff Charles Didisheim in his double capacity of the legal personal representative in England of the late Benedict Leopold Goldschmidt deceased, and of administrateur provisoire duly constituted according to the law of Belgium of the person and property of the plaintiff Marie Goldschmidt, or partly in one and partly in the other of such capacities, is entitled to call for the delivery or payment of and to receive and give the defendant bank a good discharge for (*a*) The certificates for the several stocks and shares and the scrip for the several bearer bonds and shares enumerated in the first, second and third parts of the schedule hereunder written or such of them as are within the custody of the defendant bank: (*b*) The amount now standing or hereafter to stand to the credit of the plaintiff Marie Goldschmidt upon her current or any other account with the defendant bank: and (*c*) All other property (if any) of the said B. L. Goldschmidt and M. Goldschmidt, or either of them, now in the custody of the defendant bank. And it is ordered that the defendants, the London and Westminster Bank, Limited, do deliver up such certificates, scrip and other property (if any), and do also pay the amount now standing or hereafter to stand to the credit of the current or any other account of the plaintiff M. Goldschmidt at the said bank, to the plaintiff C. Didisheim. And this Court doth also declare that the plaintiff C. Didisheim, while he is such administrateur provisoire as aforesaid, is entitled to call for the payment of and to receive and give the defendant bank a good discharge for the dividends, as they from time to time become due, upon the 500 shares of the defendant bank mentioned in the second part of the said schedule, and also to transfer the said 500 shares or any of them. And it is ordered that the defendants the London and Westminster Bank, Limited, do pay the said dividends to the said C. Didisheim while he is such administrateur provisoire as aforesaid and the said shares remain registered in the name of the said M. Goldschmidt, and to permit the transfer of the said shares by the said C. Didisheim while he is such administrateur provisoire as aforesaid. And it is ordered that the plaintiffs C. Didisheim and M. Goldschmidt, or one of them, do pay to the defendants, the London and Westminster Bank, Limited, their costs of this action and of and occasioned by the said appeal, and all other costs incurred at the request of the said C. Didisheim, such costs, the plaintiffs by their counsel consenting, to be taxed by the taxing master as between solicitor and client, unless the same shall be agreed within 21 days after delivery thereof by the defendant bank to the plaintiffs."

The schedule above referred to.

Part I.

Investments registered in the name of B. L. Goldschmidt deceased.

Part II.

Investments registered in the name of M. Goldschmidt.

Part III.

Bearer investments.

Solicitors: *Stibbard, Gibson & Co.; Travers-Smith, Braithwaite & Robinson.*

G. I. F. C.

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NOTE.

C. A. 1899, July 3.

In re SIR F. SEAGER HUNT.

ON April 29, 1898, upon evidence that Sir F. Seager Hunt, Bart., was through mental infirmity arising from disease incapable of managing his affairs, though he had not been found lunatic by inquisition, Smith L.J., sitting in Lunacy, made an order appointing his wife, Lady Hunt, interim receiver of his estate for fourteen days, pending the appointment of a committee, or quasi-committee. On May 11, 1898, the Master in Lunacy made an order under s. 116 of the Lunacy Act, 1890, appointing Lady Hunt to exercise the powers of a committee over her husband's estate until further order. On May 3, 1898, that is, between the dates of the two orders, one Attenborough—who had, prior to the order of Smith L.J., obtained judgment in the Queen's Bench Division against Sir F. Seager Hunt for 10,000*l.* and interest on a promissory note—obtained an order from Darling J. charging the judgment debt upon Sir F. Seager Hunt's interest in a certain partnership firm.

Before Attenborough obtained the charging order, he was informed that his judgment debtor was of unsound mind, and that proceedings for the appointment of a committee were pending. The business of Sir F. Seager Hunt's partnership firm was subsequently sold to a limited company, and 70,000 ordinary shares were allotted as the consideration for his interest. These shares were registered in the name of the Paymaster General. They were said to be at present of doubtful value, no dividends having yet been paid upon them.

On April 18, 1899, a scheme for Sir F. Seager Hunt's maintenance was, under s. 117 of the Lunacy Act, 1890, settled by the Master in Lunacy, who directed that the 70,000 shares should be excepted from the scheme, since he found that there were sufficient funds for providing maintenance without resorting to the shares.

The question now was whether, under a summons taken out for the purpose in the lunacy, Attenborough, the judgment creditor, was entitled to enforce his charging order on the shares by foreclosure or sale, notwithstanding that it had been obtained subsequently to the exercise of the jurisdiction of the Court in Lunacy by the order of April 29, 1898.

Swinfen Eady, Q.C., *W. M. Cann*, and *C. L. Attenborough*, for Attenborough, while admitting that under the jurisdiction in Lunacy sufficient maintenance for the lunatic out of his property was in all cases the first consideration, contended that, subject to that prior claim, the Court in Lunacy would not interfere with judgments and orders of the ordinary Courts of law.

Upjohn, Q.C., and *T. L. Wilkinson*, for Lady Hunt, and also for her husband's unsecured creditors, contended that the charging order was irregular and that the proceedings under it should have been stayed by the judge in Lunacy, it having been obtained by Attenborough with the knowledge that his debtor was of unsound mind, and that lunacy proceedings were pending; and moreover that the order had been obtained without the appointment of a guardian ad litem as required by the rules of the Court for the protection of the interests of a person of unsound mind not so found.

LINDLEY M.R. It is quite obvious that Mr. Attenborough's charging order, which was obtained on May 3, 1898, and which has been before the

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Court frequently since that date and has never been questioned by anybody, cannot now be treated as invalid simply upon the ground that the judge in Lunacy might have objected to the taking of any proceedings upon it, or could have required Mr. Attenborough to treat it as having been invalidly obtained. It has been treated as valid, with full knowledge of all the facts, by the persons whose duty it is to look after the interests and protect the interests of the lunatic, and which duty, so far as I know, has been efficiently performed. It would be grossly unjust now to Mr. Attenborough to say that that charging order ought to be treated as invalid, because it might have been stopped some fifteen months ago. There is nothing unjust in point of law. If the judge in Lunacy had considered it for the benefit of the lunatic so to do, he might have stayed all further proceedings on it. There is nothing in Mr. Upjohn's argument as to irregularity. The judge in Lunacy, in dealing with the creditors of the lunatic, always considers what is for the benefit of the lunatic first, so far as the property under the control of the judge is concerned. That is part of the law of the land, and is of so long standing that no judge in Lunacy, nor this Court, could alter it. It is our duty, as the law stands, to look to the interest of the lunatic; but when we have done that, and when we have provided for the lunatic to the extent the judge in Lunacy thinks right, there is nothing which justifies the Court in withholding a creditor from exercising his legal rights and getting paid if he can. Here the master has made a scheme for the maintenance of the lunatic, and it is found that there are 70,000 shares in this company which are not required for his maintenance. We are told they are worthless: we are told that whatever value they may have is a prospective value, and that they do not at present yield dividends, and that they are worth nothing; but at any rate they are outside what is wanted for the proper and adequate maintenance of the lunatic. Mr. Attenborough has a charging order on those shares, and he asks to be at liberty to enforce his security. In point of form, as I understand, these 70,000 shares are registered in the name of the paymaster, who of course is an officer of the Court.

The proper order will be that Lady Hunt, who has been appointed to act with the powers of a committee, shall sell those shares with the approbation of the master and apply the proceeds in payment of Mr. Attenborough. The master will have control over the sale. If Mr. Attenborough desires liberty to bid, he can have it.

As to the costs, Mr. Attenborough's costs must be added to his security. We do not think it is right to make Lady Hunt pay them or make the lunatic's estate bear them; and her costs should be retained by her out of the lunatic's estate with the approbation of the master. It is not a case for making her pay the costs.

As to the other creditors, they have nothing whatever to do with this matter. The irregularity of the order, even if there were any irregularity, is nothing to them. Of course, I see that any secured creditor who carries off his security prejudices unsecured creditors: that is all; but in any legal sense they have no locus standi at all.

SIR F. H. JEUNE and ROMER L.J. concurred.

Solicitors: *Stanley Attenborough*; *Wellington Taylor*.

G. I. F. C.

Exhibit 36

[1984–85 CILR 63]

CANADIAN ARAB FINANCIAL CORPORATION (trading as KILDERKIN INVESTMENTS GRAND CAYMAN) and KILDERKIN INVESTMENTS LIMITED (both by CLARKSON COMPANY LIMITED, Receiver and Manager) v. PLAYER

COURT OF APPEAL (Zacca, P., Carberry and Carey, JJ. A.): May 14th, 1984

Companies—directors—effect of appointment of receiver—directors' functions vest in receiver, who takes control of management and assets of company—legal proceedings by directors in company's name after appointment of receiver require leave of court if would interfere with or jeopardise company's assets in receiver's possession

Companies—receivers—receiver appointed by court—receiver entitled to defend proceedings on behalf of company whether or not specifically authorised by order of appointment—not entitled to institute proceedings on behalf of company without specific authority

Companies—receivers—foreign-appointed receiver—court may recognise receiver appointed by foreign court if sufficient connection between company ana jurisdiction appointing him—sufficient connection defined—power to refuse recognition exercised only if strong and compelling reasons

Companies—receivers—foreign-appointed receiver—procedure for recognition—English Supreme Court Act 1981, s.37(1) and O.30, r.11ay down procedure—defendant or other applicant with sufficient interest may apply ex parte for recognition in existing proceedings if sufficient connection with plaintiffs claim—sufficient connection defined

Confidential Relationships—consent of principal—receiver and manager of company—court-appointed receiver displaces directors, acts on behalf of company and may therefore consent to divulging confidential information as "principal" for purposes of Confidential Relationships (Preservation) Law,.s.3(2)(b)(i)

The appellant, having been appointed the receiver and manager of a company by the Supreme Court of Ontario, applied to the Grand Court for an order recognising it as such receiver and manager within the Cayman Islands and authorising it to identify and locate all the assets of the company within the jurisdiction.

The plaintiffs were trust companies incorporated in Ontario. The second defendant was also a company incorporated in Ontario and the

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third defendant, Mr. Player, was its sole director and the person principally interested in its funds. The first defendant was a Cayman registered company; the fourth defendant was incorporated in Ontario.

The plaintiffs were persuaded to finance a series of speculative property deals in Ontario, the ultimate purchaser of the property being the fourth defendant. It allegedly became apparent to the plaintiffs that their investments were illusory and that the ultimate beneficiaries from the property deals would be the defendants. The plaintiffs therefore instituted proceedings against the defendants in the Supreme Court of Ontario and applied *ex parte* for an order appointing the present appellant as the receiver and manager of the second defendant. The Supreme Court of Ontario granted the order and authorised the appellant to apply to it for direction and guidance or additional powers in respect of the discharge of its duties. By subsequent orders the court authorised the appellant to identify the assets of the second defendant and to receive notice of any proceedings affecting that company and, following an interim report by the appellant, authorised it to commence proceedings to preserve and recover any assets situated in the Cayman Islands.

Since the second defendant had apparently made substantial deposits in banks in the Cayman Islands, the plaintiffs instituted proceedings against the defendants in the Grand Court to recover all or part of these funds which, they alleged, were derived from the property deals in Ontario; they also claimed damages for a fraudulent conspiracy to commit a breach of trust. The plaintiffs also successfully applied for an order freezing the second defendant's assets in the Cayman Islands pending the outcome of the litigation.

The appellant then made an *ex parte* interlocutory application to the Grand Court in the proceedings commenced by the plaintiffs for an order recognising it as the receiver and manager of the second defendant, authorising it to act on behalf of the second defendant within the jurisdiction and authorising it to identify and locate all the second defendant's assets within the jurisdiction. The Grand Court (Summerfield, C.J.) granted an order in the terms sought.

Acting in pursuance of the order the appellant obtained confidential information from Cayman banks relating to the second defendant's assets. The appellant reported its discoveries to the Supreme Court of Ontario, not intending that they should be made public but they were revealed during a court hearing and received wide publicity in Canada.

Meanwhile, the third defendant, Mr. Player, applied to the Grand Court for rescission of the order recognising the appellant as receiver and manager of the second defendant, submitting, *inter alia*, that as sole director of the company and the person principally interested in its funds, he was the proper person to conduct its litigation and defend its assets, that the circumstances did not warrant an *ex parte* application for recognition of the appointment of the appellant, and that its application for authority to identify and locate the second defendant's assets went far beyond what was required for the purposes of defending the action brought by the plaintiffs and such application should therefore have been made by originating summons, not by an interlocutory application

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in the proceedings brought by the plaintiffs.

The Grand Court (Summerfieid, C.J.) rescinded its previous order recognising the appellant as receiver and manager of the second defendant, on the grounds that (i) the Supreme Court of Ontario had authorised the appellant only to institute proceedings in the Cayman Islands on behalf of the second defendant, not to defend proceedings; (ii) it was not open to a defendant to apply to the court for the appointment of a receiver and manager, and the *ex parte* interlocutory procedure adopted by the appellant under O.30, r.1of the English Rules of the Supreme Court was inappropriate and wholly unrelated to its purpose since there was no connection between the suit brought by the plaintiffs against the second defendant and the appellant's acquisition of control over the second defendant's assets in the Cayman Islands; (iii) the appellant's application should have been made by originating summons with the second defendant, and possibly Mr. Player too, as parties to the process with an opportunity to oppose the application; (iv) the appellant was no longer entitled to be recognised as receiver and manager of the second defendant within the jurisdiction, since it had deliberately acted in breach of the Confidential Relationships (Preservation) Law, s.4(1)(a)(i), having publicised confidential information relating to the second defendant's assets, without "the consent, express or implied, of the relevant principal" within the meaning of s.3(2)(b)(i), as amended, and without seeking the authority of the court under s.3A. The court also removed the attorneys acting for the appellant from the record under r.59(3)of the Grand Court (Civil Procedure) Rules 1976, substituting for them the attorneys acting on behalf of Mr. Player.

On appeal, the appellant submitted that (i) the third defendant (now the respondent), Mr. Player, was not entitled to defend the plaintiffs' action on behalf of the second defendant in the absence of an order of the Supreme Court of Ontario authorising him to do so, since the appointment of the appellant as receiver and manager had displaced the powers of the company's board of directors leaving the appellant, as an officer of that court, in control of the company's affairs, and officers of the company were no longer entitled to interfere with the company's property without the leave of the court; (ii) the powers conferred upon the appellant as receiver and manager included the power to commence and defend proceedings on behalf of the second defendant and it was proper that the appellant, rather than Mr. Player, should represent the second defendant in the proceedings brought by the plaintiffs since the company might have claims of its own against him and might wish to join him as a third party responsible to indemnify it against the plaintiffs' claims; (iii) in the absence of relevant Cayman provisions, the court had the same jurisdiction to appoint a receiver and manager, or to recognise a receiver and manager appointed by a foreign court, as that exercised by the English courts under s.37(1) of the Supreme Court Act 1981, the procedure being that laid down by O.30, r.1of the Rules of the Supreme Court, and this jurisdiction allowed a defendant to apply, *ex parte* if necessary, for the appointment of a receiver and manager; (iv) such an application could also properly be made by a person not

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party to the proceedings but having a sufficient interest in them, and the appellant's application was justified since the claim against the company was singularly large and the appellant, having a duty to preserve the company's assets, had a duty to ensure that no possible defence went by default; prompt recognition was also required to enable the appellant to comply with various mandatory orders made against the second defendant; and (v) there was no breach of the Confidential Relationships (Preservation) Law since only the appellant was authorised to act on behalf of the second defendant and the provisions of the Law could have been invoked only if (a) there had been a communication of information in confidence by the second defendant to the appellant and (b) the latter had divulged such information without the consent of the second defendant. For all these reasons it would be proper to reinstate the order recognising the appellant as receiver and manager of the second defendant.

The respondent, Mr. Player, submitted that (i) he was not obliged to obtain leave to defend the plaintiffs' action on behalf of the second defendant since he intended to meet the costs so incurred from his personal funds and would not therefore interfere with the appellant's possession of the company's assets; (ii) having been appointed receiver and manager of the second defendant on the application of the plaintiffs who were common to the actions brought against the defendants in Canada and in the Cayman Islands, the appellant was likely to be prejudiced against the claims of the defendants and it would therefore be in the best interests of the second defendant that he, as the person principally interested in its funds, should conduct the litigation on its behalf and defend its assets; (in) he agreed that the court had the same jurisdiction in this matter as that exercised by the English courts, but observed that there were no English rules dealing specifically with the recognition of a foreign-appointed receiver and manager; assuming, however, that the provisions concerning the appointment of a receiver and manager were applicable by analogy, he did not support the lower court's finding that a defendant could not apply for such appointment to be made, but submitted that the *ex parte* interlocutory procedure adopted by the appellant would have been appropriate only if the relief sought were incidental to or arose out of the relief claimed by the plaintiffs; if, therefore, the appellant had merely sought recognition or leave to defend, the procedure adopted would have been correct but since it also sought authority to identify and locate the second defendant's assets, relief which went far beyond the scope of the plaintiffs' action, the application should have been made by originating summons; (iv) the circumstances did not in any case merit an urgent *ex parte* application since he himself would have protected the second defendant's interests and the Clerk of the Grand Court could have signed the mandatory orders; and (v) it was an offence under the Confidential Relationships (Preservation) Law to divulge information, however obtained, without the consent of the principal and the appellant should therefore have sought his consent, on behalf of the second defendant, before divulging information obtained from the banks.

Held, allowing the appeal:

(1) Mr. Player could not conduct litigation on behalf of the second defendant without the leave of the Supreme Court of Ontario. The scope and nature of the functions of the appellant as receiver and manager were governed by the law of the place of incorporation of the company, *i.e.* Ontario, but it was clear that on this subject the legal position was the same in Canada as it was in England and, by derivation, the Cayman Islands. The appointment of the appellant as receiver and manager had the effect of vesting the complete control and management of the second defendant in the appellant as an officer of the court (not as an agent of the company), thereby displacing the board of directors. The second defendant did retain a residual power to institute proceedings in its own name, but if this would entail interference with the receiver's possession of its assets it had first to obtain leave of the court. If Mr. Player were allowed to defend the plaintiffs' action on behalf of the second defendant and if the plaintiffs were successful, the second defendant's assets in the Cayman Islands would be required to satisfy the judgment. Mr. Player's willingness to take personal responsibility for the costs of such defence did not, therefore, obviate the need for the leave of the court, and in the absence of such leave he could not act on the company's behalf (page 76, line 35 – page 81, line 6; page 98, lines 2–28; page 106, line 13 – page 111, line 3).

(2) The appellant, on the other hand, having been vested with the powers and authority that Mr. Player had exercised as sole director, did have the power to defend the action on behalf of the second defendant and would have had such power even if it had not been expressly conferred by the Supreme Court of Ontario; moreover, the Supreme Court of Ontario had expressly authorised the appellant to "commence proceedings" in the Cayman Islands, which really meant that it could take a step in legal proceedings and did not exclude entering an appearance or filing a counterclaim. This order served to emphasise the fact that Mr. Player had been deprived of his powers to act on behalf of the second defendant, and the appellant had, therefore, acted properly in applying for recognition and for leave to act on behalf of the second defendant within the jurisdiction (page 80, lines 22–25; page 81, lines 7–24; page 98, lines 2–12; page 110, line 33 – page 112, line 5; page 114, lines 13–35

(3) The Grand Court had jurisdiction (derived from that exercised by the High Court in England) to recognise in the Cayman Islands the appellant as a receiver appointed by a foreign court if it were satisfied that there was a sufficient connection between the second defendant company and the jurisdiction in which the appellant was appointed to justify recognition of the foreign court's order. Such a connection clearly existed in the present case since (a) the second defendant was a defendant in the Canadian proceedings and had submitted to the jurisdiction of the Supreme Court of Ontario, (b) the second defendant was incorporated in Canada, and (c) the second defendant carried on busi-

ness in Ontario and the management of the company was located in Canada. A fourth test (irrelevant in this case) to determine the necessary connection was whether the courts of the jurisdiction where the defendant was incorporated would themselves recognise a foreignappointed receiver—and in fact, the Ontario courts would do so (page 81, line 34 – page 83, line 12; page 99, lines 11–14; page 102, line 14 – page 104, line 21).

(4) In the absence of local rules dealing specifically with the procedure for the recognition of a foreign-appointed receiver and manager it was proper to follow the procedure laid down for the appointment of a receiver within the jurisdiction and, under the terms of the Grand Court Law, ss. 13(1) and 20, the English Supreme Court Act 1981, s.37(1) and the Rules of the Supreme Court, O.30, r.1 therefore applied. Under these provisions it was open to a defendant, or other applicant with a sufficient interest in the matter, to apply *ex parte* for the appointment of a receiver and an interlocutory application could properly be made if the relief claimed was incidental to or arose out of the relief claimed by a plaintiff. Since the appellant had the power to defend proceedings on behalf of the second defendant, and the duty to preserve its assets, there was a sufficient connection with the plaintiffs' claim to justify the appellant's interlocutory application for recognition and for authority to identify and locate the second defendant's assets. The urgency of the application was also justified, since the appellant had to ensure that no defence to such a singularly large claim went by default, and had also to ensure that no contempt of court was committed in respect of the mandatory orders made against the second defendant. There was no necessity to make Mr. Player a party to the application, since his authority as sole director of the second defendant had been displaced on the appointment of the appellant as receiver, nor was there any necessity to make the second defendant a party, since the appellant was entitled to act on its behalf. The appellant had, therefore, acted properly in making an *ex parte* interlocutory application (page 83, line 22 – page 84, line 24; page 85, line 5 – page 87, line 26; page 88, line 40 – page 89, line 40; page 99, lines 15–22; page 112, line 35 – page 113, line 21; page 113, line 39 – page 114, line 12; page 114, line 36 – page 115, line 3; page 116, lines 5–26). Moreover, had there been any non-compliance with the rules it would have been proper to treat it as a mere procedural irregularity under O.2, r.1and thereby to preserve the order made on the application (page 89, line 41 – page 90, line 3; page 116, line 40 – page 117, line 16).

(5) The appellant had not committed an offence under the Confidential Relationships (Preservation) Law, as amended. Although the second defendant might be a "principal" within the terms of s.3(2)(b)(i), someone had to act on its behalf, and since the appellant had displaced the sole director and was in control of the second defendant, it was itself "the relevant principal" within the terms of that section and was therefore entitled to consent to the disclosure of the confiden-

tial information obtained from the Cayman banks relating to the second defendant's assets (page 90, line 41 – page 92, line 15; page 92, line 35 – page 93, line 4; page 99, lines 23–26; page 117, line 37 – page 120, line 37). It would, however, have been preferable for the appellant to have applied to the Grand Court for directions, under s.3A of the Law (thus protecting itself under the terms of s.3(2)(a)) since, at the date of the revelations it was, by virtue of its recognition within the jurisdiction, an officer of the court (*per* Carberry, J. A. at page 99, lines 29–33). Even assuming that there had been a breach of the Law, there was no suggestion that the appellant intended that the contents of its report to the Supreme Court of Ontario should be made public, and in the circumstances—particularly in view of the fact that the appellant was acting in accordance with its obligations to the court—such breach would not be a ground for refusing to recognise the appellant's continuing appointment as receiver and manager (page 90, lines 28–40; page 121, lines 1–13).

(6) Mr. Player's application for rescission of the order recognising the appellant as receiver and manager was not "a dispute or difficulty arising as to representation" within r.59(3) of the Grand Court (Civil Procedure) Rules and the order removing the appellant's attorneys from the record should not have been made under that provision. It was particularly wrong to substitute, as attorneys for the second defendant, those acting for Mr. Player who, by virtue of the orders of the Supreme Court of Ontario had previously been deprived of his control over the company. Despite his assertions to the contrary, Mr. Player's interests did not coincide with those of the company and power over its assets and undertakings should not have been restored to him in this way (*per* Carey, J.A. at page 121, line 14 – page 122, line 31).

(7) The court had power to refuse to confirm or recognise the appointment of a foreign-appointed receiver but should exercise it only when there were strong and compelling reasons for doing so (*per* Carey, J.A. at page 122, lines 31–34). There were no such reasons in the present case. It would be in the interest of the second defendant for the appellant to continue to be recognised in the Cayman Islands as its receiver and manager. The appeal would therefore be allowed and the order of the Grand Court recognising the appellant and authorising it to identify and locate the second defendant's assets within the jurisdiction would be restored (page 93, lines 5–11; lines 14–17; page 122, lines 35–40).

Cases Cited:

(1) *Burt, Boulton & Hayward* v. *Bull*, [1895] 1 Q.B. 276; [1891–4] All E.R. Rep. 1116; (1894), 71 L.T. 810; 64 L.J.Q.B. 232; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, applied.

(2) *Carter* v. *Fey*, [1894] 2 Ch. 541; (1894), 70 L.T. 786; 63 L.J. Ch. 723; 10 T.L.R. 486; 38 Sol. Jo. 491; 7 R. 358, applied.

(3) *Chief Constable of Kent* v. *V.*, [1983] Q.B. 34; [1982] 3 All E.R. 36; (1982), 126 Sol. Jo. 536, *dicta* of Lord Denning, M.R. considered.

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(4) *Del Zotto* v. *International Chemalloy Corp.* (1976), 14 O.R. (2d) 72; 22 C.B.R.(N.S.) 268, *dicta* of Van Camp, J. applied.

(5) *Gawthorpe* v. *Gawthorpe*, [1878] W.N. 91.

(6) *Hadmor Prods. Ltd.* v. *Hamilton*, [1983] 1 A.C. 191; [1982] 1 All E.R. 1042; (1982), 126 Sol. Jo. 134; [1982] I.C.R. 114; [1982] I.R.L.R. 102.

(7) *Kennedy (C.A.) Co. Ltd. and Stibbe-Monk Ltd., Re* (1976), 74 D.L.R. (3d) 87; 23 C.B.R.(N.S.) 81.

(8) *Moss S.S. Co. Ltd.* v. *Whinney*, [1912] A.C. 254; [1911–13] All E.R. Rep. 344; (1911), 105 L.T. 305; 81 L.J.K.B. 674; 27 T.L.R. 513; 55 Sol. Jo. 631; 12 Asp. M.L.C. 25; 16 Com. Cas. 247, applied.

(9) *Newhart Devs. Ltd.* v. *Co-operative Comm. Bank Ltd.*, [1978] Q.B. 814; [1978] 2 All E.R. 896; (1977), 121 Sol. Jo. 847, distinguished.

(10) *Schemmer* v. *Property Resources Ltd.*, [1975] Ch. 273; [1974] 3 All E.R. 451; (1974), 118 Sol. Jo. 716, *dicta* of Goulding, J. applied.

Legislation construed:

Confidential Relationships (Preservation) Law (Law 16 of 1976), s.2, as amended: The relevant terms of this section are set out at page 91, line 41 – page 92, line 15.

s.3(1), as amended: The relevant terms of this sub-section are set out at page 91, lines 3–8.

(2), as substituted by the Confidential Relationships (Preservation) Amendment) Law, 1979 (Law 26 of 1979), s.3: The relevant terms of this sub-section are set out at page 91, lines 11–19.

s.3A(1), as added by the Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979), s.4: The relevant terms of this sub-section are set out at page 91, lines 21–27.

s.4(1), as amended: The relevant terms of this sub-section are set out at page 91, lines 32–36.

Grand Court (Civil Procedure) Rules, r.59(3): The relevant terms of this sub-rule are set out at page 121, lines 19–24.

Grand Court Law (Law 8 of 1975), s.13(1): The relevant terms of this sub-section are set out at page 82, line 39 – page 83, line 9.

s.20: The relevant terms of this section are set out at page 83, line 35 – page 84, line 2.

Rules of the Supreme Court 1965 (England, S.I. 1965/1776), O.30, r.1: The relevant terms of this rule are set out at page 83, lines 32–33.

Supreme Court Act 1981 (England, c.54), s.37(1): The relevant terms of this sub-section are set out at page 83, lines 24–27.

Jonathan Sumption for the appellant;
Nicholas Patten for the respondent.

ZACCA, P.: This is an appeal against a decision of the learned Chief Justice whereby he ordered:

"1. That the order of this court dated April 18th, 1983 appointing the Clarkson Company Ltd. as the interim

receiver and manager of Kilderkin Investments Ltd. within the jurisdiction of this court be discharged.

. . .

3. Further that pursuant to r.59(3) of the Rules of Court, Messrs. W.S. Walker & Co. be removed from the record as attorneys for the second defendant herein, and that Messrs. C.S. Gill & Co. may be placed on the record in their place."

The appellant, Clarkson Company Ltd., was appointed receiver and manager of Kilderkin Investments Ltd., by an order of the Supreme Court of Ontario dated February 15th, 1983. Kilderkin Investments Ltd. is the second defendant in Cayman Islands Cause 132 in which the plaintiffs are alleging a fraudulent conspiracy against all defendants. The third defendant, William Player, is the sole director of Kilderkin Investments Ltd. The application resulting in the order of the Chief Justice was made by William Player, the third defendant in Cause 132.

The appellant contends that the interest of Kilderkin Investments Ltd. would be better served if it were to defend Cause 132 on behalf of Kilderkin as the third defendant William Player, its sole director, is alleged to be involved in a fraud on his company.

In an *ex parte* application on February 15th, 1983, the Supreme Court of Ontario made an order whereby the appellant, the Clarkson Company Ltd. was appointed interim receiver and manager of Kilderkin Investments Ltd. The order was made in the following terms:

"Upon motion duly made this day on behalf of the plaintiffs, in the presence of counsel for the plaintiffs and upon reading the writ of summons herein, the affidavit of and the exhibits thereto, and the consent of the Clarkson Company Ltd. filed, and upon hearing what was alleged by counsel for the plaintiffs:

1. It is ordered that, until the trial of this action or until further order of this court, the Clarkson Company Ltd. be and is hereby appointed interim receiver and manager of all the undertaking, business, affairs, assets and property of the defendant Kilderkin Investments Ltd. (collectively referred to hereinafter as the 'undertaking and assets'), with power to

manage the undertaking and assets to carry on the business of the defendant Kilderkin Investments Ltd.

2. And it is further ordered that the defendant Kilderkin Investments Ltd., its directors, officers, employees and agents and all other parties having notice of this order deliver up to the interim receiver and manager or to such agent or agents as it may appoint, the undertaking and assets of the defendant Kilderkin Investments Ltd. and all books, accounts, securities, documents, papers, deeds, leases and records of every nature and kind whatsoever relating thereto.

3. And it is further ordered that the tenants of any properties with respect to which Kilderkin Investments Ltd. as of the date of this order, is in receipt of or entitled to the receipt of rents do attorn and pay their rents to the interim receiver and manager.

4. And it is further ordered that no party shall terminate or interfere with the right of the receiver and manager to manage and collect incomes and rents from properties which at the time of the making of this order the defendant Kilderkin Investments Ltd. has an obligation or right to manage or

in respect of which the defendant Kilderkin Investments Ltd. has an obligation or right to collect incomes or rents without leave of this court first being obtained.

5. And it is further ordered that the interim receiver and manager be and it is hereby authorised to borrow money from time to time as it may consider necessary not to exceed, in aggregate, a principal amount of $5m., for the purpose of protecting and preserving the undertaking and assets and carrying on the business of the defendant, Kilderkin Investments Ltd., and that as security therefor, the assets of the defendant, Kilderkin Investments Ltd. of every nature and kind do stand charged with payments of the moneys so borrowed by the receiver and manager, together with interest thereon in priority to the claims of the plaintiffs and, if any, to the claims of the defendants but subject to the right of the interim receiver and manager to be indemnified as such interim receiver and manager out of the undertaking and assets in respect of its remuneration to be allowed by the court and its costs and expenses properly incurred.

6. And it is further ordered that the moneys authorised to be borrowed under this order shall be in the nature of a

revolving credit and the interim receiver may pay off and reborrow within the limits of the authority hereby conferred so long as the maximum amount owing in respect of such borrowing at any one time does not exceed the amount hereby authorised with interest.

7. And it is further ordered that the interim receiver and manager be and is hereby empowered to enter into new leases for apartment units contained in lands which at the time of the making of this order, the defendant has an obligation or right to manage or in respect of which the defendant Kilderkin Investments Ltd. has an obligation or right to collect rents and that the interim receiver and manager is hereby appointed attorney in fact to negotiate all cheques, remittances and drafts relating to the rents of such lands.

8. And it is further ordered that the interim receiver and manager shall be at liberty to appoint an agent or agents and such assistants from time to time as the receiver and manager may consider necessary for the purpose of performing its duties hereunder.

9. And it is further ordered that the interim receiver and manager be at liberty, out of the moneys coming into its hands available for that purpose, to pay all expenses relating to the management of the undertaking and assets.

10. And it is further ordered that the interim receiver and manager shall be at liberty to pay itself out of moneys coming into its hands, in respect of its services and disbursements in a reasonable amount either monthly or at such longer intervals as it deems appropriate, and each amount shall constitute an advance against its remuneration when fixed.

11. And is further ordered that any expenditure which shall be properly made or incurred by the interim receiver and manager shall be allowed it in passing its accounts and together with its remuneration shall form a charge on the undertaking and assets in priority to the claims of the plaintiffs and the claims, if any, of the defendants.

12. And it is further ordered that the interim receiver and manager do from time to time pass its accounts and pay the balance in its hands as the Master of this court may direct and for this purpose the accounts of the receiver and manager are hereby referred to the said Master.

13. And it is further ordered that the interim receiver and manager may from time to time apply to this court for direction and guidance or additional powers in respect of the discharge of its duties as interim receiver and manager.

14. And it is further ordered that the costs of the plaintiffs herein, including all proceedings under the reference herein be taxed and allowed by the Master and paid by the defendants out of amounts received by the receiver and manager herein on a solicitor-and-client basis."

Further orders dated February 28th, 1983, March 29th, 1983 and April 13th, 1983 were made by the Supreme Court of Ontario as it effected the appointment of the appellant as interim receiver and manager. Paragraph 7 of the order of February 28th, 1983, stated:

"7. And it is further ordered that the interim receiver be and it is hereby authorised and directed to identify the assets of Kilderkin, and their location, to identify all persons having an interest in Kilderkin and its assets and entitled to receive notice of any proceedings affecting it."

The order of April 13th, 1983 was to the following effect:

"Upon motion made this day on behalf of the Clarkson Company Ltd. as interim receiver and manager of the defendant, Kilderkin Investments Ltd., for advice and direction of this court in relation to its administration of the undertaking, business, affairs, assets and property of the said defendant, upon reading the affidavit of David I. Richardson, sworn the 13th day of April, 1983, and the interim report of the interim receiver dated the 29th day of March, 1983, upon hearing counsel for the interim receiver and manager:

1. It is ordered that the interim receiver and manager be and it is hereby authorised to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction, or for such other remedy as counsel for the interim receiver and manager may advise."

Following upon these applications and orders of the Supreme Court of Ontario, the appellant made an *ex parte* interlocutory application in the Cayman Islands in Cause 132. Arising out of this application the learned Chief Justice on April 18th, 1983, made the following order:

"Upon hearing counsel *ex parte* for the Clarkson Company Ltd., interim receiver and manager of Kilderkin Investments Ltd. pursuant to an order of the Supreme Court of Ontario dated the 15th day of February, 1983, and upon

reading the affidavit of James Alexander Cringan sworn the 13th day of April, 1983, and exhibits thereto, and the affidavit of John L. Biddell sworn the 14th day of April, 1983, and exhibits thereto, and the affidavit of John A.M. Judge sworn the 18th day of April, 1983 and the exhibits thereto, it is hereby ordered that:

1. The Clarkson Company Ltd. as interim receiver and manager of Kilderkin Investments Ltd. (hereinafter referred to as 'Kilderkin') pursuant to the orders of the Supreme Court of Ontario dated the 15th and 28th days of February, the 29th day of March and the 13th day of April, 1983 is hereby authorised to act on behalf of Kilderkin within the jurisdiction of this court.

2. The Clarkson Company Ltd. is authorised and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any asset of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this court, notwithstanding the order of this court dated the 16th day of April, 1983.

3. The Clarkson Company Ltd. may apply to this court for further directions from time to time as the interim receiver and manager of Kilderkin in relation to any matters arising from paras. 2 and 3 hereof upon proper notice to such of the parties as may be ordered by the court."

Prior to the order of April 18th, 1983 being made, an order of the court made on April 16th, 1983 had the effect of freezing the assets of Kilderkin in the Cayman Islands.

In rescinding paras. 1 and 3 of the order of April 18th, 1983 the learned Chief Justice's decision was based on the following grounds:

"1. That the order of April 18th, 1983 (the order) had been obtained by a wrong and inappropriate process wholly unrelated to its purpose and, therefore, cannot be allowed to stand.

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2. The receiver and manager had apparently flouted the Confidential Relationships (Preservation) Law and, in the exercise of this court's discretion, could not, until an acceptable explanation by way of affidavit is placed before this court, be allowed continuing recognition as receiver and manager in this jurisdiction."

The order in terms of para. 3 was held to be a necessary consequence of the order in terms of para. 1.

The learned Chief Justice also held that the appellant had no authority to defend an action brought against Kilderkin by virtue of the orders of the Supreme Court of Ontario and that in order to do so, a direction to this appellant by the court was necessary.

For the appellant it was submitted:

"1. That the *ex parte* application made by the appellant was the proper procedural course to be adopted and that the learned Chief Justice erred in holding that a fresh originating summons was the only available course open to the appellant.

2. That the appointment of the appellant as the receiver and manager for Kilderkin displaced the powers and man-

agement of the directors and the only person who could act on behalf of Kilderkin was the appellant. The powers of the appellant included commencing and defending actions.

3. The appellant was not in breach of the Confidential Relationships (Preservation) Law as the appellant was the only person authorised to act on behalf of Kilderkin."

Counsel for the respondent in his submissions sought to support the decision on the reasons set out in the judgment of the learned Chief Justice.

It may be convenient to deal first with the question of the powers and authority of a court-appointed receiver and manager. Did the appellant have the authority to defend Cause 132 on behalf of Kilderkin?

In *Kerr on Receivers*, 16th ed., at 216 (1983) the author states:

"The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but the company is entirely superseded in the conduct of that business, and deprived of all power to enter into contracts in relation to

that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. The powers of the directors in this respect are entirely in abeyance so far as that business of the company is concerned, and the relevant powers of the company are exercised by the receiver under the direction of the court."

In *Burt, Boulton & Hayward* v. *Bull* (1), a case in which the defendants were appointed receivers and managers of the business of a company by the court, the question arose as to whether the defendants were personally liable for goods which they had ordered for the business. Lopes, L.J. said ([1895] 1 Q.B. at 282):

"It was argued that the defendants had only given the order as agents. But the company after their appointment had no control over the business: it could give no orders and make no contracts. The defendants could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court. They gave the order as receivers and managers appointed by the Court to the plaintiffs, who knew the position of the company and that of the defendants. Under these circumstances, in my opinion, the goods must be taken to have been supplied on the credit of the defendants."

In *Moss S.S. Co. Ltd.* v. *Whinney* (8), a receiver and manager was appointed in a debenture-holders' action. In discussing the powers of a receiver and manager, Lord Loreburn, L.C. stated ([1912] A.C. at 257 and 259):

"On January 5 an order was made in a debenture-holders' action that Mr. Whinney should be receiver and manager of Ind, Coope & Co. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, of which the entire conduct passed into the hands of Mr. Whinney . . . .

I agree with Fletcher Moulton L.J. that the company was still alive and its business was being still carried on by Mr.

Whinney, but he was not carrying on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable."

The Earl of Haisbury stated (*ibid.*, at 259–260):

"Another reason is that I think that, if the appellants' argument should succeed, it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets."

Lord Atkinson said (*ibid.*, at 263):

"This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

In *Del Zotto* v. *International Chemalloy Corp.* (4) an application was made by the plaintiff to strike out a counterclaim. The question for the decision of the court was whether the defendant was precluded from delivering a counterclaim in its own name by reason of the appointment of a receiver and manager and whether leave of the court was necessary prior to such delivery. On the motion of the plaintiff, the Clarkson Company had been appointed receiver and manager of the property of the defendant until trial. In considering the question the court examined a number of authorities on the position and status of a corporation after the appointment of a receiver and manager. The case of *Moss S.S. Co. Ltd.* v. *Whinney* (8) was considered. Van Camp, J. stated (14 O.R. (2d) at 75–76):

"The question of whether the receiver or the parties should institute proceedings or make applications before the Court

was also recently canvassed in the case of *Wahl v. Wahl et al. (No. 2)*, [1972] 1 O.R. 879, 16 C.B.R. (N.S.) 272. There [at pp. 891–2], the Court referred to the case of *Ireland v. Eade* (1844), 7 Beav. 55, 49 E.R. 983, where it was said [at p. 56,

per Lord Langdale, M.R.]:

> A receiver ought not to present a petition or originate any proceedings in a cause; any necessary application should be made by the parties to the suit. That is the general rule; but there is some difficulty in adhering to it and many exceptions have been allowed.
> It seems that exceptions to the general rule have been permitted in cases where the parties refuse or are unable to diligently prosecute the action. However, this would not apply, since the defendant itself desires to have carriage of the action. An exception might occur when the Court permits the receiver to institute proceedings by making such provision in the order appointing him. However, the order of Mr. Justice Wright in the present case contains no such provision and, therefore, would not provide a ground for departing from the general rule. Therefore, based on the authorities cited, the defendant herein should be permitted to institute the counterclaim in its own name."

The court then went on to consider the question of whether it was necessary for the defendant to obtain the leave of the court in order to commence proceedings. Van Camp, J. stated (14 O.R. (2d) at 76–77):

> "Perhaps by considering some general principles relating to receiverships the issue can be determined. In *Kerr on the Law and Practice as to Receivers* it is said, at p. 144:
>
> > When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave (*Angel v. Smith*, 9 Ves. 335 . . .) If anyone, whoever he be, disturb the possession of the receiver, the court holds that person guilty of contempt . . .
>
> Similarly, in *Law Relating to Receivers and Managers* (1912), Riviere points out that [p. 162]:
>
> > Interference with property over which a receiver has been appointed by a party to the action in which he has been appointed will be a contempt of Court, whether the receiver has gone into possession or not.

> Although most of the cases relating to interference with property in the possession of the receiver relate to instances of physical interference, the principles enunciated in these cases should be equally applicable to instances of non-physical interference.
> In this case the Clarkson Company Limited has been appointed receiver and manager of the property, assets, business and undertaking of the defendant corporation. To the extent that corporate funds will be required to diligently pursue the conspiracy claim, the defendant corporation would be interfering with the possession of the receiver. Therefore, to avoid being held in contempt of Court, leave should be obtained in this case, particularly in view of the large sums of money involved."

The *Del Zotto* case appears to have decided:

(1) Although the Clarkson Company was appointed receiver and manager of the defendant, the defendant was permitted to bring proceedings in its own name.

(2) Where there is interference with the possession of the receiver, leave of the court is necessary to institute proceedings in

its own name.

(3) The general rule is that a receiver ought not to institute proceedings, but an exception might occur where the court permits the receiver to institute proceedings by making such provision in the order appointing him.

Both appellant and respondent rely on the *Del Zotto* case in support of their submissions. It was submitted on behalf of the respondent that the defendant Player was not interfering with the possession of the receiver/manager as he had indicated that the costs for defending the action on behalf of Kilderkin were to be met out of his personal funds. In such circumstances Mr. Player would not require leave of the court to defend on behalf of Kilderkin as he was not interfering with the assets or possession of the receiver. It has been established that over $100m. of Kilderkin funds are in the Cayman Islands. The plaintiffs in bringing their action, Cause 132, are seeking to hold on to those assets if they are successful in the action. If the respondent Player is allowed to defend on behalf of Kilderkin and the plaintiffs succeed, then the assets of Kilderkin in the Cayman Islands, which assets have been frozen by an order of the court, could be available to satisfy the judgment. Surely this would be an interference

with the assets of Kilderkin? In such circumstances in my view it would be necessary for the respondent to obtain an order of the court appointing the receiver granting him leave to defend the action on behalf of Kilderkin. Such leave of the court has not been granted to the respondent and therefore he should not be allowed to act on behalf of Kilderkin in defending Cause 132.

What then is the position of the appellant? In my view the *Del Zotto* case is not authority for saying that a receiver cannot defend an action brought against a company for which he has been appointed receiver and manager.

The appointment of the Clarkson Company as a receiver and manager had the effect of vesting in the receiver/manager complete control of the business of Kilderkin. The receiver/manager displaced the respondent Player, its sole director. The respondent can no longer exercise any powers of control or management over Kilderkin. Under para. 2 of the order of the Ontario court dated February 15th, 1983, the respondent is directed to hand over to the receiver/manager all documents, assets, papers, *etc.* of Kilderkin.

In my view, the appellant has the power to defend and authority to instruct solicitors to enter an appearance on behalf of Kilderkin. It was therefore appropriate for the appellant to make the application which it did on April 18th, 1983, before the learned Chief Justice.

The question now arises as to whether the correct procedure was adopted by the appellant. Could such an application be made *ex parte* and was it appropriate to make such an application arising out of Cause 132?

As previously stated on February 15th, 1983 the Supreme Court of Ontario made an order appointing the appellant as receiver and manager of Kilderkin. This application was made arising out of an action in which Kilderkin and the respondent were named as defendants.

Does the court in the Cayman Islands have the jurisdiction to recognise a foreign receiver? In *Schemmer* v. *Property Resources Ltd.* (10) the court had to consider whether a receiver appointed

in the United States would be recognised in England. Goulding, J. said ([1975] Ch. at 287–288):

"I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set

up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction. Here I can find no sufficient connection. First, PRL was not made a defendant to the American proceedings, and there is no evidence that it has ever submitted to the federal jurisdiction. In that regard it is, in my judgment, not enough that certain subsidiary companies of PRL with assets in the United States of America have unsuccessfully contested the orders of the district court on the basis that it had no personal jurisdiction against them, and on other grounds. Secondly, PRL is not incorporated in the United States of America or any state or territory thereof, so that the principle tacitly applied in *Macaulay's* case, 44 T.L.R. 99, and more fully exemplified by *North Australian Territory Co. Ltd.* v. *Goldsbrough, Mort & Co. Ltd.* (1889) 61 L.T. 716 is of no direct relevance. Thirdly, there is no evidence that the courts of the Bahama Islands, where PRL is incorporated, would themselves recognise the American decree as affecting English assets. Fourthly, there is no evidence that PRL itself has ever carried on business in the United States of America or that the seat of its central management and control has been located there."

Applying the principles here suggested by Goulding, J. to the instant case: First, Kilderkin was a defendant in the Ontario proceedings and had submitted to the jurisdiction of that court. Secondly, Kilderkin was incorporated in Canada. The third principle does not arise in this case. Fourthly, Kilderkin carried on business in Ontario and the management of the company was located in Canada.

In the Ontario case of *Re C.A. Kennedy Co. Ltd. and Stibbe-Monk Ltd.* (7) the court there held that the courts in Ontario would recognise the appointment of a receiver in a foreign jurisdiction.

The Grand Court Law, s.13(1) states:

"The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time

being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Islands, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by—

(a) Her Majesty's High Court of Justice; and
(b) the Divisional Courts of that Court,
as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that act."

In my view the court in the Cayman Islands has the jurisdiction to recognise a receiver appointed by the Supreme Court of Ontario.

The application made by the appellant was made *ex parte* in Cause 132. In effect it was an application for the recognition in the Cayman Islands of the order of the Ontario court appointing the appellant as receiver and manager of Kilderkin.

Mr. Patten submitted if all that was being sought was recognition and leave to defend, then the procedure would have been correct. But he argued that para. 2 of the order went far beyond the scope of Cause 132. The application could not therefore be made in Cause 132.

The English Supreme Court Act 1981, provides for the appointment of a receiver in s.37(1) which states:

"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

Section 37(2) provides: "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

Order 30, r.1(1) of the English Rules of the Supreme Court provides: "An application for the appointment of a receiver may be made by summons or motion."

The Grand Court Law provides in s.20:

"(1) Subject to the provisions of this or any other Law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances

permit and subject to any directions which the Court may give in any particular case."

By reason of the provisions in the Grand Court Law, the English Supreme Court Act 1981 and the English Rules of the Supreme Court would be applicable to the Cayman Islands. It is of interest to look at some of the notes which appear in the White Book as applicable to O.30, r.1.

Note 30/1/1 under the heading "Power to Appoint Receiver" states:

"There is no limit to the power of the Court under this section to appoint a receiver on motion, except that it is only to be exercised when it appears 'just or convenient' . . ."

Note 30/1/5 states:

"Under the old practice an *ex parte* application would be granted only in exceptional circumstances. Sub-rules (3) and (4) now allow *ex parte* applications and give the Court power to put any terms that may be appropriate to the appointment. The application can be made even before service of the writ in exceptional cases, but usually short notice of motion should be served with the writ.

An application by a defendant or any party other than the plaintiff can only be made after appearance has been entered, although it would seem by analogy that an application might be heard upon an undertaking to appear."

In his submissions Mr. Patten stated that he would not support the finding that a defendant could not apply for the appointment of a receiver.

39 *Halsbury's Laws of England*, 4th ed., para. 815, at 413 in the section entitled "Application for Appointment of Receiver" and under the heading "Application by party to an action" states:

"An application for the appointment of a receiver under the Supreme Court Act 1981 must, in general, be made in a properly constituted action. The application may be made by any party to the action, or, it would seem, by any person served with notice of, or attending any proceeding in, the action."

And (*ibid.*, para. 822, at 416) under the heading "Application by defendant" it is stated:

"Although a plaintiff may be able in an urgent case to obtain the appointment of a receiver even before service of the writ or summons, a defendant may only apply after he has

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acknowledged service, and then only on notice to the plaintiff; nor may he apply without first filing a counterclaim or a writ in a cross-action, unless his claim to relief arises out of the plaintiff's cause of action or is incidental to it."

In the case of *Chief Constable of Kent* v. *V.* (3) Lord Denning, M.R., in discussing s.37 of the Supreme Court Act 1981, had this to say ([1982] 3 All E.R. at 40):

"But I am glad to say that the reasoning of those cases has now been circumvented by statute. They were based on the wording of s.25(8) of the Supreme Court of Judicature Act 1873, which said that—

> ' . . . an injunction may be granted . . . by an *interlocutory* order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made . . . '

That was re-enacted in s.45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 in these words:

> 'The High Court may grant a mandamus or an injunction or appoint a receiver by an *interlocutory* order in all cases in which it appears to the court to be just or convenient so to do.'

I have emphasised the word 'interlocutory' because it was the basis of the decision in the *North London Rly. Co.* case and following cases. That was pointed out by Lord Diplock in *The Siskina* [1977] 3 All E.R. 803 at 823, [1979] A.C. 210 at 254 when he said:

> 'That subsection, speaking as it does of *interlocutory* orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary.'
>
> . . . .

Now that reasoning has been circumvented by s.37(1) of the Supreme Court Act 1981, which came into force on 1 January 1982. It says that:

> 'The High Court may by order *(whether interlocutory*

or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

The emphasised words in brackets show that Parliament did not like the limitation to 'interlocutory'. It is no longer

necessary that the injunction should be *ancillary* to an action claiming a legal or equitable right. It can stand on its own. The section as it now stands plainly confers a new and extensive jurisdiction on the High Court to grant an injunction. It is far wider than anything that had been known in our courts before. There is no reason whatever why the courts should cut down this jurisdiction by reference to previous technical distinctions. Thus Parliament has restored the law to what my great predecessor Jessel M.R. said it was in *Beddow v. Beddow* (1878) 9 Ch. D. 89 at 93 and which I applied in-the first Mareva injunction case, *Mareva Compania Naviera SA v. International Bulkcarriers SA* (1975) [1980] 1 All E.R. 213 at 214: T have unlimited power to grant an injunction in any case where it would be right or just to do so . . . ' Subject, however, to this qualification: I would not say the power was 'unlimited'. I think that the applicant for an injunction must have a sufficient interest in a matter to warrant his asking for an injunction. Whereas previously it was said that he had to have a 'legal or equitable right' in himself, now he has to have a locus standi to apply. He must have a sufficient interest. This is a good and sensible test . . . . Next, it must be just and convenient that an injunction should be granted at his instance as, for example, so as to preserve the assets or property which might otherwise be lost or dissipated."

In what circumstances can a defendant apply for the appointment of a receiver and can it be an *ex parte* application? The order of the Supreme Court of Ontario was made on an *ex parte* application. *Kerr on Receivers*, 16th ed., at 105 (1983) states:

"An application for a receiver may be made by any party. It is provided by R.S.C., Ord. 30, r.1, that the application may be made either *ex parte* or on notice. It is conceived that, in a very urgent case, a defendant may obtain the appointment of a receiver on such an application. Under the old practice a defendant could not apply before decree, but he may now apply at any stage, even if the plaintiff has applied. In such a case one order is made on both motions, the conduct being usually given to the plaintiff. The relief sought by the defendant must be incidental to, or arise out of, the relief claimed by the plaintiff, or the defendant must counterclaim or issue a writ before be can obtain a receiver."

And (*ibid.*, at 106) the learned author states:

"The appointment may be made at any stage of an action according as the urgency of the case may require without formal application if necessary. A receiver may be appointed *ex parte* even after judgment where there is risk of

the defendant making away with the property: but an injunction is preferred in such cases if it will be effective."

In *Carter* v. *Fey* (2) it was held that a defendant could apply for an injunction against the plaintiff without filing a counterclaim or issuing a writ in a cross-action but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it.

I have no doubt that it is open to a defendant to apply to the court for the appointment of a receiver and manager.

It will be necessary to look at the findings of the learned Chief Justice on the question of procedure. In his judgment it is stated: "Kilderkin, as such, and its sole director could not have been aware of the original application. As will be considered later, Clarkson, as interim receiver and manager, did not assume the personality of Kilderkin."

The appellant having the control and management of Kilderkin, and having displaced the sole director, it cannot be said that Kilderkin would not have been aware of the application made by the appellant. As far as the respondent is concerned, if the application could be made *ex parte* then it would not be necessary for notice to be served on the respondent who was a defendant in Cause 132.

The learned Chief Justice held that O.30, r.1was not applicable, and stated:

> "The original application was not an application for the appointment of a receiver as contemplated by that provision. It was an application by the receiver and manager appointed by the Ontario court for the recognition of that receiver and manager and for authority for that receiver and manager to perform certain functions within this jurisdiction. Furthermore, O.30, r.1 provides machinery for a plaintiff to have a receiver appointed to take possession of and preserve the assets of a defendant for the purpose of satisfying a judgment in the plaintiff's favour. That is not what the original application was about. It was an application by a receiver and manager of a defendant in relation to the assets and operations of that defendant. Clarkson was already the

> receiver and manager of Kilderkin. Order 30, r.1is not designed to give to such a receiver and manager authority over that company for the purpose of the suit (Cause 132). Its control over the assets of Kilderkin had no connection with the suit against Kilderkin. Clarkson's preservation of the assets of Kilderkin in this jurisdiction in its capacity as receiver and manager of Kilderkin had no relevance to the suit (Cause 132) in this jurisdiction. The original application was not at the instance of the plaintiffs in the suit in this jurisdiction to have Clarkson or some other fit and proper person appointed receiver. It would have been an altogether different matter had it been. What Clarkson was seeking to do was to locate assets of Kilderkin for the benefit of and at the instance of the plaintiffs in the Ontario action, albeit the same plaintiffs, for the purpose of the action. Hence Clarkson's report to the Ontario court dated June 15th, 1983. No report to this court was contemplated or made. The order had no relation to the suit (Cause 132) in this jurisdiction. Its only possible connection with the local suit would have been to authorise Clarkson to defend that suit, an aspect dealt

with elsewhere, and an aspect not adverted to at all in the *ex parte* summons."

And later the learned Chief Justice stated:

"The terms of the order have no connection with Cause 132 or the subject-matter of it save in one very limited respect and that is that the words 'is hereby authorised to act on behalf of Kilderkin within the jurisdiction of this court' could be construed as authorising Clarkson to defend suits against Kilderkin in that jurisdiction, assuming it to have power to do so. It did not have that power. Hence the observation that the resulting order (and application) bore no relationship to Cause 132 and could not properly be an interlocutory application in that cause. Clarkson did not need the powers set out in para. 2 of the order for the purposes of Cause 132."

The appellant in attempting to locate the assets of Kilderkin in the Cayman Islands cannot be said to be locating them for the benefit of the plaintiffs. It is true that it was on the plaintiffs' application that the appellant was appointed receiver and manager in Canada. However, once appointed the receiver is an officer of the court and if he has full control and management

over the affairs of Kilderkin then once appointed he is acting in the interest of Kilderkin. He is, therefore, entitled to seek out and establish the whereabouts of assets belonging to Kilderkin.

The plaintiffs having sued Kilderkin (Cause 132) if successful the assets of Kilderkin would be in jeopardy. It cannot therefore be said that the application has no connection with Cause 132. One of the reasons for the learned Chief Justice holding that the order (and application) bore no relationship to Cause 132, and that it could not be an interlocutory application was because he held that the appellant had no power to defend.

In my view, the application made by the appellant had a real connection with the suit. An application to appoint a receiver can in a proper case be made *ex parte.*

There is no reason, therefore, why an application to recognise a receiver cannot be made *ex parte* since the Cayman Islands courts could recognise the appointment of a receiver in Canada. Having regard to the circumstances of the instant case, it would be prudent for the appellant to be recognised in the Cayman Islands.

In holding that the procedure was irregular the learned Chief Justice said:

"An important consequence of the procedural irregularity is that it has led to a denial of natural justice. With the benefit of hindsight one can see that the order was more than a formality. The company, Kilderkin, should have been made a party to the originating process—perhaps the sole director as well—and any such party should have been entitled to oppose the making of the order. The company would have been exercising its residual powers in opposing the original application. The right to do so was denied to the company."

If the appellant has the power to defend on behalf of Kilderkin, then it follows that no right has been denied Kilderkin. If the sole director has been displaced, then it is unnecessary to make him a party to the proceedings. There would be no denial of natural justice.

I hold that the appellant as manager and receiver has the power

to defend on behalf of Kilderkin. The application was properly made as an *ex parte* application arising out of Cause 132 as there was a connection with that case and it arises out of the relief claimed by the plaintiffs.

Although I hold that there was no irregularity in the

proceedings, if it became necessary, O.2, r.1 of the Supreme Court Rules could be invoked in order to preserve the order made on April 18th, 1983.

The irregularity of the procedure was only one ground on which it was held that the order of April 18th, 1983, should be discharged. It was also held that the appellant had disregarded the provisions of the Confidential Relationships (Preservation) Law. The learned Chief Justice in his judgment said:

"There is no doubt in my mind that Clarkson acted in breach of the Confidential Relationships (Preservation) Law. In the absence of an acceptable explanation, that breach appears to have been deliberate.

That in itself disentitles Clarkson to continue to be recognised as receiver and manager of Kilderkin in this jurisdiction and justifies the exercise of this court's discretion to discharge the order."

In a report by the appellant, dated June 15th, 1983 addressed to the Chief Justice of the Ontario Supreme Court, confidential information relating to transactions in the Cayman Islands' banks, concerning Kilderkin was disclosed. The contents of the report apparently received wide publicity in the press in Canada.

This report followed upon the order of April 18th where in para. 2 of the order the appellant was authorised and permitted to identify and locate all assets belonging to Kilderkin in the Cayman Islands. The report of June 15th, 1983 although marked "Strictly Confidential" and sent to the Chief Justice of the Ontario court, became public property.

There is no evidence to suggest that the appellant intended the contents of the report to be made public. As an officer of the court he made his report. Assuming a breach of the Confidential Relationships (Preservation) Law there is no evidence to suggest that the breach was a deliberate act. The appellant has not been charged with a breach of the Law but it became necessary to consider the breach because the learned Chief Justice relied on it as a ground for discharging the order of April 18th, 1983.

In my view, even assuming a breach of the Confidential Relationships (Preservation) Law, having regard to the circumstances under which the breach was committed, I would hold that this should not be a ground for not recognising the receiver and manager appointed by the Ontario court.

I will now consider whether in fact there was a breach of the

Law. The Confidential Relationships (Preservation) Law, s.3(1), as amended, states:

"Subject to subsection (2), this Law has application to all confidential information with respect to business of a pro-

fessional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout."

Section 3(2), as substituted by the Confidential Relationships (Preservation) (Amendment) Law, 1979 states:

"This Law has no application to the seeking, divulging, or obtaining, of confidential information—

(a) in compliance with the directions of the Grand Court pursuant to section 3A;

(b) by or to—

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal .. . ."

Section 3A(1) states:

"Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted."

No application was made by the appellant under s.3A(1). This section applies to a person who intends to divulge confidential information in evidence contrary to s.4(1) of the Law. Section 4(1), as amended, states:

"Subject to the provisions of sub-section (2) of section 3, whoever—

(a) being in possession of confidential information however obtained;

(i) divulges it . . . ."

The question now arises as to whether the appellant falls within s.3(2)(b). If so, then there would be no breach of the Law.

Section 2 defines "confidential information," "principal," and "professional person" as follows:

" 'confidential information' includes information concerning

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any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge;

. . . .

'principal' means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature;

'professional person' includes a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the above descriptions and whether or not licensed or authorized to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities . . . ."

The learned Chief Justice said:

"There can be no doubt that Clarkson, as receiver and manager, never became the principal in relation to the confidential information for the purposes of the Confidential Relationships (Preservation) Law. The receiver and

manager is not the agent of the company. The receiver and manager does not merge its identity with that of the company. The case law cited points clearly to the receiver and manager being a principal in his own right in relation to the control of the assets of the company and managing its business affairs . . . .

The company, Kilderkin (and the fourth defendants in relation to their affairs) remained the principal for the purposes of the Confidential Relationships (Preservation) Law and continue to be the principal in relation to the confidential information relating to the company—in particular all the confidential information in relation to which the company was the principal before the receiver and manager was appointed."

It may be that the company Kilderkin is a principal for the purposes of the Confidential Relationships (Preservation) Law. But someone has to act on behalf of the company. Surely if the sole director of the company is in control and management it could be said that he had breached the law if he had divulged confidential information. If, therefore, as I hold, the receiver and manager had displaced the sole director and is in the control and manage-

ment of the company then can it be said that he has breached the law if he divulged confidential information? In effect the appellant would be acting as a principal under the law and could not be in breach of the Confidential Relationships (Preservation) Law.

In my view it would be in the interest of Kilderkin for the appellant to continue to be recognised in the Cayman Islands as manager and receiver for Kilderkin.

For the reasons stated I would allow the appeal and vacate the order of the Chief Justice made on July 20th, 1983. I would in the circumstances restore the order of the Chief Justice made on April 18th, 1983. The appellant is to have the costs of the appeal and the costs of the application below.

CARBERRY, J.A.: I have had the opportunity of reading the judgments of Zacca, P. and Carey, J.A. herein, and I agree with the conclusions to which they have come, and the reasons that have led them to those conclusions. In doing so I have borne in mind, as 1 am sure that they have also, the views expressed by Lord Diplock in his speech in *Hadmor Prods. Ltd.* v. *Hamilton* (6) as to the relatively limited function of a court of appeal asked to review the exercise of discretion by a trial judge as to whether or not to grant an interlocutory injunction. We are not to proceed as if we were exercising an independent discretion of our own, and must not interfere merely on the ground that we would have exercised that discretion differently. Our function is one of review only: we may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law, or the evidence before him, or possibly on the ground of a change of circumstances since the order was granted. I think that the two judgments of Zacca, P. and Carey, J.A. have demonstrated that at least the first-mentioned grounds for intervention exist. In as much as the appellants have now themselves initiated an independent action against their adversaries it may be that the third ground for intervention also exists, but that has not been actively canvassed before us.

This was a complicated case, and a complicated situation, and

reading the two judgments of my brothers carefully, and more than once, I will try to avoid any unnecessary repetition of either the arguments they have discussed, or the conclusions to which they have come. It may however be useful to attempt to set out the general situation out of which litigation has arisen, without of

course attempting to reach any conclusion as to its merits, which fortunately is not before us.

It appears that the starting point of the litigation was the series of dealings that took place with regard to some 26 large blocks of apartment buildings in Toronto. These were owned by the Cadillac Fairview Corporation Ltd. and were sold to the Greymac Corporation for some CAN$270m. Leaving out the details of the intermediate dealings, a series of resales and other dealings, it appears that the ultimate resale price to the fourth defendants was somewhere in the region of CAN$500m. It appears that the basic foundation for this speculation lay in the hope and intention of the ultimate purchasers to increase very substantially the rentals that would be paid by the actual apartment dwellers for the privilege of living therein. This despite the Rent Control Acts of Toronto. Along the way, it is alleged that the three plaintiffs, trust companies deriving their assets from the investments of possibly thousands of small investors (and larger ones), were persuaded to use their assets to finance these dealings. It seems to be alleged that the trust companies may find their investments illusory, and that the only substantial beneficiaries (if there prove to be any such), are the defendants in the present proceedings. As to these we have been principally concerned with the second and third defendants, Kilderkin Investments Ltd. and Mr. William Player.

The transactions mentioned seem to have caused the greatest concern in Toronto, the city, and Ontario, the province, in which all of the parties concerned (save the first-named defendant, a Cayman registered company) have their roots, and in which they are incorporated.

Receiver-managers have been appointed to run the three trust companies, the plaintiffs, and to attempt to see what can be salvaged. As to the second defendant Kilderkin Investments Ltd. the Clarkson Company Ltd. was appointed receiver-manager, at the instance of the plaintiffs in the first place but having been appointed by the Supreme Court of Ontario on February 15th, 1983; they are so to speak officers of the court, beholden to no-one, but under a duty to that court, to supervise, manage and take control of the property of the second defendant in the interest of that company. It has facing it claims from the trust companies, from its own creditors, and also from its own shareholders, or as we understood it, shareholder, for the third-

named defendant Mr. William Player was Kilderkin's sole director and the person principally interested in its funds.

This highly complicated piece of litigation extended itself to the Cayman Islands because it is alleged that Kilderkin Investments

Ltd. has deposited in the banks of these Islands a substantial sum of money said to amount to over $100m., and this money, alleged to be derived from what is called the "Cadillac" transaction, and possibly other legitimate dealings by that company, represents what the plaintiffs see as their only hope of salvaging something for their investors. It should of course be pointed out that Mr. Player defends or will defend all of the transactions as legitimate exercises in the business world. He denies both personally and on behalf of Kilderkin Investments Ltd. the charges of conspiracy, deceit, *etc.* that have been levelled against these dealings. As I understood it, he suggests that all would have been well but for the extension of Rent Control Laws of Toronto or Ontario to the actual apartments.

The struggles which have taken place in that part of the litigation which has come before us relate to the efforts of the plaintiffs (the trust companies) to secure that the "Cadillac funds" now said to be in the hands of Kilderkin Investments stay "frozen" and available within the Cayman Islands to await the outcome of the litigation, whether it takes place in Canada or these Islands. More particularly the present appeal involves the efforts of the Clarkson Company, the receiver-managers of Kilderkin Investments Ltd., to secure not only the "Cadillac funds" but any other funds which that company may be entitled to and which are presently within the jurisdiction. The Clarkson Company Ltd. have also been concerned to establish, as part of their duty, their own control of the litigation that has been brought against Kilderkin Investments Ltd. They wish to appear for it and to defend and be involved in that litigation and they contend that Kilderkin Investments Ltd. may have claims of its own against its director Mr. Player, which they wish to pursue, and so they may wish to join him as a third party, responsible to indemnify them against claims made by the plaintiff trust companies.

Mr. Player, while through his counsel eschewing any allegations against the integrity of the Clarkson Company, has contended that as the sole director of Kilderkin Investments Ltd. (and the person principally interested in its funds), whatever may have happened in Ontario he is, in the Cayman Islands, the

person entitled to conduct its litigation and to defend its assets. He suggests that as the receiver-manager originally appointed by the Supreme Court of Ontario on the application of the plaintiffs, the Clarkson Company is so to speak likely to be prejudiced against his claims and less likely to defend Kilderkin with the same vigour that he would.

One other background factor that may be mentioned in this brief note is that the Cayman Islands have with skill and management created an offshore banking industry; they are anxious to secure foreign investment and as part of their services to such investors passed a law, the Confidential Relationships (Preservation) Law, amended by the Confidential Relationships (Preservation) (Amendment) Law, 1979, the object of which is to preserve the confidence of those who invest in Cayman banks by punishing unauthorised disclosures of their investors' affairs.

After the preliminaries begun in the jurisdiction of the Ontario Supreme Court with the appointment of Clarksons as receiver-manager to Kilderkin (and prior to that with the appointment of receiver-managers to the trust companies, who initiated the main Canadian litigation), the scene of the litigation shifted to the Cay-

man Islands, where the Kilderkin moneys now lie.

The plaintiffs on April 16th, 1983 obtained an order from the Chief Justice which in effect appointed a Caymanian citizen, Mr. C D . Johnson, receiver of the "Cadillac assets" and gave an interlocutory injunction against the first, second and fourth defendants transferring any assets out of the jurisdiction, or dealing with them save to transfer them to Mr. Johnson, and requiring all the defendants to refrain from parting with the relevant documents relating to the transactions referred to earlier.

On April 18th, 1983, Clarksons obtained from the Chief Justice, an *ex parte* order that recognised them as receiver and manager of Kilderkin, and gave them authority to identify and locate *all* assets belonging legally or beneficially to Kilderkin within the jurisdiction of the court.

Clarksons acted in pursuance of this order, and in course of their duty to report back to the Ontario court, reported to that court the result of their investigations. It appears that such reports are from time to time the subject of mention in open court on the occasion of applications by receiver-managers for further directions from the Ontario court. That happened in this case, and in view of the public interest which already existed for the

reasons mentioned earlier, their interim report received wide publicity in the ordinary press in Toronto. Though apparently aware of the Cayman Islands Confidential Relationships (Preservation) Law it had not occurred to Clarksons that they could or should have got permission under that law from the court in Cayman to report to the Ontario court on their investigations.

In the mean time the litigation in Cayman was proceeding; claims were filed and appearances and defences were due to be put in. Mr. Player for his part moved before the Chief Justice for the *ex parte* order given to Clarksons on April 18th, 1983 to be set aside. It was set aside on July 20th, 1983 by the Chief Justice for the reasons set out in his written judgment of October 12th, 1983. The new order of July 20th, 1983 purported to revoke the order of "April 18th, 1983, appointing the Clarkson Company Ltd. as the interim receiver and manager of Kilderkin Investments Ltd. within the jurisdiction of this court" and it went on to remove from the record as attorneys for Kilderkin the attorneys appointed by Clarksons, and to substitute therefor the attorneys appointed by Mr. Player.

It may be said that three reasons seem to have induced the learned Chief Justice to reverse the previous order of April 18th, 1983: (a) his view of the authority vested in Clarksons by the various orders made by the Supreme Court of Ontario from time to time—he held that those orders did not give them any authority to defend the litigation now coming to a head in Cayman between the trust companies and the defendants; (b) he held that the procedure adopted by Clarksons in seeking their order in the suit already begun by the trust companies was wrong—they should have initiated a separate and independent application; and (c) disturbed by the publicity given to their interim report to the Ontario Supreme Court in the newspapers in Toronto, he decided that Clarksons had broken the Confidential Relationships (Preservation) Law and in effect that in the absence of explanation or apology were not entitled to enjoy the powers previously given to them.

For the reasons given by both Zacca, P. and Carey, J.A. I am

of the view that the learned Chief Justice was wrong on all three reasons. And apropos of the advice given by Lord Diplock, and referred to earlier above, it should be noted that this appeal from the decision of July 20th, 1983, treating it as a refusal of something in the nature of an interlocutory injunction, followed on an

earlier *ex parte* grant.

As to (a) it appears to me that the learned Chief Justice misapprehended the effect of the orders made in the Ontario Supreme Court (the court of the country in which Kilderkin was incorporated) in two respects: (i) those orders suspended completely the management powers and authority of Mr. Player as director of Kilderkin; (ii) they vested the powers he previously enjoyed in the Clarkson Company, the receiver-managers appointed by the court, and whether expressly mentioned or not (and in my view they were sufficiently mentioned) those orders gave Clarksons the right and duty to defend the Kilderkin company in any action taken against it by the trust companies or otherwise. With great respect, I think that the position set out in 2 Dicey & Morris, *The Conflict of Laws*, 10th ed., at 730 and 741 (1980) in rr. 139 and 143 is correct. As they have not been otherwise cited I set out the rules here:

> "**Rule 139.**—(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.
>
> (2) All matters concerning the constitution of a corporation are *governed by the law of the place of incorporation.'* [Emphasis supplied.]
>
> " . . . EFFECT OF A FOREIGN WINDING UP ORDER
>
> **Rule 143.**—The authority of a liquidator appointed under the law of the place of incorporation is recognised in England."

For "liquidator" I would substitute "receiver-manager."

Counsel for the respondent, Mr. Player, pressed on us the case of *Newhart Devs. Ltd.* v. *Co-operative Comm. Bank Ltd.* (9). In that case developers had enlisted the aid of a bank to provide financial backing under a debenture that granted the bank the power to send in a receiver. The bank did so. This had the effect of suspending the powers of the directors. However, they wished to sue the bank for breach of contract and did so. The bank moved to strike out their claim on the ground that the directors no longer had the power to do anything like bring an action on behalf of the company, seeing that a receiver had been appointed. The bank failed. The court held that the directors could bring such an action; provided it did not touch the assets of the company it could if successful only go to swell those assets.

The case did not deal with the status of a *receiver appointed by the court*, owing a duty to the court, not to a mere creditor. Further, if by chance a director were to find that a receiver appointed by the court was to be put in a similar position of conflict as in the

Newhart case, I would think his proper course would be to apply to the court, in much the same way as a cestui que trust would in the case of a trustee wasting the assets. This would not involve the survival of any powers in the director as such, but merely his right as an interested person to complain of the conduct of an officer appointed by the court.

For the rest I adopt without reiterating the conclusions arrived at by Zacca, P. and Carey, J.A. as to the law relating to the recognition of a foreign receiver-manager appointed by the court of the country in which the subject corporation is incorporated.

As to (b), the procedural point: here again I would express agreement with the conclusions reached by Zacca, P. and Carey, J.A. and agree that the learned Chief Justice misapplied the effect of the English Supreme Court Act 1981, s.37, and also the effect of the English Rules of the Supreme Court, O.30, r.1relating to such applications for interlocutory orders, both of which are incorporated into Cayman law, the former by virtue of s.13 of the Grand Court Law, and the latter by s.20 of the same Law.

As to (c) the question of whether or not a breach took place of the Confidential Relationships (Preservation) Law, I agree for the reasons expressed by Zacca, P. and Carey, J.A. that in fact no breach of that Law took place. It is proper and understandable that those who administer the laws of Cayman should be anxious to see that those laws are given the respect which is their due, and judging by hindsight it would have been better for all concerned if Clarksons, who by virtue of their recognition in that jurisdiction had become officers of the Cayman court also, had made an application under s.3A of that Law to the Grand Court for directions, but they did owe a duty to the Supreme Court of Ontario by whom they were originally appointed, and I suppose that the investigative capacity of the members of the Press in the Western world is something which from time to time appears both unpredictable and startling.

Overall, it sometimes happens that first impressions prove better than second thoughts, and with respect, this seems to have happened here. It would I think seem a little odd that a director who had been relieved of his corporate powers in the country in

which the company was incorporated, should nevertheless be held to be still in control of the company in the friendly foreign country in which it seems the litigation arising out of his and the company's transactions is destined to be fought out.

I would close by thanking the several counsel and attorneys involved for the great assistance provided to us by their arguments, and by the careful preparation of the documents, and the photocopies of the authorities and cases which they wished to place before us. They did much to lighten a difficult task.

CAREY, J.A.: A remarkable feature of this appeal is that the Caymanian connection is altogether tenuous; only one of the several companies involved is incorporated in the Cayman Islands and even so, its solitary Caymanian shareholder owns a mere 2% of the issued share capital. Be that as it may, the matters arising on this interlocutory appeal concern firstly, a procedural point and secondly, the construction of the Confidential Relationships (Preservation) Law, as amended by the Confidential Relationships (Preservation) (Amendment) Law, 1979. The resolution of these questions will determine which of the two parties, the pro-

tagonists in this appeal, *viz.*, William Player, the sole director of Kilderkin Investments Ltd. or the Clarkson Company, appointed by the Ontario Supreme Court as receiver and manager of the company will have the right to act on behalf of the company in defending the suit (Cause 132) filed in this jurisdiction against that company and other defendants.

Both points arise from an order of the Chief Justice dated July 20th, 1983, discharging his earlier *ex parte* order made on April 18th, 1983. This latter order (the first in point of time) was in the following terms:

"Upon hearing counsel *ex parte* for the Clarkson Company Ltd., interim receiver and manager of Kilderkin Investments Ltd. pursuant to an order of the Supreme Court of Ontario dated the 15th day of February, 1983, and upon reading the affidavit of James Alexander Cringan sworn the 13th day of April, 1983, and exhibits thereto, and the affidavit of John L. Biddell sworn the 14th day of April, 1983, and exhibits thereto and the affidavit of John A.M. Judge sworn the 18th day of April, 1983 and the exhibits thereto, it is hereby ordered that:

1. The Clarkson Company Ltd. as interim receiver and

manager of Kilderkin Investments Ltd. (hereinafter referred to as 'Kilderkin') pursuant to the orders of the Supreme Court of Ontario dated the 15th and 28th days of February, the 29th day of March and the 13th day of April, 1983, is hereby authorised to act on behalf of Kilderkin within the jurisdiction of this court.

2. The Clarkson Company Ltd. is authorised and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any asset of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this court, notwithstanding the order of this court dated the 16th day of April, 1983.

3. The Clarkson Company Ltd. may apply to this court for further directions from time to time as the interim receiver and manager of Kilderkin in relation to any matters arising from paras. 2 and 3 hereof upon proper notice to such of the parties as may be ordered by the court."

The learned Chief Justice in discharging this *ex parte* order, and thereby removing the appellants as interim receiver and manager of Kilderkin Investments Ltd., made the following order as well:

"3. Further that pursuant to r.59(3) of the Rules of Court, Messrs. W.S. Walker & Co. be removed from the record as attorneys for the second defendant herein, and that Messrs. C.S. Gill & Co. may be placed on the record in their place."

In a considered judgment, the learned Chief Justice rested his decision on two bases: First, the interlocutory application made by the appellants for recognition as receiver and manager of Kilderkin Investments Ltd. was made by a wholly inappropriate procedure; secondly, the conduct of the appellants in breaching provisions of the Confidential Relationships (Preservation) Law disentitled them to hold the position of interim receiver and manager within this jurisdiction.

Before I make my own observations on the questions which

arise for consideration, I desire to pay tribute to the lucidity of the submissions of counsel who appeared before us and, for my part, I wish to express my appreciation for their helpfulness and refreshing candour.

It now becomes necessary to examine the reasons of the Chief

Justice stated in his judgment in order to deal with the grounds of appeal which challenged both bases of his decision. The *ex parte* order originally made by him did not appoint the appellants receiver and manager of Kilderkin Investments Ltd.; it was an order *recognising* them as such. This is plain from the nature and terms of the order which he made:

> "The Clarkson Company Ltd. as interim receiver and manager of Kilderkin Investments Ltd. . . . *pursuant to the orders of the Supreme Court of Ontario* dated the 15th and 28th days of February, the 29th day of March and the 13th day of April, 1983 *is hereby authorised to act on behalf of Kilderkin within the jurisdiction* of this court" [Emphasis supplied.]

The appellants having been previously appointed as receiver and manager by the Ontario court now received the "imprimatur" of the competent court within this jurisdiction, *i.e.* the Grand Court. The basis of the jurisdiction then being exercised, is, it is accepted, derivative. Section 13(1) of the Grand Court Law provides as follows:

> (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Islands, *the like jurisdiction within* the Islands which is vested in or capable of being exercised in England by—
> (a) Her Majesty's High Court of Justice; and
> (b) the Divisional Courts of that Court,
> as constituted by the *Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that act."* [Emphasis supplied.]

Section 20(2) of the same Act is also relevant. It recites:

> "(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

For completion, it should be noted that since no Rules of Court exist in the Grand Court in relation to the appointment or recog-

nition of a receiver and manager, it is the appropriate Rules of the Supreme Court in England, if such there are, to which reference must be made. There are, however, no specific Rules of the Supreme Court in England either, dealing with the recognition of

a foreign-appointed receiver and manager, and in his observation to that effect, Mr. Patten for the respondent was undoubtedly correct. But that the High Court in England exercises an undoubted jurisdiction to recognise a foreign-appointed receiver and manager, is no less true and he was not so bold as to suggest otherwise. He was careful to say no more than that the submissions of Mr. Sumption were mainly concerned with the appointment of a receiver and manager by the High Court in England.

I do not put forward any heretical view if I venture to suggest that the Grand Court, as does the High Court in England, has an inherent power to recognise foreign-appointed receivers and managers over assets within the jurisdiction based on well-recognised conflict of laws principles. Illustrative of the exercise of this jurisdiction, is *Schemmer* v. *Property Resources Ltd.* (10) where one of the points raised before Goulding, J. was that the plaintiff, a foreign-appointed receiver had no *locus standi.* The plaintiff had been appointed a receiver by a district court judge in the United States of America and had issued a writ in England seeking to have himself appointed receiver and manager of the assets of a company and its subsidiaries in England. The learned judge in a considered judgment held ([1975] Ch. at 287), rightly as I think, that before the English courts would recognise the title of a foreign- receiver to assets located in the United Kingdom or direct the setting up of an auxiliary receivership, the court had to "be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed . . . ."

There can be little doubt that Kilderkin Investments Ltd. has a real connection with the jurisdiction in which the Clarkson Company was appointed. Kilderkin Investments Ltd. is a limited company incorporated under the Laws of Ontario, while the Clarkson Company, the receiver and manager, has been appointed by the Ontario Supreme Court. Goulding, J., in *Schemmer* v. *Property Resources Ltd.* ([1975] Ch. at 287–288) suggested four tests to determine whether that connection existed or not:

1. Has the company in respect of whose assets the receiver and manager has been appointed, been made a defendant in the

action in the foreign court? The answer to this is "Yes." Kilderkin Investments is a defendant in the suit.

2. Has the company in respect of whose assets the receiver and manager has been appointed, been incorporated in the country which appointed the receiver and manager? Again the answer is "Yes."

3. Would the courts of the country of incorporation recognise a foreign appointed receiver? Answer—the Ontario Supreme Court would recognise the appointment of a receiver of a foreign jurisdiction. See *Re C.A. Kennedy Co. Ltd. and Stibbe-Monk Ltd.* (7).

4. Has the company carried on business in Canada or is the seat of its central management and control been located there? Answer—"Yes." Kilderkin Investments carries on business in Ontario, Canada. It is as a result of their business operations in Canada that an action has been launched against them by the plaintiffs.

The result of this excursus is that the Grand Court has an undoubted power to make orders recognising a foreign-appointed receiver and manager and accordingly had the power to recognise

these appellants.

The Chief Justice in discharging his *ex parte* order was of the view, not that he did not have a jurisdiction to recognise a foreign-appointed receiver and manager but that the procedure adopted by the appellants, *viz.*, an application *ex parte* in the suit then pending before his court, was inappropriate. Perhaps it would be helpful if the *ipsissima verba* of the Chief Justice on this aspect were recited:

> "The original application was not an application for the appointment of a receiver as contemplated by that provision. It was an application by the receiver and manager appointed by the Ontario court for the recognition of that receiver and manager and for authority for that receiver and manager to perform certain functions within this jurisdiction. Furthermore, O.30, r.1provides machinery for a plaintiff to have a receiver appointed to take possession of and preserve the assets of a defendant for the purpose of satisfying a judgment in the plaintiff's favour. That is not what the original application was about. It was an application by a receiver and manager of a defendant in relation to the assets and operations of that defendant. Clarkson was already the

> receiver and manager of Kilderkin. Order 30, r.1is not designed to give to such a receiver and manager authority over that company for the purpose of the suit (Cause 132)."

I understood the learned judge to be saying as well that the procedure was inappropriate because the Ontario Supreme Court did not by any order authorise the Clarkson Company to enter an appearance on behalf of Kilderkin Investments and defend any proceedings brought against that company. The purpose of the application made by the Clarkson Company was to locate assets of Kilderkin for the benefit of and at the instance of the plaintiff in the Ontario action. The terms of the order were far wider than was necessary for the purpose of the suit.

The *ex parte* order of the Chief Justice was made pursuant to several orders of the Ontario Supreme Court, the entirety of which it would be really unnecessary to rehearse, but I propose to set out the salient segments of the relevant orders, the better to appreciate the reasoning of the Chief Justice. The first order appointing the Clarkson Company receiver and manager was dated February 15th, 1983, and provided:

> " 1. It is ordered that, until the trial of this action or until further order of this court, the Clarkson Company Ltd. be and is hereby appointed interim receiver and manager of all the undertaking, business, affairs, assets and property of the defendant Kilderkin Investments Ltd. (collectively referred to hereinafter as the 'undertaking and assets'), with power to manage the undertaking and assets and to carry on the business of the defendant Kilderkin Investments Ltd.
>
> 2. And it is further ordered that the defendant Kilderkin Investments Ltd., its directors, officers, employees and agents and all other parties having notice of this order deliver up to the interim receiver and manager or to such agent or agents as it may appoint, the undertaking and assets of the defendant Kilderkin Investments Ltd. and all books, accounts, securities, documents, papers, deeds, leases and records of every nature and kind whatsoever relating thereto."

"13. And it is further ordered that the interim receiver and manager may from time to time apply to this court for direction and guidance or additional powers in respect of the discharge of its duties as interim receiver and manager."

The second was dated February 28th, 1983:

"7. And it is further ordered that the interim receiver be and it is hereby authorised and directed to identify the assets of Kilderkin, and their location, to identify all persons having an interest in Kilderkin and its assets and entitled to receive notice of any proceedings affecting it."

The third was dated April 13th, 1983:

"1. It is ordered that the interim receiver and manager be and it is hereby authorised to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction, or for such other remedy as counsel for the interim receiver and manager may advise."

My first concern is to consider what these orders empowered the Clarkson Company to do as respects Kilderkin Investments. It is, I think, well-established that the scope and nature of the functions of a receiver and manager is governed by the law of the place of incorporation, in this case, Ontario law. The Chief Justice so stated and in that view, both Mr. Sumption and Mr. Patten are agreed. There were two affidavits of law, one each on behalf of the respective parties in this appeal. The learned judge dealt with these offerings in this way:

"While there is very little difference of opinion between them in the sphere covered by both, one goes very much further than the other in setting out the scope of a receiver and manager's powers. As each, presumably, purports to be exhaustive in setting out the opinion of the respective deponent as to the extent of the powers of a receiver and manager under the law of Ontario this difference in the bounds amounts to a discrepancy or conflict of fact. I cannot choose between the two on affidavit evidence only. I could only accept the common ground in the opinions put forward by two deponents. Further assistance was to be found in *Del Zotto* v. *International Chemalloy Corp.* (1976), 14 O.R. (2d) 72."

Seeing that the judge said he was unable to choose between the two this court is entitled to consider this question of fact and make up its own mind as to the true view it should form. Mr. Lederman's affidavit which was filed on behalf of the appellants was full and, if I may say so, appears the more helpful. The two most important pieces of information he vouchsafed are to be found in paras. 5 and 6 of his affidavit:

"5. It is a general rule of receivership law in Ontario that a receiver and manager of a corporation appointed by the court is an officer of the court and not an agent of the corporation. Upon appointment, the receiver and manager

takes possession of the corporation's property which is the subject of the appointment. He also takes control of the conduct of the business of the corporation, exercising the powers of the company as an officer of the court and as principal. The receiver and manager acts for the benefit of all parties in accordance with the directions of the court: *Del Zotto* v. *International Chemalloy Corp.* (1976), 14 O.R. (2d) at 74–75; *Kerr on Receivers*, 15th ed., at 145, 165 and 232 (1978).

6. While the corporation against whom an order is made appointing a receiver and manager is not dissolved, the receiver-manager displaces the board of directors in exercising control over the assets and affairs of the corporation. The officers and directors of the corporation may not interfere with the property over which the receiver has been appointed without first obtaining leave of the court. Any party who interferes with the possession of the receiver without first obtaining leave may be in contempt of court: *Del Zotto* v. *International Chemalloy Corp. (supra)* at 73, 74, 76, 77; *Federal Business Dev. Bank* v. *Shearwater Marine Ltd.* (1979), 102 D.L.R. (3d) 257."

The other affidavit of law was that of Donald J. Brown. I give an extract below of the three important paragraphs of this affidavit, *viz.*, paras. 7,8,9:

"7. The general rule in Ontario is that the company against whom a receiving order has been made pursuant to s.19 has the status to commence proceedings and has an independent status: *Del Zotto* v. *International Chemalloy Corp.* (1976), 14 O.R. (2d) 72; *Clarkson Co. Ltd.* v. *Canadian Acceptance Corp. Ltd.* (1977), 24 C.B.R. (N.S.) 197.

8. In fact, Kilderkin Investments Ltd. has commenced proceedings in the Province of Ontario in connection with a libel and slander action. These proceedings were expressly authorised by the Honourable Mr. Justice Galligan as appears by the true copy of his order annexed hereto and marked as Exhibit DJB 1.

9. As can be seen from the letter dated June 20th, 1983

annexed hereto and marked as Exhibit DJB 2, Ontario counsel for the Clarkson Company Ltd. expressly recognise that there is a separate existence or residuary power in the company notwithstanding the appointment of the receiver."

It is of interest that both learned and distinguished members of the Ontario Bar referred to and relied on *Del Zotto* v. *International Chemalloy Corp.* (4), a decision of the Ontario Supreme Court, *per* Van Camp. J. And this court is entitled to look at this case and consider it to confirm or reject the validity of the opinions proffered. Mr. Brown suggested that a company in respect of which a receiver and manager is appointed has the power to commence proceedings if leave of the court is obtained. I am not at all certain what the deponent means when he says that "the company . . . has an independent status." Doubtless this opinion should be understood as meaning no more than that the original directors have some residual powers, even when the company is in receivership. Mr. Lederman made the point quite clearly that the receiver and manager when appointed becomes an officer of the court and not an agent of the company. He takes the place of the board of directors and exercises control as an offi-

cer of the court and as principal. The directors who have been superseded are, nonetheless, entitled to bring an action or defend proceedings with respect to the corporation only where leave of the court has first been obtained. Understood in this light, I for one do not see any divergence of view. Where Mr. Lederman was explicit, Mr. Brown was less than direct, but what was implied is, I think, plain. Paragraph 8 of his affidavit, I suggest, purports to explain para. 7 which otherwise would convey the impression that the directors of the company in respect of which a receiver has been appointed could act at their own discretion in initiating proceedings. But para. 8 derogates from that expansive view and indicates quite plainly that such a director requires the leave of the court. This must mean therefore that since the company does not cease to exist, its management is in the hands not of the directors but of the receiver and manager who on appointment by the court, assumes responsibility for the company's assets and undertakings.

I can now turn to *Del Zotto* v. *International Chemalloy Corp.*, in which two questions arose for consideration by the learned judge, Van Camp, J., but only one of these is material for our purposes, namely, whether a company in respect of which a

receiver and manager is appointed, is able to prosecute a counterclaim, "which requires corporate funds. In other words, can the directors interfere with the company's assets, control of which the receiver and manager has been given? The learned judge came to the conclusion that in pursuing a claim in damages, the company would be interfering with the possession of the assets which would constitute a contempt of court. In those circumstances, leave would be required. As to the status of a corporation after appointment of a receiver and manager, Van Camp, J. relied strongly on *Moss S.S. Co. Ltd.* v. *Whinney* (8) the *locus classicus* on this point. It seems to me to follow ineluctably that the legal position with respect to a receiver and manager is the same in Canada as it is in England and by derivation in the Cayman Islands. The result of all this, in my view, is that there does not appear to be any divergence of view between the two affidavits of law put forward by each of the parties to this appeal. The one was explicit, the other impliedly made the same point. It is essential to understand this, as the status of Mr. Player, the director, who has been superseded by the appointment is plainly at issue. Has he a *locus standi* to apply to the Grand Court to remove the receiver and manager without first obtaining leave of the Ontario court? This question must in my view underlie any proper consideration of the issues involved in this appeal.

Seeing then that the law of England in regard to receivers and as a consequence, the law of Cayman and the law of Canada, more particularly the law of the province of Ontario, are similar, it is right to set out that law. In *Moss S.S. Co. Ltd.* v. *Whinney*, Lord Atkinson provided the most definitive formulation as to the effect of the appointment of a receiver and manager in these words ([1912] A.C. at 263):

> "This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all

power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

To the like effect was the Earl of Halsbury who stated (*ibid.*, at 260) that the effect of the appointment was that it—

" . . . removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets."

These authoritative statements which, so far as I know, have never been doubted, make it abundantly clear that the powers of the directors of a company are suspended during the tenure in office of the receiver and manager. The receiver is an officer of the court in the performance of his functions and has for that purpose all the powers of the company. He is not an agent of the company but a principal and as such is personally liable on contracts made by them. This aspect of the legal position of receivers and managers is exemplified in *Burt, Boulton & Hayward* v. *Bull* (1) in which Lopes, L.J. observed ([1895] 1 Q.B. at 282):

"But the company after their appointment had no control over the business: it could give no orders and make no contracts. The [receivers and managers] could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court."

And Rigby, L.J., as to personal liability, said (*ibid.*, at 285):

"The rule has always been that such persons are prima facie themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees."

In so far as this case is concerned, the Clarkson Company Ltd. were specifically given the control and management of all the assets and undertaking of Kilderkin Investments Ltd. and notice was given to the directors to deliver up the assets of the company to the appellants. It appears to me that the Clarkson Company Ltd. had completely ousted the director William Player. In so far as the control and management of the company was concerned, William Player, in my view, had no *locus standi.* When the Ontario Supreme Court by its order of February 28th, 1983, directed (see para. 7) the Clarkson Company Ltd. to identify and locate the assets of Kilderkin, it was not enlarging the powers of the receiver and manager; it was giving specific authorisation as opposed to the comprehensive powers conferred upon the

appointment of the Clarkson Company Ltd. as a receiver and manager. This specific authority could not be exercised by William Player, the sole director of Kilderkin. Further, by parity of reasoning, when by its order dated April 13th, 1983, the Ontario

Supreme Court, gave the appellants authority "to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd." it effectively and expressly confirmed removal of such a power from the hands of its sole director, William Player.

The reason for subsequent applications seeking, for example, authority to institute or defend proceedings is not far to seek. The receiver and manager who institutes or defends proceedings without the prior approval of the court, runs the risk of having his costs disallowed, if subsequently his action is not sanctioned. Seeing that the receiver and manager is personally liable, ordinary prudence would seem to dictate self-preservation by recourse to prior judicial sanction. It is to be noted that in para. 13 of the first order of the Ontario Supreme Court, the appellants were given liberty to apply "for direction and guidance or additional powers in respect of the discharge of its duties as interim receiver and manager." They did take advantage of this provision in order to make applications to the court "for the advice and direction of this court *i.e.* the Ontario Supreme Court," first on February 28th, 1983 when an order was made authorising the receiver and manager to receive and account for rental payments accruing from the undertaking (para. 2) and further, by para. 7, authorising the Clarkson Company Ltd. "to identify the assets of Kilderkin, and their location, to identify all persons having an interest in Kilderkin and its assets . . . . " Secondly, by an order dated March 29th, 1983, authorisation was sought to scale down the organisation of Kilderkin. Thirdly, by the order dated April 13th, 1983, authority was given to the receiver and manager—

> " . . . to commence proceedings in the Cayman Islands to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction or for such other remedy as counsel for the interim receiver and manager may advise."

In my view, there was no necessity in point of law for any application for the powers set out in these subsequent orders. The purpose of the applications was to prevent claims being successfully made against the receiver and manager who, as is well-known, is liable personally for his acts. But they demonstrated another

important factor. Where the receiver and manager was specifically authorised to act, it was notice to William Player that he had no power to act in those respects. He had been dispossessed of those powers which as a director he would undoubtedly have been able to exercise.

I should at this point say something about a point raised by Mr. Patten for the respondent, William Player. It was submitted that the court should never lose sight of the fact that the appellants were appointed at the instance of the plaintiffs who are common to the actions filed in both jurisdictions. Clarkson were fulfilling functions brought into being, he said, at the suit of the plaintiffs.

The law is that once a receiver and manager is appointed by the court, he becomes an officer of the court and is required to act fairly, and not take sides. In the absence of evidence to the contrary, he is presumed to be acting fairly in the interests of the company to preserve the assets for the benefit of all parties. Mr. Patten, as I recall, expressly disclaimed any suggestion that the Clarkson Company Ltd. were acting other than with perfect propriety. He said there was no basis for alleging any conspiracy between the plaintiffs and the receiver and manager. In the light

of that concession, whatever Player might have been entitled to think, and it was mooted that he believed that there had been an element of co-operation between the plaintiffs and the Clarkson Company Ltd., plainly, the point really is without substance.

I can therefore return to matters of substance. Were Clarkson entitled to make the particular application which was in fact made and granted? Was there the necessity for an *ex parte* application? The question which is prompted by this mode of application must then be: In what circumstances is it appropriate to apply *ex parte* for the recognition of the appointment of a receiver and a manager? And then to go on to consider whether those circumstances obtained in the present case. It was Mr. Patten's submission that the circumstances did not warrant such an application.

Earlier in this judgment, I concluded that the Grand Court had an inherent jurisdiction to recognise a foreign-appointed receiver and manager. It is as well to observe that there are no specific rules either for making such an application. But as I can see no juridical difference between a power to appoint a receiver and the power to recognise a receiver and manager, I can see no serious objection to a resort to the procedure for the appointment of

receivers within the jurisdiction. By s.37(1) of the English Supreme Court Act 1981—

> "the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

The procedure for such appointment is to be found in O.30, r.1of the English Rules of the Supreme Court. As long ago as *Gawthorpe* v. *Gawthorpe* (5) Jessel, M.R. wisely observed that there was no limit to the power of the court except that it appears just and convenient. In so far as *ex parte* applications go, it is trite that such applications are made only in urgent cases. The circumstances which, it was urged, warranted an urgent application was the need for prompt recognition of the appointment of Clarkson Company Ltd. by the court below. The claim made against Kilderkin Investments Ltd. was singularly large, in excess of CAN$109m. and this obliged the receiver and manager in preserving the company's assets, first, to prevent any defence open to the company from going by default and secondly, to take prompt action in the light of the mandatory orders against the company, which required timely compliance.

The response made to these submissions by Mr. Patten was that there was a coincidence of interests as between the company and its sole director and shareholder, Player, who all along intended to protect the company's interest. As to the mandatory orders made, there could be no cause for concern since the Clerk of the Grand Court under powers in the Grand Court Act, would have signed the orders as had occurred in the case of the fourth defendants.

I must confess that I remain wholly unconvinced by these arguments of learned counsel for the respondent, attractive though they appear to be. In the first place, even if there is a coincidence of interest, the receiver and manager is obliged by the nature of his responsibility to act at his discretion for it is on him the mantle of management of the company has fallen. But this coincidence of interest has certainly not been demonstrated in any shape or

form. Indeed, far from that being the case, we were advised that the company has launched its own action against the sole director, William Player (being Cause 183). As respects timely compliance with the mandatory orders in favour of the plaintiffs and against all the defendants, the receiver and manager, who has the

control and management of the company in carrying out his functions, has the responsibility of seeing that so far as the orders touch and concern the company, no contempt of court was committed. I think this was a positive duty and part of what Mr. Sumption categorised as managerial functions of a director. In endeavouring to see whether the *ex parte* application was justified, it is the circumstances at the time of the application that should be looked at and these have been indicated earlier. For with the benefit of hindsight, it might well be thought that there was scarcely any need for precipitate action. In my view, having regard to those circumstances, the appellants were entitled to make an application *ex parte.*

One of the arguments mounted in support of the Chief Justice's order discharging the *ex parte* order, was that the appellants, as defendants in an action were not entitled to make the application largely because the Ontario Supreme Court orders did not authorise the appellants to defend any action but "to commence proceedings . . . to preserve and recover any assets of Kilderkin Investments Ltd. situated in that jurisdiction . . . ." The learned Chief Justice was clearly of opinion that "Clarkson, as manager and receiver, had no authority under the orders of the Supreme Court of Ontario to defend on behalf of Kilderkin in Cause 132."

In my view the phrase "commence proceedings" is not a term of art. It is plain English and means, in my view, no more than to begin a step in legal proceedings. To ascribe any other meaning would lead to a clear absurdity, for it would mean that while the Clarkson Company Ltd. would be acting perfectly legitimately in filing an action on behalf of the company to preserve or recover the company's assets, they would, on the other hand, be acting illegitimately if they entered an appearance on behalf of the same company and filed a counterclaim, for example, to preserve or recover the same assets. I would reject a construction which leads to such a patent absurdity. I must therefore record my dissent to the contrary view expressed by the learned Chief Justice. In my respectful view, he was patently in error.

Further, it should be said that there is no question but that such an application can be made either by the plaintiff or a defendant in the action. Where the relief is sought by the defendant, however, there is authority for saying that it must arise out of the relief claimed by the plaintiff or the defendant must counterclaim or issue a writ before he can obtain a receiver: *Carter* v. *Fey* (2).

The learned Chief Justice was plainly in error when he observed : "Furthermore, O.30, r.1provides machinery for a *plaintiff* to have a receiver appointed . . . ." [Emphasis supplied.] Mr. Patten candidly acknowledged that the view here expressed was

erroneous and nothing further need be said about it.

Another of the reasons put forward by the Chief Justice for discharging his order was that the order sought on the *ex parte* application, and in the result granted, was wider than was necessary for the purposes of recognition of a receiver and manager within the jurisdiction. The particular wider order was numbered 2 and recited as follows:

> "2. The Clarkson Company Ltd. is authorised and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any assets of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this court, notwithstanding the order of this court dated the 16th day of April, 1983."

The view of the Chief Justice was "that Clarkson did not need the power [as set out above] for the purposes of Cause 132," and "the resulting order went far beyond what was necessary for the purposes of Cause 132." The action against Kilderkin and the other defendants sought *inter alia*:

> "1. Damages for fraudulent or illegal conspiracy to apply in breach of trust the moneys of the plaintiffs or one or more of them."
>
> "3. An enquiry as to what moneys, investments and securities now represent or, but for the wilful default of the defendants, would represent the said profits and an order that the defendants and each of them pay to the plaintiffs what may be found due upon making such an enquiry."
>
> "5. An order that the defendants and each of them to the extent of any estate or interest respectively vested in them in the said moneys, securities and investments or any of them or any part or parts thereof, and in respect of the said profits, investments and dividends or any of them or any part or parts thereof, pay or transfer the same to the plaintiffs or as they direct."
>
> "7. Insofar as necessary, an enquiry and/or account of all dealings with the said moneys, securities and investments and the said profits, interests and dividends, an order that payment of any sum found due to the plaintiffs and the taking of such enquiry and/or account."

Plainly, all the assets of Kilderkin Investments would be at risk in the event that this action was successfully concluded in the plaintiffs' favour. Moreover, during the hearing of the present appeal, the appellants on behalf of Kilderkin filed an action against William Player to protect the assets and undertaking of Kilderkin. A responsible receiver and manager would enquire where his company's assets are so that they may be protected. It is difficult to conceive how the receiver and manager could properly function in accord with his prime duty, if he was quite unaware where the assets of the company were located. The claims against the company sought to trace funds which the plaintiffs were alleging were theirs, while the company would be asserting its own entitlement to those funds. Indeed, it is right to say that in locating funds of the company, the appellants were doing no more than was essential or prudent for the proper discharge of their duties. They would be acting consistently with their duties and in my view,

need not have sought the order in terms of para. 2 of the application, which have earlier been set out. In these circumstances, I cannot regard the view of the learned Chief Justice that "Clarkson's preservation of the assets of Kilderkin in this jurisdiction in its capacity as receiver and manager of Kilderkin had no relevance to the suit (Cause 132) in this jurisdiction," as correct.

The assets of Kilderkin had to be protected and preserved not only by reason of the plaintiffs' claim but also (and this is a mere allegation) by reason of the illegal activity of William Player, the sole director, and himself a defendant in the action (Cause 132). There was some suggestion that the assets of Kilderkin were no longer at risk by reason of the Mareva injunction obtained by the plaintiffs and further an undertaking in costs. As to the first suggestion, relief sought and obtained by the plaintiffs cannot in my view relieve the receiver and manager of his responsibilities in respect of the company. As to the second, I am content to say that the same reasoning applies. At all events, I cannot see how these considerations have any bearing on whether the procedure adopted was appropriate or not.

But even if, contrary to the conclusion at which I have arrived, the procedure adopted by the appellants was inappropriate and

an original application would have been proper, I would have been prepared to hold nonetheless that the order should not have been discharged for in my judgment no prejudice has resulted to the respondent. He was heard by the Chief Justice and by this court and was afforded every opportunity to represent his cause. There is, moreover, power in the court (see O.2, r.1) to treat non-compliance with the rules as an irregularity and not as nullity. I did not understand the Chief Justice's judgment as deciding that the procedure was a nullity for he did not appear to think that Clarkson were not entitled to be recognised as receiver and manager within the jurisdiction, but that the procedure was not the correct method. In fact he himself identified the non-compliance as a "procedural irregularity." That being so, unless some injustice could be shown and none has been, although the Chief Justice thought that it led to a breach of the *audi alteram partem* rule, the irregularity should not be allowed to affect the matter. I have dealt with the fact of prejudice previously. It is enough to repeat that the circumstances in my view warranted an *ex parte* order and at all events, the other side has now been heard. I think Mr. Sumption was eminently right when he observed that the point of procedure was the purest technicality, which might well suggest that it did not merit as exhaustive a consideration as it in fact received. But the matter is of some interest in this jurisdiction; the careful research and arguments of counsel were deserving of serious consideration and treatment both in their own right and out of deference to the judgment of the Chief Justice.

I pass now to the question of construction mentioned earlier. The learned Chief Justice discharged his *ex parte* order by reason of their conduct in flouting, as he found, the provisions of the Confidential Relationships (Preservation) Law. He found that— "Clarkson has been responsible for the disclosure of confidential information within the meaning of that Law in the report of June 15th, 1983 addressed to the Chief Justice of the Ontario Supreme Court." And that—" . . . no application was made under s.3A. The confidential information was divulged without authority." He concluded that the breach appeared to be deliberate.

We must now examine the relevant provisions of the Act. Section 4(1)(a)(i) creates the offence of divulging confidential information. It states as follows:

"(1) Subject to the provisions of sub-section (2) of section 3, whoever—

(a) being in possession of confidential information however obtained;

(i) divulges it . . . "

is guilty of an offence. This provision, plainly all-embracing in scope, is limited however by s.3(2), as amended, which recites as follows:

"(2) This Law has no application to the seeking, divulging, or obtaining of confidential information—

(a) in compliance with the directions of the Grand Court pursuant to section 3A;

(b) by or to—

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal . . . ."

For completeness, the provisions of s.3A(1) should be recited. These provisions are in the following form:

"(1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted."

The Chief Justice by his findings came to the conclusion that the appellants had acted contrary to s.4(1)(a)(i) of the Law. There was no question but that the appellants had submitted a report dated June 15th, 1983, to the Ontario Supreme Court concerning the affairs of Kilderkin which they had doubtless obtained from banks in these Islands.

Mr. Sumption submitted that in order to invoke the provisions of the Law, two conditions must be satisfied, *viz.*: (i) there must be a communication of information in confidence by a principal to someone else, *i.e.* Clarkson, and (ii) it must be shown that Clarkson divulged that information without the consent of Kilderkin; and these had not been met. Mr. Patten contended that it was an offence to divulge information "however obtained." This would be so even if Clarkson obtained information from a bank notwithstanding that the information was originally given to the bank by Kilderkin and by the bank to Clarkson. So the offence was committed not only by the person to whom the information is commu-

nicated but anybody else who subsequently receives it and divulges it.

Under the Law, the information which it is forbidden to divulge is "confidential information" which is defined by the Law

as including—"information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge . . ."

In the present appeal, it is accepted that the "principal" is Kilderkin Investments. "Principal" means under the Law—"a person who has imparted to another confidential information in the course of the transaction of business of a professional nature. . . ." So that we are concerned with confidential information, which Kilderkin did not authorise to be divulged. Mr. Patten urged that Clarkson in order to obtain the consent of Kilderkin had to ask for it. In my view, this cannot be right. The consent of Kilderkin if no receiver and manager had been appointed would have been given by its director, William Player. But in the circumstances of this case, the managerial functions of Player were in abeyance, and management of the assets and undertaking of the company had been entrusted to the receiver and manager. The Ontario Supreme Court's order make that abundantly clear and in point of law, the managerial functions of Player were ousted. It would be no more than solemn farce for Clarkson to obtain consent from themselves, to divulge information in the normal course of business. "Normal course of business" is defined in the Law as meaning—

> "the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees . . . ."

Clarkson did not therefore require any consent. The information which was disclosed to them and which they divulged to the Ontario court, was received in virtue of their position as replacing the director of the company. Section 3(2)(b)(i) exempts from the operation of the Law the divulging of information by any professional person acting in the normal course of business or with the consent of the principal, express or implied. The combined effect of s.4(1)(a)(i) and s.3(2)(b)(i) is not to forbid absolutely the divulging of confidential information but to prevent a finding of guilt where the communication occurs in the normal course of

business or where the principal consents to the dissemination.

In the result, there is merit in the submission of Mr. Sumption as to the conditions which must be satisfied in order to invoke the provisions of the Law. I entirely agree that the conditions have not been satisfied and accordingly there has been no breach of the Law by the appellants.

Having regard to the approach which the Chief Justice took in relation to the position of a receiver and manager *vis-à-vis* the company in respect of which they have been appointed, it followed logically that he would conclude, as indeed he did, that—

> "the company, Kilderkin (and the fourth defendants in relation to their affairs) remained the principal for the purposes of the Confidential Relationships (Preservation) Law and continue to be the principal in relation to the confidential information relating to the company—in particular all the confidential information in relation to which the company was the principal before the receiver and manager was appointed."

He was right in holding that the company was the "principal" for the purpose of the Law, but fell into error in thinking that the

receiver and manager had not replaced the company's director in respect to its management. I do not think there would be any doubt that if Kilderkin through its director had divulged confidential information prior to the appointment of the receiver and manager, anyone could successfully assert they had breached the Law. Seeing then that Clarkson have stepped into the shoes of Player, they are in the same position as the erstwhile director and equally exempt from liability under the Law. Mr. Sumption pointed out, as I think correctly, that the information belongs to the company. He regarded this information as an asset. Mr. Patten disagreed as to the information being an asset, but he did not dissent from the view that as business information, the company retained the privilege of non-disclosure. It is the director who has the right to this information and who exercises a managerial function in respect of it. In the present case, it is the appellants who exercised that power; they have the control and management of the assets and undertaking of the company.

If what has been said is correct, it is really unnecessary to consider whether the receiver and manager was required to comply with the provisions of s.3A(1), *viz.*, obtain directions from the court. The fact of the matter was that no such application was

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made. A factor which I think should be kept in mind is that Clarkson as receiver is an officer of the court and a report to the court by its officer cannot surely qualify as conduct which should disentitle the receiver and manager to continue to act. In my view, these appellants in reporting to the Ontario Supreme Court with respect to their stewardship, could scarcely be categorised as busybodies interfering in the affairs of strangers; they would be acting in consonance with their obligations to the court as officers of the court and in accord with their responsibilities as managers of the company. I am therefore constrained with respect to disagree with the conclusion of the learned Chief Justice that—"that justifies the exercise of this court's discretion to discharge the order."

It only remains to consider that part of the order whereby the attorneys acting for the receiver and manager were removed from the record and the attorneys for Player placed thereon. The Chief Justice acted pursuant to r.59(3) of the Grand Court (Civil Procedure) Rules 1976 which decrees:

> "If a dispute or difficulty arises as to the representation of any party to a suit or any person claiming to be the attorney-at-law of any party to that suit or to have acted in that suit may make application by summons to the judge in chambers who may make such order in that behalf as appears just and expedient."

There was not a deal of argument in relation to this rule but I would be inclined to think that it is based on O.67 of the English Rules of the Supreme Court. There is, however, no rule in that order in similar terms. I am not at all clear what was the intention of the draftsman in the use of the words "dispute or difficulty." Order 67, r.5 appears to be the only rule where a party other than a party to the cause or action is entitled to apply, in effect for a declaration that the solicitor has ceased to be the solicitor acting for the party. Rule 5 provides:

> "(1) Where—
>
> (a) a solicitor who has acted for a party in a cause or matter has died or become bankrupt or cannot be

found or has failed to take out a practising certificate or has been struck off the roll of solicitors or has been suspended from practising or has for any other reason ceased to practise, and

(b) the party has not given notice of change of solicitor

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or notice of intention to act in person in accordance with the foregoing provisions of this Order,

any other party to the cause or matter may apply to the Court or, if an appeal to the Court of Appeal is pending in the cause or matter, to the Court of Appeal for an order declaring that the solicitor has ceased to be the solicitor acting for the first-mentioned party in the cause or matter, and the Court or the Court of Appeal, as the case may be, may make an order accordingly."

The occasions in which a situation such as occurred in this case came about are so rare that it is unlikely that the rule could have been devised for such an unusual eventuality. But even if I am wrong in this view, it is difficult to regard the application by the respondent as "a dispute or difficulty arising as to representation." Having removed the attorneys on the record for Kilderkin, some other attorney was required on the record as acting for the company. I do not think that the rule could be prayed in aid in these circumstances.

Perhaps of more fundamental importance is the fact that by that order, Player, the director of Kilderkin who had been required to hand over all the assets and undertaking of the company under orders of the Ontario Supreme Court, was being placed once more in a position where the assets and undertaking of the company would be at risk. For it is evident that while Player considered his interests and those of the company to coincide, that was a picture the duly-appointed receiver and manager did not share. We understood during these hearings that Kilderkin had filed an action against Player and others in relation to the assets of Kilderkin within the jurisdiction. So startling a result is not, in my respectful opinion, in keeping with the principle of comity. I am not to be taken as suggesting for one moment that the court has not the power to refuse to confirm or recognise the appointment of a foreign receiver, but there must exist strong and compelling constraints against such recognition. None in my view has been shown. For these reasons I am led to hold that that portion of the order was also erroneously made.

Accordingly, I would set aside the order of the Chief Justice which discharged his *ex parte* order and removed the appellants' attorneys from the record. The appeal should be allowed with costs both here and below.

Appeal allowed.

Exhibit 37

[2009 CILR 7]
IN THE MATTER OF LANCELOT INVESTORS FUND LIMITED

GRAND COURT (Quin, J.): December 10th, 2008

Companies—compulsory winding up—stay of winding up—order may be stayed if bankruptcy proceedings already commenced overseas—stay enables Cayman liquidator and foreign liquidator to discuss respective roles for efficient liquidation, avoiding multiple proceedings and duplication of costs—respects judicial comity and universalism in insolvency

The petitioners were shareholders who sought the winding up of a Cayman company and the appointment of a liquidator.

The company was an open-ended investment fund which, according to the petitioners, was operated fraudulently by the directors to induce investors to provide funds to enter into fictitious transactions. The company had substantially lost all of its funds and the investors had no prospect of being repaid.

Its principal creditors, the investment manager and the entity for making investments were located in the United States. The company had already filed for bankruptcy in the United States and a Chapter 7 trustee had been appointed under the US Bankruptcy Code, who claimed to have exclusive jurisdiction over all the assets of the company.

The petitioners submitted that they nevertheless were entitled to a Cayman winding-up order on the "just and equitable" ground and the appointment of a liquidator in the Cayman Islands because (a) the substratum of the company had failed and it was irrelevant that a winding-up order was opposed by the majority of the shareholders or creditors or that liquidation proceedings had already begun in another jurisdiction; and (b) because the company was domiciled in the Cayman Islands, this was the jurisdiction in which it should be wound up.

The directors, investors in and the major creditor of the company submitted in reply that (a) although the making of a winding-up order was inevitable, the appointment of a liquidator in the Cayman Islands was unnecessary given the existing appointment of a Chapter 7 trustee in the United States, since it would lead to undesirable complication and additional expense; and (b) alternatively, if a liquidator were appointed, proceedings should be stayed as a matter of judicial comity. The Chapter 7 trustee had also voiced his intention to oppose the recognition of a Cayman liquidator in US proceedings should the Grand Court choose to appoint one.

Held, allowing the application:

(1) The company would be wound up and a liquidator appointed. Since there was no office of Official Receiver in the Cayman Islands, it would be impractical to allow the property of the company to remain in the custody of the court (which would follow by virtue of the Companies Law (2007 Revision), s.106 if no liquidator were appointed) and it was also necessary that the petitioners had someone to speak for them. Even though the court recognized the United States as the principal place for the liquidation of the company, its incorporation and many of the arrangements for the investments were governed by the laws of the Cayman Islands and would therefore have to be examined and assessed against such laws. However, the court would only appoint one official liquidator, in recognition of the possibility that that the Chapter 7 trustee might still wish to seek recognition in the Cayman Islands (paras. 63–68).

(2) The winding-up order would be stayed, however, in accordance with the principles of judicial comity and universalism in corporate insolvency. This would give both the Cayman official liquidator and the Chapter 7 trustee an opportunity to discuss their respective roles and try to agree a protocol for the efficient liquidation of the company, thus avoiding multiple proceedings and the duplication of costs. Further, the court was keen to encourage co-operation with the US court both in recognizing the Cayman liquidator in the United States, with the Chapter 7 trustee reconsidering his opposition to any application, and in encouraging the Chapter 7 trustee similarly to apply to the Grand Court for recognition here (paras. 68–69; paras. 75–82).

Cases cited:

(1) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, [2007] 1 A.C. 508; 2005–06 MLR 297; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2006] BCC 962; [2007] 2 BCLC 141, applied.

(2) *English*, *Scottish & Australian Chartered Bank*, *In re*, [1893] 3 Ch. 385, referred to.

(3) *Gordon & Breach Science Publishers*, *Re*, [1995] 2 BCLC 189; [1995] BCC 261, referred to.

(4) *HIH Casualty & Gen. Ins. Ltd.*, *In re*, [2008] 1 W.L.R. 852; [2008] Bus. L.R. 905; [2008] 3 All E.R. 869; [2008] BCC 349; [2008] BPIR 581; [2008] Lloyd's Rep. I.R. 756; [2008] UKHL 21, applied.

(5) *Philadelphia Alternative Asset Fund Ltd., In re*, 2006 CILR *N* [7]; further proceedings, Grand Ct., July 19th, 2007, unreported, followed.
(6) *Reeves* v. *Sprecher*, [2008] BCC 49; [2007] 2 BCLC 614; [2007] EWHC 117 (Ch), applied.
(7) *Rio Tinto Zinc Corp.* v. *Westinghouse Elec. Corp.*, [1977] 3 All E.R. 703; on appeal, [1978] A.C. 547; [1978] 1 All E.R. 434; *sub nom. Westinghouse Elec. Corp. Uranium Contact Litigation M.D.L. Docket 235*, [1978] 1 C.M.L.R. 1000, applied.
(8) *Suidair Intl. Airways Ltd.*, *In re*, [1951] Ch. 165; [1950] 2 All E.R. 920, referred to.

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(9) *Universal Casualty Surety Co.* v. *Gee* (1985), 53 B.R. 891, considered.

Legislation construed:

Companies Law (2007 Revision), s.106: The relevant terms of this section are set out in para. 30.

C. Bridges for the petitioners;
P. Hayden for the directors;
A. Heaver-Wren for the opposing investors;
F. Hughes for the principal creditor;
D. Schofield, *Asst. Solicitor General*, for the Attorney General as *amicus curiae*.

1 **QUIN, J.:**

Chronology

On October 13th, 2008, a winding-up petition was presented to this court in the matter of a Cayman company called Lancelot Investors Fund Ltd. ("the company"). The petition was presented by BNP Paribas Bank & Trust Cayman Ltd. ("the first petitioner") and Aris Multi-Strategy Offshore Fund Ltd., a Cayman company ("the second petitioner"), registered at M & C Corporate Services Ltd., Ugland House, George Town, Grand Cayman, collectively known as ("the petitioners").

2 The company was incorporated as Granite Investors Fund Ltd. on September 2nd, 2002, under the laws of the Cayman Islands, by Registration No. 119694, and commenced operations on October 6th, 2002. The registered office of the company is at the office of Walkers SPV Ltd., Walker House, Mary Street, George Town, Grand Cayman. The authorized share capital of the company is US$50,000, consisting of 50,000 shares of US$1.00 each. The petitioners' shareholding is set out in para. 5 of the petition. Their shareholding was acquired by subscription in the company according to its articles and offering memoranda governed by Cayman law.

3 The founding directors appointed on September 27th, 2002 were Messrs. Gregory Bell, Vincent King and Benjamin Miller. On February 10th, 2003, Granite Investors Fund Ltd. changed its name to Lancelot Investors Fund Ltd. On December 23rd, 2003, the directors (Messrs. Gregory Bell, Vincent King and Benjamin Miller) appointed Altschuler, Melvoin & Glasser (Cayman), Cayman Corporate Centre, Hospital Road, Grand Cayman, as the company's auditors. Also on December 23rd, 2003 the then directors approved and filed the amended form MF1 with the Cayman Islands Monetary Authority. The directors also resolved that the terms of the subscription documents be approved. On December 23rd,

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2003, the directors determined to provide written notice to the investors in the company forthwith of the adoption of the new offering memorandum and resolved to deliver notices to the investors enclosing copies of the new offering memorandum. The company has operated as an open-ended investment company and is registered with the Cayman Islands Monetary Authority as a mutual fund under the Mutual Funds Law (2007 Revision). On March 6th, 2006, Mr. Gregory Bell resigned as a director of the company and Messrs. Trevor Sunderland and Thomas DeMaio were appointed as directors of the company on March 6th and 7th, 2006 respectively.

4 The investment manager is a Delaware limited company called Lancelot Investments Management LLC ("LIM"), whose principal is Mr. Gregory Bell. The administrator of the company, appointed pursuant to an administration agreement, is Swiss Financial Services (Bahamas) Ltd., based in Nassau, Bahamas, whose head office is in Switzerland.

5 The petition sets out the allegations as follows: the petitioners and other investors invested in the company pursuant to and in reliance on, *inter alia,* information memoranda produced by the company dated December 2003 and March 2006 which stated that the company had been formed for the following purpose or to pursue the following investment strategy:

(a) All of the company's assets were to be invested through the purchase of short-term trade finance notes from other entities ("notes") issued by Lancelot Investors Fund L.P. ("Lancelot USA"), a private investment fund organized as a limited partnership under the laws of the State of Delaware. LIM is the general partner of Lancelot USA.

(b) The investment objective of the company was as set out in the information memoranda as being "to achieve consistent and reliable investment returns while minimizing the risk of permanent impairment to capital. The investment manager seeks to achieve [the company's] investment objective by investing [the company's] assets through the purchase of short-term trade finance notes from other entities ['notes']."

(c) "The notes will be acquired by [the company] from [Lancelot USA] and also may be acquired from other affiliated or unaffiliated entities from time to time . . . It is anticipated that the notes sold by [Lancelot USA] to [the company] will evidence loans made to one or more independently controlled special purpose vehicles ['the SPVs'] which engage in the business of acquiring goods and selling goods to major retailers."

(d) "Each SPV [*sic*] will use the proceeds from such notes to finance the acquisition of goods . . . which such SPV sells to a retailer."

(e) "[The company] will purchase notes only in circumstances where the SPV has a pre-existing, binding agreement with a retailer to sell the

underlying goods to such retailer on a future date ['a purchase order']. As a result of such purchase orders, [the company] will assume little or no inventory risk with respect to the underlying goods."

(f) "With respect to each note by [the company], [the company] will require collateral generally equal to 150% of the value of the note. [The company] will have a security interest in the underlying goods which will be protected through the use of a proof of encumbrance filing under art. 9 of the Uniform Commercial Code . . . As further protection, [the company] generally will purchase notes only in circumstances where the SPV has purchased credit insurance with respect to the particular retailer."

6 In the premises, on the true construction of its memorandum, the main object for which the company was formed was to pursue the specific opportunity of acquiring and holding the notes issued by Lancelot USA which were themselves backed by the interests in genuine purchases and sales of excess inventory secured by liens and insurance, as described in the information memoranda and as set out above.

7 The petition alleges that LIM has admitted to the petitioners and others in the course of conversations and meetings and in discussions in September 2008 (as to which see below) that—

(a) the SPV to which Lancelot USA made loans for the acquisition and sale of goods as described in the information memorandum was called Petters Company Inc. ("PCI"). Since the hearing, I now understand from the directors' counsel that the SPV was, in fact, Thousand Lakes ("TL") and not PCI, and that TL was affiliated with PCI;

(b) all of the moneys or substantially all of the moneys provided by the company to Lancelot USA in return for the notes issued by Lancelot USA to the company were used by the fund to make loans to PCI; and

(c) Lancelot USA has no assets other than the right to receive repayment from PCI and/or associated companies of loans made to it.

8 The shares in PCI were held directly or indirectly by one Mr. Thomas Petters ("Mr. Petters"), a resident of Minnesota and/or by another body corporate called Petters Group Worldwide Inc. ("PGW"), the shares of which are also owned and controlled by Mr. Petters. Mr. Petters together with others also controls the management of PCI and PGW.

9 Mr. Petters and his associates also own and control the shares and management of two other companies, Nationwide Resources Inc. ("NIR") and Enchanted Family Buying Company ("Enchanted").

10 The petition alleges that the issue of short-term notes acquired by Lancelot USA was part of a fraudulent scheme devised by PGW, PCI, NIR, Mr. Petters and others to induce investors to provide funds. In particular—

(a) Mr. Petters and others created numerous fictitious sales confirmations purportedly from NIR or Enchanted in the pretence that the latter were vendors of excess inventory;

(b) the vast majority of the sales orders issued by NIR or Enchanted did not relate to any merchandise purchased or ordered by either of them and neither was able to deliver any of the merchandise;

(c) Mr. Petters and others also caused PCI to issue purchase orders in respect of the excess inventory which NIR and Enchanted had purported to sell when PCI was not expecting to take delivery of any goods and knew the sales by NIR and Enchanted were not genuine;

(d) Mr. Petters and others also caused PCI to issue purchase orders in respect of purported further onward sales of the non-existent goods to buyers such as "BJ Wholesale" and "Sam's Club" when no such onward sale had taken place;

(e) PCI then fraudulently pledged the non-existent merchandise as security for the investments;

(f) Mr. Petters and his associates caused PCI to obtain insurance in respect of the non-existent goods by arranging for representatives of insurance companies to tour warehouses containing electronic goods owned by other companies, while falsely representing that the goods were those sold to PCI;

(g) the short-term notes issued by PCI in respect of these transactions were not secured on any goods and were not supported by any genuine sales or purchase orders which would ever be fulfilled by delivery of merchandise; and

(h) in many instances funds from the company and Lancelot USA were sent directly to NIR or Enchanted. In turn those companies directed the funds to PCI (less a commission) without any merchandise changing hands.

11 The petitioner alleges that this fraudulent scheme came to light after September 24th, 2008 when agents from the US Federal Bureau of Investigation (FBI) executed search warrants at PCI's offices as well as on the homes and the vehicles of various employees and the agents of PCI.

12 The company is required by its articles of association to redeem participating shares at the redemption price, calculated as the price equal to the net asset value per share at the redemption date, on receipt of 60 days' notice. The directors had the power to suspend redemptions. On September 27th, 2008, the company notified the petitioners and others by letter that they had suspended further redemptions.

13 On January 5th, 2008, the fund had assets of US$1,139,842,696. This

was confirmed by an independent auditors' report dated March 28th, 2008 from Messrs. McGladrey & Pullen, Cayman. The petition alleges that the company has substantially lost all of its funds, and that neither the petitioners nor other investors have any prospect of being repaid all or any portion of these funds within the ordinary time frame envisaged by them and the company at the time they subscribed.

14 The company has never held and does not hold valid or real investments. The notes that were acquired from Lancelot USA and the receivables held by Lancelot USA against PCI are said to be totally worthless.

15 The opportunity to acquire valuable notes was in fact never genuinely available to the company and/or never materialized and/or has proved worthless and/or cannot be pursued without further capital which none of its members will contribute. There is no realistic hope that the company will ever be profitable.

16 The petitioners allege that for the above reasons, the company can no longer carry out the business for which it was formed and the substratum of the company has failed. Accordingly, the petitioners claim that they have a legitimate interest that the affairs of the company, the conduct of its directors and the responsibility for LIM's investment in the fraudulent scheme be investigated by an independent liquidator. Accordingly, the petitioners contend that in all the premises it is just and equitable to wind up the company.

17 The petition is supported by eight creditors whose total value is US$80,305,163.88, as set out in the notice of intention to appear on the petition, filed by the petitioners' attorneys, Messrs. Ritch & Conolly, on November 26th, 2008.

18 The petitioners submit that under the laws of the Cayman Islands they are entitled to a winding-up order, even if it is contrary to the wishes of the majority of the shareholders or creditors, and even if winding-up proceedings have already commenced in another jurisdiction.

19 The petitioners further submit that because the company is domiciled in the Cayman Islands, this is the jurisdiction in which it should be wound up. They also submit that they clearly had a legitimate expectation that it would be wound up in accordance with the laws of the Cayman Islands.

Proceedings in the United States

20 On October 2nd, 2008, Mr. Gregory Bell, the investment manager's principal and a former director of the company, advised the board of directors that on September 24th, 2008 criminal proceedings had been commenced against Mr. Petters and others. Mr. Bell further advised that

substantially all of the company's assets were invested through Lancelot USA in loans to Thousand Lakes.

21 At a meeting on October 2nd, 2008, the directors of the company passed a resolution to suspend further redemptions of the company's assets. On October 3rd, 2008, at a subsequent meeting of the board of directors of the company, and, as a result of a further update from Mr. Gregory Bell, the directors resolved to file the US bankruptcy proceedings.
22 On October 20th, 2008, the US bankruptcy proceedings were filed by the company, and consequently the US trustee—an official of the US Department of Justice—appointed Mr. Ronald R. Peterson as the interim case trustee of the company, whose appointment remains in force until the first meeting of the creditors. Mr. Peterson filed an affidavit on November 3rd, 2008 and confirms that when a debtor files a voluntary petition for relief under Chapter 7, the appointment of a trustee is mandatory. Furthermore, his appointment as interim trustee becomes permanent, unless there is a request for an election. Since the hearing, I have been informed by the directors' counsel that Mr. Peterson's appointment was made permanent on December 2nd, 2008.
23 Mr. Peterson avers that under US law he is the legal owner of all the assets of the company, wherever located, and further, that the Bankruptcy Court has exclusive jurisdiction over all the assets of the company. He states that his duties include (a) collecting and reducing to money the property of the company; (b) accounting for all property received; (c) examining process of/proceeds of claim; (d) furnishing information about the estate to all parties with interest in the matter, including the petitioners before the court; (e) making a final report and account to the US court; (f) investigating a company and its affiliates: directors, managers, general partners and officers, and, if necessary, institute legal actions to recover any damages caused by their negligence or intentional conduct; and (g) having power, under US laws, to compel all US citizens and all aliens located within the United States to appear before him and be examined under oath. It is my understanding that the powers of the Chapter 7 trustee in the United States are broadly similar to the powers and duties of an official liquidator under the Companies Law of the Cayman Islands.
24 The Chapter 7 trustee, Mr. Peterson, avers in his affidavit that since there are no material Cayman assets, he believes that the appointment of a provisional liquidator in the Cayman Islands will serve no useful purpose. Furthermore, Mr. Peterson goes on to state that he believes the appointment of a provisional liquidator in Cayman Islands will make a complicated case more complex, as it will involve two courts in the administration of the assets, which adds time and complexity, and could result in potentially inconsistent judgments. Mr. Peterson further avers that

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it will create another level of expense that must be met before creditors and equity holders can receive distributions.
25 And finally, Mr. Peterson states in his affidavit that if a liquidator were appointed and sought recognition in the United States under Chapter 15 of the Bankruptcy Code, he would oppose such recognition.
26 On November 6th, 2008, the directors of the company—Messrs. Trevor Sunderland, Vincent King, Benjamin Miller and Thomas DeMaio, and, in the case of Mr. DeMaio, in his capacity as a contributory, represented by Mourant du Feu & Jeune Cayman—filed notices indicating that they intended to oppose the petition for the winding up of the company and the appointment of the joint provisional liquidators, or joint official liquidators, or, alternatively, they would seek a stay of the Cayman winding-up proceedings pending the outcome of the Chapter 7 proceedings in the United States.
27 The directors contend that they are entitled to participate in the Cayman proceedings in their capacity as contingent creditors, arising from the right to indemnity granted by art. 144 of the company's articles of association to the directors, against the anticipated costs likely to be incurred by the directors in these proceedings. Furthermore, Mr. Thomas DeMaio, one of the directors, is the owner of 635.9994 PS1 voting participating shares in the company, and is therefore entitled to appear in these proceedings as a contributory. Mr. Trevor Sunderland filed two affidavits on November 3rd and 5th, 2008, on behalf of the directors and on behalf of Mr. Thomas DeMaio, supporting Mr. Peterson's position and seeking a stay of the winding-up proceedings in the Cayman Islands.
28 On November 6th, and at the continuation of the hearing on November 25th and 26th, 2008, Mr. Hayden, on behalf of the directors and Mr. Thomas DeMaio, submitted that the petition should be stayed or adjourned, and that no provisional or joint official liquidators should be appointed. He relies on s.100 of the Companies Law (2007 Revision) which provides that "upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally and may make any interim order or any other order that it thinks just . . ."
29 The directors' main ground for their application to stay the petition is that parallel winding-up proceedings in Cayman will lead to unnecessary duplication of efforts and costs as between the Chapter 7 trustee and any liquidator appointed by the Grand Court of the Cayman Islands. The

directors maintain in their attorneys' letter, dated November 25th 2008, that this will impair the efficient progress of the Chapter 7 bankruptcy proceedings and reduce the ultimate distribution payable to creditors and/or investors.

30 Mr. Hayden further submits that his clients are agreed that the Cayman petitioners' position should be protected, and all their rights preserved. Since some of the petitioners' rights may be predicated on a winding-up order being made, Mr. Hayden's clients are now agreeable to a winding-up order being made. However, Mr. Hayden submits that the court should have regard to s.105 of the Companies Law, where the court may have regard to the wishes of creditors or contributories. They no longer oppose the winding up of the company by this court but submit that no liquidator should be appointed. Mr. Hayden supports this submission with reference to s.106 of the Companies Law (2007 Revision), which states that the court, "*may* [appoint] one or more than one person to be called an official liquidator or official liquidators." [Emphasis supplied.] And further, that "if no official liquidator is appointed, or during any vacancy in such office, all property of the company shall be in the custody of the Court."

31 On behalf of the directors and Mr. Thomas DeMaio, Mr. Hayden sets out four options in order of desirability for the directors and the creditors represented by Appleby and Conyers, Dill & Pearman:

(a) make a winding-up order, but stay it without appointing a liquidator;

(b) make a winding-up order, appoint a liquidator and then stay the winding-up proceedings;

(c) make a winding-up order and appoint a liquidator with a very limited remit. Mr. Hayden states that a protocol could be agreed between the Cayman liquidator and the Chapter 7 trustee with a very limited role for the Cayman liquidator; or

(d) accept the petitioners' position and then make a winding-up order and appoint a liquidator with no conditions, which Mr. Hayden submits may lead to a highly expensive turf war and would be extremely undesirable.

32 Mr. Heaver-Wren on behalf of a number of opposing creditors, who filed a notice of intention to appear and oppose the petition, supports Mr. Hayden's submissions and confirms that his clients wish the winding up of the company to be in the hands of the Chapter 7 trustee, Mr. Peterson, which he submits protects the interests of all the shareholders and the investors. He confirms that his clients do not want there to be parallel liquidation proceedings resulting in the possibility, if not the likelihood, of an expensive turf war.

33 Mr. Hughes, on behalf of the largest creditor, RBS Citizens N.A., took a neutral position at the beginning of the hearing on November 6th, 2008. However, on November 26th, Mr. Hughes submitted that his client has since been otherwise persuaded by Mr. Hayden and his clients, and now submits that a winding-up order could be made and then stayed, with

liberty to apply for the appointment of a liquidator at a future stage, should it become necessary.

34 Mr. Hughes argues that there are many good reasons not to appoint a liquidator in the Cayman Islands, and that the majority of shareholders oppose such an appointment. The way he puts it is that there is absolutely no good reason to layer one professional on top of another, and, under the circumstances, a Cayman liquidator should not be appointed.

35 The Assistant Solicitor General, Mr. Schofield, as *amicus curiae*, submitted there were two areas of public interest for the court to consider:

(a) first, that the Cayman petitioners, who represent 12% of the investors, must satisfy themselves that the conduct of the Chapter 7 proceedings is above board and that they are treated equally; and

(b) secondly, that the court and this jurisdiction must be seen to adhere to the tenets of judicial comity. He pointed out that this is not an obligation created by statute, but it is very desirable, and should be granted out of respect, deference and friendship.

36 In the circumstances of this case Mr. Schofield urged caution, and submitted that the Chapter 7 trustee's co-operation was demonstrated by his willingness to prepare a report for this court. Accordingly, Mr. Schofield, as *amicus curiae*, suggested that the matter could be stayed until this report is received.

The law

37 The petitioners' counsel, Ms. Bridges, argues that this is a Cayman company which was set up because of, *inter alia,* the obvious tax advantages afforded to companies in the Cayman Islands, together with the regulation of the Cayman Islands Monetary Authority, and the strong anti-money laundering laws of the Cayman Islands.

38 Ms. Bridges submits that the Grand Court should follow the decision of Henderson, J. in *In re Philadelphia Alternative Asset Fund Ltd.* (5). Indeed, the facts of this case are very similar to the facts in *Philadelphia,* in which Henderson, J. ordered that, as the substratum of the company had gone, the petitioners were entitled to a winding-up order, even if it were contrary to the wishes of the majority of the creditors or shareholders. And further, the petitioners would be entitled to a winding-up order, even though receivership proceedings had already started in the United States. Henderson, J. stated the law of the Cayman Islands as it was in 2005. The company in *Philadelphia* was domiciled in the Cayman Islands, and this was the jurisdiction in which it should be wound up. The petitioners had a legitimate expectation that it would be wound up in the Cayman Islands even though there might be some duplication of effort, or wasted costs, in pursuing ancillary proceedings abroad. In his judgment, Henderson, J.

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confirms that one of the long-established purposes of liquidation is the investigation of a company's affairs. Henderson, J. quoted from Robert Walker, J. (as he then was) in *Re Gordon & Breach Science Publishers* (3) ([1995] 2 BCLC at 199):

"Fairness and commercial morality may require that a substantial independent creditor (in this case investor) which feels itself to be prejudiced by what it regards as sharp practice, should be able to insist on the company's affairs being scrutinised by the process which follows a compulsory order. Such a creditor is entitled to an investigation which is not only independent, but can be seen to be independent. This may be so even where the voluntary liquidation is already well advanced and a compulsory order may cause further expense and delay . . ."

39 The petitioners rely on this authority and say it is not for the directors or others to turn their backs on the legal system of the place chosen for the incorporation of the company.

40 Indeed, Henderson, J.'s reasoning and decision follow the classic decision of Vaughan Williams, J. in *In re English, Scottish & Australian Chartered Bank* (2) where he stated ([1893] 3 Ch. at 394):

"One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation and that the other Courts act as ancillary, as far they can, to the principal liquidation."

41 Furthermore, Wynn-Parry, J. in *In re Suidair Intl. Airways Ltd.* (8), citing the passage from the judgment of Vaughan Williams, J. in *In re English, Scottish & Australian Chartered Bank*, said ([1951] Ch. at 173):

"It appears to me that the simple principle is that this court sits to administer the assets of the South African company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law; that is, primarily, the law as stated in the Companies Act, 1948, looked at in the light, where necessary, of the authorities. If that principle be adhered to, no confusion will result. If it is departed from then for myself I cannot see how any other result would follow than the utmost possible confusion."

42 In addition, since Henderson, J.'s decision in *Philadelphia* (5), Ms. Bridges cites the judgment of Lewison, J. in *Reeves* v. *Sprecher* (6), when he stated that the courts of the place of incorporation were the appropriate forum in which matters relating to the internal management of the company should be determined.

43 Mr. Hayden, on behalf of the directors, submits that matters have

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moved forward since Henderson, J. gave his ruling in *Philadelphia* in December 2005 and this was forecast by Fletcher, *Insolvency in Private International Law*, 1st ed., at 93 (1999) where he stated that the common law on cross-border insolvency has for some time been "in a state of arrested development."

44 For this purpose Mr. Hayden relies on the decision of the Privy Council, which is of course the final appellate court for this court, in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (1), in which Lord Hoffmann considered the principle of universalism in matters of corporate insolvency. In that case the New York Bankruptcy Court under Chapter 11 of the US Bankruptcy Code sent a letter of request to the High Court of Justice in the Isle of Man asking for assistance in giving effect to "the plan and confirmation order." The court considered the English statutory authority, which does not apply to the Isle of Man, for providing assistance to a foreign court. Section 426(5) of the UK Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction." The Cayman Islands does not have the same or similar statutory provisions to s.426(5) of the UK Insolvency Act.

45 Furthermore, the United Kingdom, unlike the Cayman Islands, is a signatory to the United Nations Commission on International Trade Law ("UNCITRAL") Model Law which it brought into force by reg. 2 of and Schedule 1 to the Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030).
46 Lord Hoffmann, in his review of the common law position, stated in *Cambridge Gas* (1) ([2007] 1 A.C. 508, at para. 16):
"The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."
Lord Hoffmann stated (*ibid.*, at para. 17) that "universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view."
47 Lord Hoffmann went on to state (*ibid.*, at para. 20) that—
"corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's assets in some other person. They remain the assets of the

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company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England."
Accordingly, the Privy Council in the *Cambridge Gas* case stated (*ibid.*, at para. 21) that—
"their Lordships consider that these principles are sufficient to confer upon the Manx [Isle of Man] Court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance."
Lord Hoffmann went on to state (*ibid.*, at para. 22) that—
"at common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."
48 I should state that at this stage the Chapter 7 trustee has not made any application to be recognized by this court, nor has he appointed attorneys to make any representations on his behalf. I do acknowledge that Mr. Peterson requested to join the hearing of the petition by telephone, but I was of the view that, without meaning any discourtesy whatsoever to Mr. Peterson, a more formal approach should be made on the first occasion. Proceedings in both the Grand Court of the Cayman Islands and the US Bankruptcy Court for the Northern District of Illinois are at a very early stage, and it is reasonable to assume that as Chapter 7 trustee, Mr. Peterson is extremely busy coming to terms with the facts behind the failure of the substratum of the company. However, as matters stand, this court has not received any letter of request for assistance from Mr. Peterson, or from the US Bankruptcy Court for the Northern District of Illinois.
49 I did state, when we adjourned on November 6th, that this court embraces the concept of co-operation and co-ordination as reflected by the principles of international judicial comity. I would have thought that it must be in the best interests of the Cayman petitioners and indeed all the

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creditors of the Cayman company for co-operation and assistance between the two jurisdictions to be actively encouraged. I will address this point later in this ruling.
50 Mr. Hayden submits on behalf of the directors and is supported by Mr. Heaver-Wren, on behalf of the opposing creditors, and Mr. Hughes, on behalf of the major creditor, that, in light of the facts and circumstances in this case, the place of principal liquidation is the United States which is "the centre of the company's main interests" and not the Cayman Islands which is the place of incorporation.
51 For this proposition he cites Lord Hoffmann's speech in the House of Lords ruling of *In re HIH Casualty & Gen. Ins. Ltd.* (4). In Australia, the court had made winding-up orders and appointed liquidators. In England, provisional liquidators were appointed to realize and protect the assets of the companies. The Australian court had sent a letter of request to the High Court in London asking

that the provisional liquidators be directed after payment of their expenses to remit the assets to the Australian liquidators for distribution.
52 The question in that appeal was whether the English court can and should accede to that request. The alternative was a separate liquidation and distribution of the English assets, in accordance with the Insolvency Act 1986 of the United Kingdom.
53 The Australian Court made its request pursuant to s.426(4) of the Insolvency Act 1986: "The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in . . . any relevant country . . ."
54 Australia had been designated a "relevant" country by the UK Secretary of State. However, as I stated above, we do not yet have the equivalent legislation to the Insolvency Act 1986 in the Cayman Islands. I quote again from Lord Hoffmann, in *HIH* (4) where he stated ([2008] 1 W.L.R. 852, at para. 6):
"Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."
Lord Hoffmann went on to state (*ibid.*, at para. 7) that "this was very much a principle rather than the rule. It is heavily qualified by exceptions on pragmatic grounds . . ."

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55 Lord Hoffmann referred to Fletcher, *Insolvency in Private International Law*, 2nd ed., at 15–17 (2005), and states: "Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one." In his *HIH* speech, Lord Hoffmann also refers to Professor Jay Westbrook—the distinguished American writer on international insolvency—who has called it the principle of "modified universalism."
56 Lord Hoffmann said that in certain circumstances an English court may "disapply" parts of the statutory scheme by authorizing the English liquidator to allow actions which he is obliged by statute to perform according to English law, to be performed instead by the foreign liquidator according to the foreign law (including its rules of the conflict of laws).
57 In *HIH* Lord Hoffmann stated (*ibid.*, at para. 28):
"The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of law to be applied to those questions. That would be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction."
58 He continued (*ibid.*, at para. 30):
"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."
59 In *HIH* (4) the companies in question were incorporated in Australia. In addition, their central management had been in Australia and the overwhelming majority of their assets and liabilities were situated in Australia.
60 Lord Hoffmann stated that, as for UK public policy, he could not see how it would be prejudiced by the application of Australian law to the distribution of the English assets, as there was no question of prejudice to the English creditors.

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61 According to the headnote to the decision in *The Weekly Law Reports* ([2008] 1 W.L.R. at 853)—"a discretion to order a remission of assets to a country whose insolvency scheme is not in accordance with English law also arises under the inherent powers of the court under common law, pursuant to the principle that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation, to ensure that all of a company's assets are distributed to its creditors under a single system of distribution . . ."
Summary of conclusions

62 I am satisfied that the petitioners have presented a petition to this court which makes a winding-up order inevitable. I follow Henderson, J.'s judgment in *Philadelphia* (5) and find that the petitioners are entitled, under the Companies Law of the Cayman Islands, to the relief they seek. Furthermore, I am not persuaded by the arguments advanced by the directors and the opposing creditors not to appoint the liquidator, and to leave the properties of the company in the custody of the court, in accordance with s.106 of the Companies Law. Unlike the United Kingdom we do not have an official receiver in the Cayman Islands, and therefore it would be impractical to allow the property of the company to remain in the custody of the court.
63 Furthermore, as Ms. Bridges submitted, the petitioners do need a mouthpiece, and, in my view, experienced insolvency and corporate recovery accountants are the most appropriate persons to be appointed as official liquidators. However, in these particular circumstances, and in light of the fact that Mr. Peterson, the Chapter 7 trustee, may still wish to seek recognition in the Cayman Islands, I propose, at this stage, to appoint one and not two official liquidators. Accordingly, I appoint Mr. Geoffrey Varga of Kinetic, chartered accountants, Grand Cayman, as official liquidator of the company.
64 I have been persuaded that in the present case the place of principal liquidation as determined under the common law, or the "centre of [the company's] main interests" as determined under the UNCITRAL Model Law, art. 17.2, is clearly the United States.
65 The offshore fund's assets being choses in action are governed by US law. The main creditors are located in the United States. Lancelot USA—the entity through which the investments have been made—is a US entity. The investment manager is a US entity, and the investment management appears to have taken place exclusively in the United States. Finally, the alleged fraud, which is the subject of an FBI investigation, also appears to have taken place in the United States.

66 Consequently, it would appear that the majority of the investigations to be undertaken for the realization of these assets are required to be undertaken in the United States, involving mainly US individuals or persons located in the United States and subject to the jurisdiction of the US courts.
67 Nonetheless, investments made through the company and onwards into Lancelot USA were made in the Cayman Islands. The arrangements by which these investments were made are governed by the laws of the Cayman Islands. Any claims that the petitioners and, indeed, other investors may have against the company will have to be examined and assessed according to the law of the Cayman Islands.
68 I note that less than nine days after the date of his appointment as the Chapter 7 trustee, Mr. Peterson states in his affidavit that, if a Cayman liquidator is appointed and seeks recognition in the United States under Chapter 15 of the Bankruptcy Code, he would oppose such recognition. It may transpire that it is in the best interests of the petitioners and the creditors of the company for Mr. Varga to seek recognition in the United States under Chapter 15 and, should that happen, I sincerely hope that Mr. Peterson might be prepared to reconsider his position on this point.
69 The Cayman Islands has enjoyed international standing as a major financial centre for almost 40 years and the Grand Court of the Cayman Islands has actively assisted foreign courts to give effect to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968.
70 Indeed, the Grand Court of the Cayman Islands has, on many occasions, assisted American courts and, to adopt the classic language of Lord Denning sitting in the Court of Appeal in *Rio Tinto Zinc Corp.* v. *Westinghouse Elec. Corp.* (7) ([1978] A.C. at 560): "It is our duty and our pleasure to do all we can to assist [the foreign] court, just as [the English court] would expect the [foreign] court to help us in like circumstances." In that particular case, the House of Lords ruled on appeal that the High Court in England should assist in a letters rogatory application made by the District Court of Virginia in the United States.
71 It was in this spirit that I stated in open court on November 6th, 2008, that the Grand Court embraces the concept of facilitation of co-operation and co-ordination in cross-border insolvency proceedings.
72 Article 25 of UNCITRAL Model Law on Cross-Border Insolvency contemplates "direct" communication between the Grand Court and foreign courts and their representatives.
73 Official and joint official liquidators appointed by the Grand Court have sought and obtained assistance from foreign courts, in particular in the United States, on numerous occasions. In this respect a landmark

decision was *Universal Casualty Surety Co.* v. *Gee* (9), in which the US Bankruptcy Court for the Southern District of New York analysed Cayman law and practice and concluded that it did meet the criteria under s.304 of the Bankruptcy Code necessary to enable it to provide assistance to an official liquidator appointed by the Grand Court. Such assistance has been rendered on numerous subsequent occasions.

74 Should Mr. Varga believe, after careful consideration of the background and circumstances of this matter, that he needs to seek recognition, I trust that such an application would meet with favourable consideration from the Chapter 7 trustee and the US Bankruptcy Court for the Northern District of Illinois.

75 On November 6th, 2008, before the hearing was adjourned, I also floated the idea of the Chapter 7 trustee considering an appointment as a joint liquidator of the company. The Grand Court has appointed foreign insolvency practitioners (including government or quasi-government officials) as joint official liquidators of Cayman companies. This course is contemplated by art. 27(a) of the UNCITRAL Model Law. The Grand Court has on several occasions appointed a foreign insolvency practitioner and this ensures a highly efficient method of effecting a co-operative and unified approach in a multi-jurisdictional insolvency. It is still an option open to Mr. Peterson which I believe merits further serious consideration. In fact I would go further than what I said on November 6th, 2008 and state that the Grand Court of the Cayman Islands would welcome a direction from the US Bankruptcy Court for Mr. Peterson to consider making a constructive application for recognition in this matter.

76 I refer to the Note by the Secretariat of the United Nations General Assembly of the United Nations Commission on International Trade Law in its 40th Session in Vienna between June 25th and July 6th, 2007. Note 6 states:

"... [P]rotocols have been used in a number of different cross-border cases to achieve different goals. They have no prescribed format and are intended to address issues unique to a specific case, with flexibility for amendment in the event that circumstances change. Given that they are specific to the circumstances of a particular case, protocols may be negotiated at different times. In some cases, negotiation may be initiated by the parties well in advance of the commencement of insolvency proceedings; in others, a protocol may be negotiated after commencement of proceedings, sometimes at the suggestion of the presiding judge, to cover specific issues in dispute and may be in the nature of an emergency measure. The provisions of a protocol generally cover procedural issues and, in some cases, substantive issues. Issues covered may include governance, claims adjudication, notice, co-ordination of asset disposition or preservation, measures to avoid duplication of

efforts, minimization of fees and expenditure, sharing of information, mapping out of responsibility for claims resolution, development of a plan of reorganization and access to courts."

77 On the authorities cited before me, the principle of universalism is consistent with international judicial comity—long practised by these courts—and is aimed at preventing multiplicity of proceedings with its attendant duplication of costs to the detriment of the liquidation's estate.

78 It is the decision of this court that Mr. Geoffrey Varga of Kinetic be appointed as the official liquidator of the company. Mr. Peterson is clearly an experienced bankruptcy trustee and states that he has administered approximately 16,000 estates in his career, including being the Chapter 11 trustee of Lester Witte & Co. I understand that Mr. Peterson hopes to have prepared a report on his investigations early next year, and, possibly, before the end of March 2009. Mr. Varga is an experienced insolvency and corporate recovery accountant. He has been appointed as an officer of the Grand Court of the Cayman Islands on previous occasions so we are fortunate to have such experienced and expert insolvency practitioners in both jurisdictions.

79 I think it is in the best interests of the petitioners and, indeed, all the creditors, for Mr. Varga to enter into discussions with Mr. Peterson and to agree a protocol which should be a professional partnership for the efficient liquidation of the Cayman company. It may be that after their discussions, the Cayman liquidator will have a limited role. At this early stage it must be too soon to come to any firm conclusion as to the respective roles of the Chapter 7 trustee and the official liquidator. That is something which I would have thought could be agreed between them as experienced officers of their respective courts. Given their obligations as officers of their courts I hope we never even have to contemplate the deeply unattractive scenario of what has been described by counsel for those opposing the petition as a "turf war."

80 In the case of *Philadelphia* (5), the Cayman courtappointed joint official liquidators agreed a protocol with the US receiver appointed by the US District Court for the Eastern District of Pennsylvania. The protocol identified distinct divisions of work, although naturally, and sensibly, the US receiver was primarily responsible for the litigation in that country. I would commend the ruling

of Smellie, C.J., dated July 19th, 2007, in *Philadelphia* where he identified, for strict application, 11 separate and distinct areas of activity when dealing with an application to approve the liquidators' fees and expenses.

81 For the above reasons I will stay any immediate action to investigate the affairs of the company until March 31st, 2009, in order to give both the Cayman official liquidator and the Chapter 7 trustee a proper and full

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opportunity to discuss their respective roles and, if possible, to agree a protocol.

82 As I have made the order for the winding up of the company and appointed Mr. Varga as official liquidator, but yet at the same time imposed a temporary stay of the winding up, it is not necessary for me to consider Mr. Hayden's subsidiary argument on *forum non conveniens* because I have accepted and adopted the decisions of the Privy Council and the House of Lords in *Cambridge Gas* (1) and *HIH* (4) respectively.

83 The possible question of Mr. Varga and Kinetic having a conflict of interest in this proposed liquidation was raised towards the end of the hearing on November 26th. I do not propose to examine this question at this stage. Should such a conflict emerge then I am confident that Mr. Varga as an experienced liquidator and officer of the court would bring it to the attention of this court for resolution.

84 Accordingly, I order that—

(a) the company, Lancelot Investors Fund Ltd., be wound up by the court, under the provisions of the Companies Law (2007 Revision);

(b) Geoffrey E. Varga of George Town, Grand Cayman be appointed official liquidator of the company;

(c) the official liquidator be authorized to exercise any of the powers listed in s.109 of the Companies Law (2007 Revision);

(d) the official liquidator be at liberty to appoint counsel, attorneys, professional advisors, whether in the Cayman Islands or elsewhere, as he may consider necessary to advise and assist him in the performance of his duties and on such terms as he may think fit, and remunerate them out of the assets of the company;

(e) the official liquidator and his staff be remunerated out of the assets of the company at their customary rates;

(f) the official liquidator use his best endeavours to enter into a protocol with the Chapter 7 trustee appointed on October 20th, 2008 by the US trustee, an official of the United States Department of Justice, and/or with the US Bankruptcy Court for the Northern District of Illinois, in order to promote an orderly and efficient administration of the insolvency proceedings in both jurisdictions;

(g) save for taking the steps required, pursuant to para. (f) of this order, the winding up of the company is to be stayed until March 31st, 2009, in order for the official liquidator to file with the Clerk of the Court a report, in writing, of the progress made towards agreeing a protocol with the Chapter 7 trustee;

(h) the official liquidator be at liberty to apply generally;

(i) the costs of the petition and the petitioners be paid out of the assets of the company; and

(j) the official liquidator cause a copy of this petition to be delivered to the Registrar of Companies and to the Cayman Islands Monetary Authority.

Order accordingly.

Attorneys: *Ritch & Conolly* for the petitioners; *Mourants* for the directors; *Appleby* for the opposing investors; *Conyers, Dill & Pearman* for the principal creditor; *Government Legal Dept.*

Exhibit List

	Jurisdiction	Exhibit Number
Statutes & Regulations		
British Virgin Islands Insolvency Act (2003), Part XIX (Sections 466–472)	British Virgin Islands	1
Cayman Companies Law (2016), Sections 145–147, 240–243	Cayman Islands	2
United Kingdom Cross-Border Insolvency Regulations (2006), Art. 25 of Schedule 1	United Kingdom	3
United Kingdom Insolvency Act (1986), Sections 213, 238–239, 423, 426	United Kingdom	4
Cases		
Re Al Sabah [2002] CILR 148	Cayman Islands	5
Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1, [2005] 2 A.C. 333	United Kingdom	6
AWB Geneva SA v. North America Steamships Limited [2007] 1 CLC 749	United Kingdom	7
AWB Geneva SA v. North America Steamships Limited [2007] 2 Lloyd's Rep 31	Canada	8
Banco Nacional de Cuba v. Cosmos Trading Corporation [2000] 1 BCLC 813	United Kingdom	9
Banque Indosuez SA v. Ferromet Resources Inc [1993] BCLC 112	United Kingdom	10
Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825	United Kingdom	11
Bilta (UK) Ltd v. Nazir [2014] Ch 52 (CA)	United Kingdom	12
Bilta (UK) Ltd v. Nazir [2016] AC 1 (SC)	United Kingdom	13
Bloom v. Harms Offshore AHT "Taurus" GmbH & Co KG [2010] Ch 187	United Kingdom	14
In re C (A Bankrupt) BVIHC 0080/2013	British Virgin Islands	15
Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 A.C. 508	United Kingdom	16
Re China Agrotech Holdings Ltd. , Unreported, Cause No. FSD 157 of 2017 (NSJ) (Grand Ct. Fin. Servs. Div. Sept. 19, 2017)	Cayman Islands	17
Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852	United Kingdom	18
Jyske Bank (Gibraltar) Ltd v. Spjeldnaes [2000] BCC 16	United Kingdom	19
Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557	United Kingdom	20

Exhibit List

	Jurisdiction	Exhibit Number
Cases, continued		
Re Paramount Airways Ltd [1993] Ch 223	United Kingdom	21
Picard v. Bernard L Madoff Investment Securities LLC BVIHCV140/2010	British Virgin Islands	22
Rubin v. Eurofinance SA [2013] 1 AC 236; [2012] UKSC 46	United Kingdom	23
Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675	United Kingdom	24
Stichting Shell Pensioenfonds v. Krys [2015] AC 616; [2014] UKPC 41	United Kingdom	25
Other Authorities		
McPherson's Law of Company Liquidation (4th ed. 2017)	United Kingdom	26
Anthony Smellie, *A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies: The Case for Judicial Co-Operation* , 2 Beijing L. Rev. 4 (2011)	Cayman Islands	27
Cases Cited by *Amici Curiae*		
A, B, C & D v. E , HCVAP 2011/001	Anguilla	28
Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167	United Kingdom	29
Re Babcock & Wilcox Canada Ltd. , 2000 CanLII 22482 (O.N.S.C.)	Canada	30
Blum v. Bruce Campbell & Co. , [1992-3] CILR 591	Cayman Islands	31
Changgang Dunxin Enterprise Company Ltd. , Unreported, Cause No. FSD 270 of 2017 (LMJ) (Grand Ct. Fin. Servs. Div. Feb. 8, 2018)	Cayman Islands	32
Re CHC Group Ltd. , Unreported, Cause No. FSD 5 of 2017 (RMJ) (Grand Ct. Fin. Servs. Div. Jan. 10, 2017)	Cayman Islands	33
Re China Shanshui Cement Group Ltd. [2015] 2 CILR 255	Cayman Islands	34
Didisheim v. London & Westminster Bank , [1900] 2 Ch. 15	United Kingdom	35
Kilderkin Investments Ltd. v. Player [1984-85] CILR 63	Cayman Islands	36
Re Lancelot Investors Fund Ltd. [2009] CILR 7	Cayman Islands	37
Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547	United Kingdom	38
Re Trident Microsystems (Far East) Ltd. [2012] (1) CILR 424	Cayman Islands	39
UBS AG New York and others v. Krys , BVIHCM 2009/0136	British Virgin Islands	40

Exhibit 38

[HOUSE OF LORDS]

RIO TINTO ZINC CORPORATION AND OTHERS . . APPELLANTS

AND

WESTINGHOUSE ELECTRIC CORPORATION . . RESPONDENTS

et e Contra

[On appeal from *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No.* 235 (*No.* 1 *and No.* 2)]

1977 May 25, 26
July 7, 8, 11

Lord Denning M.R., Roskill and Shaw L.JJ.

Oct. 17, 18, 19, 20, 24, 25, 26, 27, 31; Dec. 1

Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Fraser of Tullybelton and Lord Keith of Kinkel

Evidence—Foreign tribunal, for—Jurisdiction of English court —Letters rogatory—Privilege against self-incrimination—Liability to fines under E.E.C. Treaty and American anti-trust legislation—Whether "penalties"—Testimony and documents —Whether required for use at trial—Civil Evidence Act 1968 (*c.* 64), *s.* 14 [1]*—Evidence (Proceedings in Other Jurisdictions) Act* 1975 (*c.* 34), *ss.* 1, 2 (1) (2) (3) (4), 3 (1) [2]*—E.E.C. Treaty* (*Cmnd.* 5179–II), *arts.* 85, 189, 192*—E.E.C. Council Regulation No.* 17/62, *art.* 15

Practice — Discovery — Privilege — Self-incrimination — Uranium cartel—Order to produce company's documents to examiner— Company's fear of penalty proceedings by E.E.C. Commission—Whether risk appreciable—Whether company privileged against self-incrimination—Civil Evidence Act 1968, *s.* 14 (1) *—E.E.C. Treaty* (*Cmnd.* 5179–II), *arts.* 85, 89, 192*—E.E.C. Council Regulation No.* 17/62, *arts.* 13, 14, 15 (2), 17

International Law—Letters rogatory—Extra-territorial investigations—Attempt to extend U.S. grand jury's investigations extra-territorially—Infringement of U.K. sovereignty

A United States corporation ("W") was sued in Virginia for breach of contract in relation to certain contracts to build

[1] Civil Evidence Act 1968, s. 14: "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(*a*) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; . . ."

[2] Evidence (Proceedings in Other Jurisdictions) Act 1975, s. 1: "Where an application is made to the High Court . . . for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—(*a*) that the application is made in pursuance of a request issued by or on behalf of a court . . . ('the requesting court') exercising jurisdiction . . . in a country or territory outside the United Kingdom; and (*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which . . . have been instituted before the requesting court . . . the High Court . . . shall have the powers conferred on it by . . . this Act."

S. 2: "(1) . . . the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence

nuclear power stations. By their defence they alleged that the contracts had been made incapable of performance by reason of shortage of uranium and steeply rising prices which they attributed to the activities of an international cartel of uranium producers including two English companies, "R.T.Z." On the application of W, the judge of the Virginia court issued letters rogatory to the High Court in London asking it to order that named individuals appear before a U.S. consular officer in London to be examined in the litigation and that the two English companies, with which they were connected as officers or directors, should produce certain itemised documents or classes of documents. On October 28, 1976, a master made two orders giving effect to the letters rogatory. MacKenna J. and the Court of Appeal subsequently upheld his orders. R.T.Z. claimed privilege in respect of the documents on the basis that their production might render R.T.Z. liable to fines under the E.E.C. Treaty which was part of English law. MacKenna J. upheld the claim of privilege and on July 11, 1977, the Court of Appeal upheld his decision.

On June 8, 1977, the judge of the Virginian court upheld a claim by the individual witnesses to privilege under the Fifth Amendment to the U.S. Constitution on the ground of self-incrimination. On June 15, 1977, the judge was informed by the U.S. Department of Justice that it required the evidence of the witnesses for the purposes of a grand jury investigation started in Washington in 1976 into possible violations of the U.S. anti-trust laws by members of the alleged uranium cartel so as to initiate criminal proceedings if it saw fit. On July 18, 1977, the Department of Justice applied to the judge for an order to compel testimony under U.S.C. sections 6002/3, applicable when a witness claimed privilege on the ground of self-incrimination but under which no testimony compelled might be used against the witness in a criminal case. The judge made the order.

On appeal from the decision of the Court of Appeal by R.T.Z. and the persons named, on the one hand, and by W., on the other: —

Held, (1) (Viscount Dilhorne and Lord Fraser of Tullybelton dissenting), that the master's order rightly gave effect to the letters rogatory in respect of the production of documents, subject to amendments to confine their operation to areas allowed by English law and further (Viscount Dilhorne dissenting) that the order rightly gave effect to them as regarded the witnesses sought to be examined but (*per* Lord Wilberforce) subject to the disallowance of certain witnesses (post, pp. 611G—612B, 636A–B, 652D, 654D, E).

Radio Corporation of America v. *Rauland Corporation* [1956] 1 Q.B. 618, D.C. considered.

in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; . . . (2) . . . an order under this section may, in particular, make provision—(*a*) for the examination of witnesses, either orally or in writing; (*b*) for the production of documents; . . . (3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order . . . (4) An order under this section shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

(2) That the companies were entitled to claim privilege against self-incrimination under section 14 (1) of the Civil Evidence Act 1968 in respect of the documents required to be produced, since production would tend to expose them to fines under articles 85, 189 and 192 of the European Economic Community Treaty, which cover penalties imposed by administrative action and recoverable in England by "proceedings . . . for the recovery of a penalty" within section 14 (1) (post, pp. 612B–E, G, 627A–C, 628C, 632C–D, F, 636F–H, 637F, 646E, F, 647G, 652D).

Triplex Safety Glass Co. Ltd. v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395, C.A. applied.

(3) That, in accordance with the ruling of the judge of the Virginian court, upholding the right of the individual witnesses to claim privilege against self-incrimination under the Fifth Amendment to the U.S. Constitution, they could not, in consequence of section 3 (1) (*b*) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, be compelled to give evidence (post, pp. 615C, D, 632E, 639B, C, 647E—648B, 652D).

(4) That the intervention of the Department of Justice, converting the letters rogatory into a request for evidence for the purposes of a grand jury investigation, changed their character, seeking to use the Act of 1975 for purposes for which it was not intended by extending the grand jury's investigations internationally in a manner which was impermissible as being an infringement of United Kingdom sovereignty, a context in which the courts were entitled to take into account the declared policy of Her Majesty's Government (post, pp. 615E—616A, 617B, 630H—631A, F, G, 632F, 639F, 640D, E, 650G—651A, D, G).

Decision of the Court of Appeal (post, p. 558H); [1977] 3 W.L.R. 430; [1977] 3 All E.R. 703, upholding the implementation of the letters rogatory, reversed.

Decision of the Court of Appeal (post, p. 572B); [1977] 3 W.L.R. 492; [1977] 3 All E.R. 717, upholding the claims of privilege, affirmed.

The following cases are referred to in their Lordships' opinions in the House of Lords:

British Nylon Spinners Ltd. v. *Imperial Chemical Industries Ltd.* [1953] Ch. 19; [1952] 2 All E.R. 780, C.A.

Burchard v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241, C.A.

Fagernes, The [1927] P. 311, C.A.

Radio Corporation of America v. *Rauland Corporation* [1956] 1 Q.B. 618; [1956] 2 W.L.R. 281, 612; [1956] 1 All E.R. 260, 549, Barry J. and D.C.

Triplex Safety Glass Co. Ltd. v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395; [1939] 2 All E.R. 613, C.A.

The following additional cases were cited in argument in the House of Lords:

Adams v. *Adams (Attorney-General intervening)* [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572.

Alterskye v. *Scott* [1948] 1 All E.R. 469.

American Banana Co. v. *United Fruit Co.* (1909) 213 U.S. 347.

American Express Warehousing Ltd. v. *Doe* [1967] 1 Lloyd's Rep. 222, C.A.

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Béguelin Import Co. v. *G. L. Import Export S.A.* [1972] C.M.L.R. 81.
Blunt v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253; [1942] 2 All E.R. 187, C.A.
Distillers Co. (Biochemicals) Ltd. v. *Times Newspapers Ltd.* [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41.
Gibbons v. *Waterloo Bridge Co. Proprietors* (1818) 5 Price 491; 1 Coop. Temp.Cott. 385.
Goldstone v. *Williams, Deacon & Co.* [1899] 1 Ch. 47.
Huntington v. *Attrill* [1893] A.C. 150, P.C.
Imperial Chemical Industries Ltd. v. *E.C. Commission* [1972] C.M.L.R. 557.
Jones v. *Jones* (1889) 22 Q.B.D. 425, D.C.
Lee v. *Angas* (1866) L.R. 2 Eq. 59.
Lotus, The (1927) P.C.I.J. Series A. No. 10, p. 29.
Maccallum v. *Turton* (1828) 2 Y. & J. 183.
McFadzen v. *Liverpool Corporation* (1868) L.R. 3 Ex. 279.
Newland v. *Steere* (1865) 13 W.R. 1014.
Panthalu v. *Ramnord Research Laboratories Ltd.* [1966] 2 Q.B. 173; [1965] 3 W.L.R. 682; [1965] 2 All E.R. 921, C.A.
Parkhurst v. *Lowten* (1819) 2 Swans. 194.
Penn-Texas Corporation v. *Murat Anstalt* [1964] 1 Q.B. 40; [1963] 2 W.L.R. 111; [1963] 1 All E.R. 258, C.A.
Penn-Texas Corporation v. *Murat Anstalt (No. 2)* [1964] 2 Q.B. 647; [1964] 3 W.L.R. 131; [1964] 2 All E.R. 594, C.A.
Reg. v. *Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118; [1972] 1 All E.R. 65, C.A.
Reg. v. *Boyes* (1861) 1 B. & S. 311.
Reg. v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).
Reynolds v. *Godlee* (1858) 4 K. & J. 88.
Richardson v. *Hastings* (1844) 7 Beav. 354.
Riddick v. *Thames Board Mills Ltd.* [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.
Seyfang v. *G. D. Searle & Co.* [1973] Q.B. 148; [1973] 2 W.L.R. 17; [1973] 1 All E.R. 290.
Short v. *Mercier* (1851) 3 Mac. & G. 205.
Soul v. *Inland Revenue Commissioners (Practice Note)* [1963] 1 W.L.R. 112; [1963] 1 All E.R. 68, C.A.
Suffolk (Earl of) v. *Green* (1739) 1 Atk. 450.

The following cases are referred to in the judgments of the Court of Appeal on May 26, 1977:

American Express Warehousing Ltd. v. *Doe* [1967] 1 Lloyd's Rep. 222, C.A.
Colne Valley Water Co. v. *Watford and St. Albans Gas Co.* [1948] 1 K.B. 500; [1948] 1 All E.R. 104, C.A.
Comet Products U.K. Ltd. v. *Hawkex Plastics Ltd.* [1971] 2 Q.B. 67; [1971] 2 W.L.R. 361; [1971] 1 All E.R. 1141, C.A.
Mexborough (Earl of) v. *Whitwood Urban District Council* [1897] 2 Q.B. 111, C.A.
Radio Corporation of America v. *Rauland Corporation* [1956] 1 Q.B. 618; [1956] 2 W.L.R. 281, 612; [1956] 1 All E.R. 260, 549, D.C.

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Redfern v. *Redfern* [1891] P. 139, C.A.
Reg. v. *Boyes* (1861) 1 B. & S. 311.

The following additional cases were cited in argument:

Blunt v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253; [1942] 2 All E.R. 187, C.A.
Burchard v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241, C.A.
Debtor (No. 7 of 1910) In re [1910] 2 K.B. 59, C.A.
Elder v. *Carter, Ex parte Slide and Spur Gold Mining Co.* (1890) 25 Q.B.D. 194, C.A.
Hunnings v. *Williamson* (1883) 10 Q.B.D. 459.
Martin v. *Treacher* (1886) 16 Q.B.D. 507, C.A.
National Association of Operative Plasterers v. *Smithies* [1906] A.C. 434, H.L.(E.).
Panthalu v. *Ramnord Research Laboratories Ltd.* [1966] 2 Q.B. 173; [1965] 3 W.L.R. 682; [1965] 2 All E.R. 921; C.A.
Penn-Texas Corporation v. *Murat Anstalt (No. 2)* [1964] 2 Q.B. 647; [1964] 3 W.L.R. 131; [1964] 2 All E.R. 594, C.A.
Reg. v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).
Seyfang v. *G. D. Searle & Co.* [1973] Q.B. 148; [1973] 2 W.L.R. 17; [1973] 1 All E.R. 290.
Soul v. *Inland Revenue Commissioners (Practice Note)* [1963] 1 W.L.R. 112; [1963] 1 All E.R. 68, C.A.

The following cases were referred to in the judgments of the Court of Appeal on July 11, 1977:

Blunt v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253; [1942] 2 All E.R. 187, C.A.
Brebner v. *Perry* [1961] S.A.S.R. 177.
Lamb v. *Munster* (1882) 10 Q.B.D. 110.
National Association of Operative Plasterers v. *Smithies* [1906] A.C. 434, H.L.(E.).
Parry-Jones v. *Law Society* [1969] 1 Ch. 1; [1968] 2 W.L.R. 397; [1968] 1 All E.R. 177, C.A.
Quinine Cartel, In re [1969] C.M.L.R. D41.
Redfern v. *Redfern* [1891] P. 139, C.A.
Reg. v. *Boyes* (1861) 1 B. & S. 311.
Reg. v. *Garbett* (1847) 1 Den.C.C. 236.
Reynolds, Ex parte (1882) 20 Ch.D. 294, C.A.
Short v. *Mercier* (1851) 3 Mac. & G. 205; 15 Jur. 93; 20 L.J.Ch. 289.
Triplex Safety Glass Co. Ltd. v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395; [1939] 2 All E.R. 613, C.A.

No additional cases were cited in argument.

INTERLOCUTORY APPEALS from MacKenna J.

On October 21, 1976, Judge Merhige in the United States District Court for the Eastern District of Virginia, Richmond Division granted the applications of Westinghouse Electric Corporation ("Westinghouse") to issue two letters rogatory to the High Court asking that court to issue process causing named persons to appear before a consular officer

of the United States in London, to be examined orally, as witnesses in actions in Virginia and causing two English companies, Rio Tinto Corporation Ltd. and RTZ Services Ltd. ("RTZ"), with which the named persons were connected as officers or directors, to appear at the oral examination of the witnesses to produce itemised documents. Pursuant to the letters rogatory and to the Evidence (Proceedings in Other Jurisdictions) Act 1975 and R.S.C., Ord. 70, Master Creightmore on October 28, 1976, made two orders (1) that Peter Daniel, Jean Loup Dherse, the Rt. Hon. Lord Shackleton of Burley, Sir Ronald Mark Cunliffe Turner and Roy William Wright to attend before the consul, vice-consul or consular officer of the United States Embassy on a named date to be examined on oath or affirmation touching evidence required for civil proceedings in Virginia, and that RTZ by its director and proper officer Andrew Edward Buxton produce at the oral examination the documents enumerated in Schedule B to the letter rogatory, (2) a similar order naming Andrew Edward Buxton and Kenneth E. Bayliss as witnesses and RTZ Services Ltd. by its director and proper officer Andrew Edward Buxton as the company to produce the documents enumerated in schedule B to the other letter rogatory.

On February 22, 1977, Master Jacob upheld the order of Master Creightmore and on May 10, 1977, MacKenna J. dismissed appeals from Master Jacob.

RTZ and the persons named appealed on the grounds that the judge erred: (1) in holding that the order sought for the production of documents was within section 2 (4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, for the following reasons; (a) the order would require RTZ to state what relevant documents were or had been in its possession, custody or power, contrary to section 2 (4) (*a*); (b) the documents sought were not "particular documents" within the meaning of section 2 (4) (*b*); (2) in holding that the onus on an applicant for the production of documents under the Act was only to show that the documents appeared to be likely to exist, and that the applicant need not show that they did in fact exist; (3) in finding that all the documents sought appeared to be likely to exist, and appeared to be likely to be in the possession, custody or power of RTZ; (4) in holding that the Act did not require that the documents sought be ancillary to the oral testimony of a witness at the trial; and erred in fact in finding that the documents sought were so ancillary; (5) in that he considered de novo the question of what directly relevant oral testimony the persons named in the letters rogatory would have to give; and ignored the fact that the judge who issued the letters rogatory had not considered the question whether the named persons did have such evidence to give, and that there was no evidence before that judge on which he could have answered that question in the affirmative; (6) in deciding for himself whether the named persons had directly relevant evidence to give, he erred in law in holding that the onus on an applicant under the Act was only to show that the named persons were likely to have such evidence to give, and that the applicant need not show that they did in fact have such evidence to give; and erred in fact in finding that

all the persons named in the letters rogatory were likely to have relevant evidence to give; (7) in holding and/or in finding that the request, both for oral and documentary material, was not an application for discovery against persons not parties to the United States proceedings in respect of which the letters were issued. In particular, the judge failed to take any or any sufficient account of the breadth of the description of the documents sought; or of the fact that the judge who issued the letters had not decided that the material sought would be directly relevant at the trial of the action, and indeed stated that he did not know how relevant the material would be. The judge further attached undue importance to statements made on behalf of Westinghouse that they intended to use all the material sought at the trial of the action; (8) in holding that the request, both for oral and documentary material, was not objectionable by reason of the fact that it was made by the United States court as part of its pre-trial discovery procedure; (9) in the exercise of his discretion in ordering production of the documents sought in that he failed to take any or any proper account of the fact that the material, in so far as it tended to prove the issues to which Westinghouse alleged it related, would also be relevant in certain anti-trust proceedings pending in the United States District Court for the Northern District of Illinois, Eastern Division, in which proceedings RTZ were defendants and in which they had elected to take no part on the ground that the Illinois court had no jurisdiction, and (10) in the exercise of his discretion in ordering that the named persons do attend to give oral testimony in that he failed to direct himself correctly in the application of the Fifth Amendment of the United States Constitution, or to consider adequately the implications thereof.

By a respondent's notice, Westinghouse contended that MacKenna J.'s judgment should be affirmed on the additional grounds that (1) under the provisions of the Act of 1975 there was no requirement that documents ordered to be produced must be ancillary to the oral evidence of witnesses; and (2) the privilege against exposure to proceedings for the recovery of a penalty under section 14 of the Civil Evidence Act 1968 did not confer any right to refuse to answer any question or produce any document on the grounds that to do so would tend to expose the person claiming the privilege to the imposition of a fine under article 85 or 86 of the Treaty of Rome and articles 14 or 15 of E.E.C. Regulation No. 17/62.

The facts are stated in the judgment of Lord Denning M.R.

Raymond Kidwell Q.C. and *Richard Wood* for RTZ and the persons named in the orders. These letters rogatory were issued referring not only to the companies in England but also to companies in Canada and Australia (both of which have passed legislation on the matter). The court is concerned with a very wide ranging request. Comity comes into the issue and there may well be a predeliction to do what the American courts wish. English courts only act where the documents are properly specified and not where there is an attempt to obtain discovery. The court has to inquire whether the American pre-trial procedure was

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in the United States Court's mind. The appellants are not parties to the proceedings in that court and the request is oppressive. A

Section 1 of the Foreign Tribunals Evidence Act 1856 (19 & 20 Vict., c. 113) provided for the examination of witnesses in this country in a cause pending before a foreign tribunal and section 5 gave a right of refusal to answer questions and produce documents tending to incriminate. See now the Evidence (Proceedings in Other Jurisdictions) Act 1975, ss. 2 and 3. Although the question of privilege does not at present arise, B the common market legislation whereby the companies may be subject to penalties and the United States Fifth Amendment may have to be considered.

The intention of the Act of 1975 is that the documents requested to be produced should be ancillary to oral testimony (see sections 1 and 2). Section 2 (1) emphasises the court's discretion by twice using the word "may." Section 2 (4) gives effect to the judicial interpretation of the C Act of 1856. Section 3 deals with privilege. R.S.C., Ord. 70, r. 6, is a new rule, "Claim to Privilege" (see *The Supreme Court Practice 1976, Supplement No. 5*, para. 70/6) introduced to give effect to section 3 (1). R.S.C., Ord. 70, gives teeth to the statute: see r. 4 on the taking of the examination and the note 70/4/3 thereto. R.S.C., Ord. 39, r. 5, shows how the question of a claim to privilege is dealt with in English law. D R.S.C., Ord. 38 deals generally with our rules for obtaining evidence: r. 14 deals with writs of subpoena (see form No. 28 in Appendix A, *The Supreme Court Practice 1976*, vol. 2, p. 17). R.S.C., Ord. 38, r. 13 (order to produce document at proceeding other than trial) is taken from the former R.S.C., Ord. 37, r. 7.

The court has to ask whether this is a request for the production of specific documents or for ranging discovery. Persons who are not parties E to an action should not be put into the position where they have to give discovery. Although comity must be considered, the English courts in applying the Act of 1975 must apply English principles and not American pre-trial procedure.

The letters rogatory partake of the nature of discovery and are not within the scope of the Act of 1975. They are not particular specified F documents which must be shown to exist. The order is oppressive. It is open to the court to use a blue pencil. It is for Westinghouse to ensure that the letters rogatory are in the proper form. If the claim is too wide the court in its discretion can give nothing. Section 2 (4) of the Act of 1975 is very restrictive: even more so than the common law principles. The language used is the language of discovery.

If on a broad view the classification is an exercise in discovery the G whole letters rogatory should be rejected. The important word in section 2 (4) of the Act of 1975 is "specified," and the Act separates oral testimony and documents. The production of documents should be limited to documents ancillary to the oral testimony and should also limit the numbers of specified documents to be produced. The shutter should be brought down as soon as it appears that what is sought is roving discovery. H Under the Act of 1856 and in pre-Act of 1975 authorities documents were treated as ancillary to oral testimony. The order as it stands could lead to an unlimited inquiry into the whole uranium business conducted over

five years, such inquiry arising out of the documents. Though it may be difficult to limit examination of witnesses, the court should exercise a discretion as it has done in the past, despite the different words used in the Act of 1975. It is implicit in section 2 (4) that there cannot be a fishing inquiry by making an order on an oral witness where the first question to the witness could be: what documents have you got? or what documents are in the possession and power of your company?

The crucial question is whether the evidence asked for is for use at the trial or for discovery. This order is in such wide terms as to fall outside the scope of our interrogatories. The court should still prefer the approach in the old cases and should not lend its process under this Act to give discovery to the extent implicit in the letters rogatory where the order for documents is directed to the company and that for oral evidence is directed to a person. Under section 3 (1) the witness is not to be compelled to give evidence which he could not be compelled to give in civil proceedings in England.

T. H. Bingham Q.C. for Westinghouse intervening. The order only permits the asking of relevant questions and if a question is not relevant it will not be asked. It is the examiner who will rule on a refusal to answer a question on the ground that it is irrelevant.

Kidwell Q.C. continuing. In the English authorities the phrases "directly relevant" and "indirectly relevant" have been used; the present categories are "relevant" or "not relevant" to the civil proceedings. "Not relevant" should be limited as in the decided cases. Though the evidence permitted under the Act of 1975 is "for the purposes of civil proceedings" the courts have always refused to make an order where what is asked for is an exercise in pre-trial discovery.

The letters rogatory are so wide as they stand that they should be rejected.

[ROSKILL L.J. The whole purpose of the new Act is to widen the power to assist foreign courts.]

That could have been said of the Act of 1856. The courts had the power to make the orders but looked at each case on its merits: see *Elder* v. *Carter, Ex parte Slide and Spur Gold Mining Co.* (1890) 25 Q.B.D. 194. In *Burchard* v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241, where only one small file was involved, the court held it had no jurisdiction to make the order because it was thought that inspection and discovery, not evidence, was sought. That attitude was maintained in *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618. [Reference was also made to *Penn-Texas Corporation* v. *Murat Anstalt (No. 2)* [1964] 2 Q.B. 647; *Panthalu* v. *Ramnord Research Laboratories Ltd.* [1966] 2 Q.B. 173; *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222 and *Seyfang* v. *G. D. Searle & Co.* [1973] Q.B. 148.] The court has always exercised a discretion and should do so under the new Act, even while bearing in mind the desirability of respecting comity when a request has been made. There is a difference between pre-trial discovery and evidence on commission which will be available at the trial. The American procedure on documents is the same as ours though they may require wider disclosure of indirectly relevant

documents. Twenty five nations at the Hague Convention agreed that the proper meaning of " for the purposes of civil proceedings " is " for use in civil proceedings." There is a duty on the court to make only such limited orders as are proper under English procedure. [Reference was made to *National Association of Operative Plasterers* v. *Smithies* [1906] A.C. 434.]

The E.E.C. point on articles 85 and 86 is very important. The question is whether those articles can bite on the alleged cartel. A decision on the impact of those articles at the present stage would be based on inadequate information. Common market law is not the same as United States anti-trust law.

T. H. Bingham Q.C. and *Timothy Walker* for Westinghouse. What the United States judge is asking for is trial testimony, " the taking of that testimony and the production of documents " by June 3 for the trial in August in Virginia. Westinghouse face a suit for $200m. and believes it has a good defence so it is not surprising that this information is wanted. The distinction between " pre-trial " and " trial " discovery arises because this country and the United States may be divided by a common language; the Americans use the expression " pre-trial discovery " for what we call evidence on commission. The judge may be asking for evidence which could either be produced at the trial or which will open up a line of inquiry; but all the matters come under one umbrella. It was made clear to those making the application under the Act of 1975 that a fishing expedition would not be allowed by the English court and undertakings have been given that all the material obtained under the letters rogatory will be put in at the trial.

This court will be slow to go behind a request from a United States judge for material " for the trial." If the appellants' submissions were accepted it would put real obstacles in the way of a foreign state and would be contrary to the spirit of the Act of 1975.

The question is whether what the foreign court is asking for is something which by English notions goes further than what is permissible in domestic proceedings. Section 2 of the Act of 1975 does not restrict the principles on which the court will act. Each head in section 2 (2) has an analogy in terms of our own rules of court to bring into line with our own procedure what we are willing to do for others. Section 2 (4) is a prohibition of an order for discovery and sub-paragraph (*b*) has two requirements: that the documents shall be " specified " and also whether they are likely to be in the " possession, custody or power " of the person concerned. The court's observations in *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222, all apply to the present case. The list of documents, though long, is limited in the way it ought to be; they are sufficiently specified. [Reference was made to *Soul* v. *Inland Revenue Commissioners* (*Practice Note*) [1963] 1 W.L.R. 112.] The documents in the list are " reasonably distinct," are shown to be likely to exist and to be in the possession of the appellants. The question is: is the United States court asking for something we call discovery and therefore will not grant, or is it something which in English terms we would call the taking of evidence on commission? What the judge has asked for is something different. It is a written application for material " for use at the trial." The *Radio Corporation* case [1956] 1 Q.B. 618 is distinguishable for there

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the letters rogatory were a pure fishing expedition, a general order for discovery without putting any burden on the parties to whom they were addressed to decide what was relevant: see also *Burchard* v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241, 247.

Equity, whose procedure led to the disclosure of documents, disliked helping common informers recover penalties. As to "Community Judgments Enforceable in the U.K.," see *The Supreme Court Practice 1976,* vol. 1, p. 1116, note 71/15–24/2 to R.S.C., Ord. 71, r. 24. In an action to recover penalties the plaintiff was not entitled to administer interrogatories or to discovery under the old R.S.C., Ord. 31: *Hunnings* v. *Williamson* (1883) 10 Q.B.D. 459. In an action for penalties by a common informer leave would not ordinarily be given to the plaintiff to administer interrogatories: *Martin* v. *Treacher* (1886) 16 Q.B.D. 507. A large number of common informer actions were abolished by the Common Informers Act 1951.

The first safeguard is relevance. The Americans can designate a document "confidential" or "specially confidential": they have a clear procedure designed to see that confidentiality is not abused. R.S.C., Ord. 39, r. 5, deals with the refusal of a witness to attend or be sworn where evidence is given by deposition. Westinghouse are not interested in the contents of documents but in evidence of what happened. [Reference was made to section 51 of the Taxes Management Act 1970 and section 499 of the Income Tax Act 1952.] "Penalty" is a term of art to be construed in a strict historical context. The origin of Inland Revenue enforcement lay with people employed as common informers. There must be a real risk of proceedings for the recovery of a penalty. It is E.E.C. Regulation No. 17/62 which provides that the Commission can impose fines on undertakings which intentionally or negligently break article 85 of the E.E.C. Treaty (article 15, para. 2). The Fifth Amendment applies to individuals only and does not apply to companies.

Kidwell Q.C. on privilege. If RTZ and those named in orders are heavily fined they will not be impressed by the argument that the ancient privilege against self-incrimination is not available to them. Ecclesiastical censure by being excluded from Holy Communion was once a ground for claiming privilege.

Forfeiture of a lease is a purely civil matter between landlord and tenant. This privilege against self-incrimination was stoutly asserted until it was abolished by section 16 (1) (*a*) of the Civil Evidence Act 1968: see in particular *per* Lord Esher M.R. in *Earl of Mexborough* v. *Whitwood Urban District Council* [1897] 2 Q.B. 111, 115.

Section 14 (1) (*a*) of the Civil Evidence Act 1968, recognising the privilege against self-incrimination applies to "a person" in "proceedings for an offence or for the recovery of a penalty." It is a fundamental principle of English law that a man cannot be compelled to incriminate himself out of his own mouth: see its application to bankruptcy in *In re A Debtor (No. 7 of 1910)* [1910] 2 K.B 59, 61, 63. The provisions of the Treaty of Rome, including articles 85 and 86, are now part of our law: see section 2 of the European Communities Act 1972. Section 3 of the Act of 1975 is concerned to protect these ancient privileges. [Reference was made to *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253, 256.] In *Colne Valley*

Water Co. v. *Watford and St. Albans Gas Co.* [1948] 1 K.B. 500 the principle was so well recognised that the whole case turned on whether it was a claim for damages or a penalty. Penalties like liquidated damages were the subject of privilege.

The great ancient privilege against self-incrimination is not confined to criminal self-incrimination. The protection is against any process with a punitive element. A man may have a suit against me, either civil or criminal, but he may not make it out of my mouth. The European Communities (Enforcement of Community Judgments) Order 1972 (S.I. 1972 No. 1590) came into force when the United Kingdom became a member of the European Communities. By article 15, paragraph 2 of General Regulations No. 17 of February 6, 1962 the Commission can impose fines on undertakings intentionally or negligently breaking article 85.

The wording of the orders is much too wide; the words "memoranda . . ." should be out. Lord Denning M.R. in *Comet Products U.K. Ltd.* v. *Hawkex Plastics Ltd.* [1971] 2 Q.B. 67, 74, said that "the genius of the common law" had prevailed since the days of Sir William Blackstone to prevent a defendant being a compellable witness in "contempt proceedings against him." See also *per* Bowen L.J. in *Redfern* v. *Redfern* [1891] P. 139, 147. [Reference was made to *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222; the Foreign Tribunals Evidence Act 1856, s. 1; and R.S.C., Ords. 24, r. 7 and 39, r. 5.] These are "pre-trial proceedings, proceedings by way of discovery": see *per* Devlin J. in *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618, 646.

On the Fifth Amendment point, it is unsatisfactory that in American proceedings an untrained, unqualified, consular officer should be presiding at the examination. He will know nothing about the privilege against self-incrimination.

Bingham Q.C. in reply on privilege referred to the *Radio Corporation* case [1956] 1 Q.B. 618, 644, 648; *Cross, Evidence*, 4th ed. (1974), pp. 243–244 and *Earl of Mexborough* v. *Whitwood Urban District Council* [1897] 2 Q.B. 111, 114. The facts in *In re A Debtor* [1910] 2 K.B. 59 give the clue to the case. *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253 shows that the courts move with the times. In the *Colne Valley Water Co.* case [1948] 1 K.B. 500, 504, Diplock for the gas company was not called upon to argue. [Reference was made to the Income Tax Act 1952, s. 499 (2) and (3) and the Taxes Management Act 1970, s. 100.] "Penalty" has a specialised historical meaning and does not include everything that is penal. There is a difference between Revenue proceedings and European Commission proceedings. A tendency to expose a person to a penalty is different from tending to expose him to proceedings for a penalty. The maxim cessante ratione legis, cessat ipsa lex applies.

Kidwell Q.C. in further reply referred to *Reg.* v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388.

LORD DENNING M.R. As this is an urgent matter we will give judgment straight away. It arises out of a dispute now going on in the

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A United States of America. In the 1960s the Westinghouse Electric Corporation made contracts with power companies under which Westinghouse were to build nuclear power stations and to supply them with uranium as a fuel. The prices were stated in the contracts. There was an escalation clause to meet increases in the general cost of living, but not to meet changes in the market price of uranium.

B At the time when Westinghouse agreed to supply this uranium, the price was comparatively low, but in the middle 1970s, especially after the raising of the oil prices, the price of uranium rose very sharply. In February 1973 it was only $6 a pound, but three years later it had risen to $41 a pound. The result was that Westinghouse found themselves in great difficulty, both in getting uranium and in supplying it to the power stations. So much so that they were unable to fulfil C their contracts. They sought to excuse themselves on the ground that the performance of them was "commercially impracticable"; a line of defence with which we are familiar in England, and known as "frustration owing to supervening circumstances."

Then the power companies brought proceedings against Westinghouse in the States of Virginia and Pennsylvania. In addition there is an anti-trust suit in the State of Illinois. The amount in dispute is D extremely large, $2,000 million or £1,000 million sterling.

At first sight this dispute seems to have nothing to do with England at all or any of us. But it appears that in Australia about a year ago someone surreptitiously got access to the files of an Australian uranium producer and Westinghouse got hold of those files. They disclosed the existence of an international cartel in uranium. This cartel was an E association by which the big producers of uranium combined to regulate the output of uranium and the price of it. We are told that Australia, Canada, South Africa, France and the English company of Rio Tinto were parties to this cartel. Its object is said to have been to manipulate the market in uranium, to limit competition and to force prices up to excessively high levels. The files showed that in about 1972 there was formed a policy committee, an operating committee and F a secretariat.

To aid their defence in America, Westinghouse want to prove the existence of this cartel and its dealings. They want to see all the documents which have been passing between the members and the notes of all the meetings. They desire to show the existence of this "conspiracy," as they would call it, to keep up prices. They have tried G and failed in Australia, Canada, France and South Africa. We were told that in those countries regulations have been passed so as to forbid the documents of the cartel being disclosed. Now Westinghouse seek to get them from Rio Tinto in England.

There are no regulations in England forbidding access to these documents. The disclosure of them depends on our ordinary rules of law. H We have before us a courteous request from the United States District Court for the Eastern District of Virginia, Richmond Division. It has asked us to order the Rio Tinto Zinc Corporation Ltd. and its principal directors, Sir Ronald Mark Cunliffe Turner, Lord Shackleton of Burley

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and others, to produce the documents relating to this cartel, and also to give evidence here in England. The federal judge, Judge Robert R. Merhige Jr., has issued two letters rogatory (which we call letters of request) addressed to us on October 21, 1976. The actual words are worth noting:

> "The People of the United States of America to the High Court of Justice in England. Greetings:
>
> "Whereas, certain actions are pending in our District Court for the Eastern District of Virginia, Richmond Division, in which the corporations listed in Schedule A attached hereto are plaintiffs and Westinghouse Electric Corporation is defendant, and it has been shown to us that justice cannot be done among the said parties without the testimony, which is intended to be given in evidence at the trial of the actions, of the following persons residing in your jurisdiction, being directors . . . of the RTZ Services Ltd. . . . nor without the production of certain documents in the possession of the RTZ Services Ltd. . . . related to the existence and terms of various agreements, arrangements or concerted practices between RTZ Services Ltd. and the following entities . . . Rio Tinto Zinc Corporation Ltd. (England) . . . And whereas the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court.
>
> "We, therefore, request that in the interest of justice, you cause by your proper and usual process [Sir Ronald Mark Cunliffe Turner and others] . . . to appear before any consul or vice-consul or other consular officer of the United States at London . . . to be examined orally as witnesses . . . and . . . cause the said RTZ Services Ltd. . . . to produce the documents enumerated in Schedule B hereto, being documents which appear to be or to be likely to be in the possession, custody or power of the RTZ Services Ltd. . . ."

The letter rogatory finished with the assurance: "and we shall be ready and willing to do the same for you in a similar case when required."

A few days ago on May 20, Federal Judge Merhige made a supplement to these letters in which he makes it clear that the letters rogatory are concerned with material that is required not merely for pre-trial procedure (as it is called in the United States of America) but for evidence and documents for actual use at the trial. He tells us that he has ordered that the trial of the proceedings in Virginia shall commence on August 22, 1977. He desires that all proceedings here be completed at the earliest possible date, so that the plaintiff shall have an adequate opportunity to consider such testimony and documents in connection with the presentation of their case.

Such is the request made by the United States Federal Court. It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. "Do unto others as you would be done by."

In answering this request, we have to go by our English statutes. Until 1975 the law on this subject was governed by the Foreign Tribunals

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A Evidence Act 1856. There have been many decisions on that Act. Notably, in our present context, is the *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618. The Divisional Court there made it quite plain that we should not accede to anything in the nature of a roving inquiry in which a party sought to "fish out" something. (It was thought that pre-trial discovery was of this nature.) But that case should not be read as putting any difficulty in the way of relevant B evidence and ancillary documents. That was made clear by the latest case before the new Act. It was *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222.

The Act of 1856 has now been replaced by the Evidence (Proceedings in Other Jurisdictions) Act 1975. It was passed so as to give effect to the Hague Convention on the Taking of Evidence Abroad in Civil C or Commercial Matters 1968 (Cmnd. 3991 of 1969). It makes new provision for enabling the High Court to assist foreign courts in obtaining evidence here. Section 2 is expressed in much wider language than the Act of 1856. The High Court is empowered to make provision for the examination of witnesses, for the production of documents, for the inspection of property and many other things which were not within the Act of 1856 at all. So long as the evidence is required for use in D civil proceedings, the request of the foreign court should usually be granted; provided that the evidence is relevant to the issues in dispute in the foreign court. (The only limitations are those contained in section 2 (4) and section 3. They require separate consideration.)

Mr. Kidwell made, however, a general submission. He asked us to throw out these letters regatory altogether. He submitted that this E case is just like the *Radio Corporation* case [1956] 1 Q.B. 618. The United States court, he said, want the documents for "pre-trial discovery"—in the sense in which that phrase was there used (see p. 620)—that is to discover documents which are not necessarily relevant in the trial, but they "might lead to a line of inquiry which would itself disclose relevant material": *per* Devlin J. at p. 643.

F The first answer to this is given by Federal Judge Merhige himself. In his latest supplement to the letters rogatory he made it clear that that court requires the documents, not for pre-trial discovery, but for use at the actual trial itself which has been listed for August 22, 1977. The second answer is to be found in the Convention. It deals with pre-trial discovery in article 23 which said:

G > "A contracting state may at the time of signature, ratification or accession, declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."

The United Kingdom, when it ratified this, did not make any such declaration. So I cannot accept Mr. Kidwell's general submission.

H Turning now to the statutory limitations. Section 2 (4) (*a*) says:

> "An order under this section shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application

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for the order relates are or have been in his possession, custody or power." A

That seems to me to exclude what we would call a " fishing inquiry." A witness cannot be required to make a general affidavit of documents. To that extent it excludes pre-trial discovery. Section 2 (4) (*b*) says that the order shall not require a person:

" to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power." B

So the only documents which can properly be the subject of an order are

" particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power." C

This also, in a way, excludes pre-trial discovery too.

We have had some discussion as to whether the documents in those letters rogatory are sufficiently specified. They are in Schedule B with sub-headings from 1 to 81. It contains many documents which are specified as being or likely to be in the possession of Rio Tinto. Most of them are particular documents which are specified sufficiently. For instance, all underlined in green and those underlined in pencil seem to me to be sufficiently specified. But some of the words in the sub-headings seem to me to be rather too wide. They have these words, " and also all memoranda, letters and other documents in its files relating to " the foregoing. Those words were used in the *American Express* case [1967] 1 Lloyd's Rep. 222. They may have to be narrowed a bit. I think the words " relating thereto " cast the net too widely. It would be better to limit them more specifically, such as " referred to therein " or some such words. The point is that the documents should be specified with such distinctiveness as would be sufficient for a subpoena duces tecum. The description should be sufficiently specific to enable the person to put his hand on the documents or the file without himself having to make a random search—in short, to know specifically what to look for. D E F

Going through the documents, no. 16 seems to me to be cast too widely. The person ought not to be required to chase through masses of documents to see whether this or that may or may not relate to the dispute. There may be other items too. On the whole the list seems to be valid, but it may need some modification so as to be sure the documents are sufficiently specified so as to satisfy the section of the statute. G

There is no similar provision in regard to oral testimony. The limitation in section 2 (4) only applies to documents. So far as evidence is to be given, by word of mouth, the witnesses can, I think, be required to answer any questions which fairly relate to the matters in dispute in the foreign action. Mr. Kidwell asked us to disallow questions of a roving nature, but I do not think the order can or should be so limited. The only practical test of any question is: " Is it relevant? Does it H

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relate to the matters in question?" No one would wish the witnesses to be asked about irrelevant matters or to go into other things with which the dispute is not concerned. But it is said there is a difficulty. The witnesses are not conversant with the issues in the case. They do not know what is relevant, and what is not. Any difficulty on that score is readily overcome. By agreement (and I think even without agreement) these witnesses, when they are asked to give evidence, can and should have legal advisers at their elbow. There are very reputable and responsible advisers on each side. If a question is irrelevant the witness will be told and advised not to answer. So the point can and should be resolved by the responsible lawyers on each side without difficulty.

Now I come to the really troublesome question, that is, the question of privilege. We have a rule here against self-incrimination. The common law has for centuries held that a person is not bound to answer a question which may render him liable to punishment, penalty or forfeiture. In the United States under the Fifth Amendment an individual (not a company) is entitled to a privilege by which he is not bound to answer questions by which he may incriminate himself.

Take first our English position. We discussed it in the recent case of *Comet Products U.K. Ltd.* v. *Hawkex Plastics Ltd.* [1971] 2 Q.B. 67. I quoted at p. 73 Bowen L.J. as saying in *Redfern* v. *Redfern* [1891] P. 139, 147:

> "It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, . . . 'no one is bound to criminate himself'."

That privilege prevailed in England until an inquiry by the Law Reform Committee, 16th Report in 1967 (Cmnd. 3472). They recommended that the privilege in regard to forfeiture should be abolished. It had been upheld in *Earl of Mexborough* v. *Whitwood Urban District Council* [1897] 2 Q.B. 111. It was expressly abolished by the Civil Evidence Act 1968, section 16 (1) (*a*).

But the privilege in respect of penalties was not abolished. It was retained by section 14. It says:

> "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(*a*) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; . . ."

Mr. Bingham submitted that the word "penalties" should be confined to penalties in revenue cases. He referred us to the report of the Law Reform Committee which said in paragraph 13: "Actions for penalties are now obsolete except in revenue cases." He referred us also to a case about penalties in the Water Works Clauses Acts of *Colne Valley Water Co.* v. *Watford and St. Albans Gas Co.* [1948] 1 K.B. 500: he said that they, too, had become obsolete. He pointed out, quite rightly,

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that in the old days common informers used to sue for penalties under various Acts but these had all been replaced by summary proceedings before the magistrates. I appreciate the force of these submissions, but I am afraid I do not feel able to give effect to them. The statute retains the privilege in respect of penalties provided for by "the" law of any part of the United Kingdom and I do not see that we can escape from it. There is, after all, good reason for retaining it—the same reason as lay behind its introduction centuries ago. No person should be compelled to expose himself to pains or penalties out of his mouth. If he is to be penalised for wrongdoing, it should be proved against him by those who accuse him.

Mr. Bingham did raise another argument of a semantic nature. He stressed the words proceedings "for the recovery of a penalty." He said that the privilege was allowed when a person was in danger of an action to recover a penalty; but not to a case in which a person might be liable to have a penalty imposed on him without an action. That is too fine a distinction for me. If he is liable to a penalty, it matters not whether it is recoverable by action or otherwise.

So in my view the word "penalty" includes a penalty to which a person may be subject under the law of any part of the United Kingdom.

Now I come to the community law. None of the witnesses in this case would be liable to a penalty under the old law of England. But since 1972 everything is different. We are now in the European Economic Community. The Treaty of Rome ("E.E.C." Treaty signed at Rome, March 25, 1957) and all its provisions are now part of the law of England. That is clear from section 2 of the European Communities Act 1972. We have to give force to the Treaty as being incorporated—lock, stock and barrel—into our own law here.

One of the most important of the provisions of the Treaty is article 85. It is wide enough to prohibit any cartel or association of producers by which they agree to keep up prices or to limit competition in a way which affects the common market. It says:

> "... all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (*a*) directly or indirectly fix purchase or selling prices or any other trading conditions; (*b*) limit or control production, markets, technical developments, or investment;"

and so on, are prohibited. It goes on to say that all those that are so prohibited are automatically void.

If the allegations made by Westinghouse are well-founded, it does look as if the Rio Tinto company and the French companies were parties to an agreement which had, as its object, the restriction of competition and the fixing of selling price; and that this would affect the trade between member states—as interpreted by the European Court. So there would be a breach of article 85 by Rio Tinto.

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But what are the consequences? For these we have to turn to the regulations which are binding as part of English law. Article 189 says: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states." The material regulations are the General Regulations No. 17 of February 6, 1962. Article 15, paragraph 2 says that the Commission may impose fines on undertakings (not on individuals) who intentionally or negligently break article 85. The fines may be as much as 1,000 million units of account, or not exceeding 10 per cent. of the turnover in the preceding business year. In fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement.

It is plain, therefore, that Rio Tinto may be exposed to a very large fine by the European Commission. Is it a penalty? I think it is. It is a penalty for entering into an agreement to restrict competition or to fix prices contrary to article 85. It is to be noted that article 15, paragraph 4 of the General Regulations says: "The decisions taken under paragraphs 1 and 2 shall not entail any consequences under criminal law." That is inserted because the Treaty in article 192 provides that enforcement of fines and so forth "shall be governed by the rules of civil procedure in force in the state in the territory of which it is carried out." So the fines are not enforceable by the sanctions of criminal law. Only by the civil procedures of the state. In this case, by the civil procedure of the English courts. Nevertheless they are clearly "penalties" just as much as the penalties under revenue law are penalties enforceable by civil procedures: see sections 93 to 100 of the Taxes Management Act 1970. And they are "provided for by" the "law of . . . the United Kingdom," because the Treaty is part of our law. So liability to them is a ground for privilege against self-incrimination.

All I have said about "penalties" is, however, a preliminary view—given because the parties requested it. It is preliminary in case the company claims a privilege, on the ground that it may expose itself to penalties by the European Commission. If the company does claim privilege, the examiner must give effect to it. It is preserved by section 3 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, which provides:

> "(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give (*a*) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction, . . ."

Applied to this case, if Rio Tinto Zinc claim privilege saying: "We would be exposed to penalties at the instance of the European Commission" then they have a privilege against self-incrimination and can take the objection before the examiner.

If, however, circumstances arose so as to show that there is no "real or appreciable" danger to the Rio Tinto company of being fined or exposed to a penalty, the privilege would be lost: see *Reg.* v. *Boyes* (1861) 1 B. & S. 311, 330. So if the European Commission said they

were not going to take any proceedings, there would not be any risk and the privilege would go.

Turning now to the American position. Section 3 (1) (*b*) of the Act of 1975 says that a person shall not be compelled to give evidence which he could not be compelled to give "in civil proceedings in the country or territory in which the requesting court exercises jurisdiction." So under these letters rogatory when an individual witness was asked to give evidence, he could claim the privilege given by the Fifth Amendment. He could say: "I am giving evidence for the purpose of being used in an American court. So I have a privilege against incriminating myself and making myself liable to proceedings in the United States if I go there." He has a privilege, therefore, which he can call in aid in an examination here under the Fifth Amendment in the United States. It only applies to individuals and not to companies—an interesting contrast to article 85 which only applies to undertakings and not to individuals.

So far as procedure is concerned, if privilege is claimed because of the risk of a fine by the European Commission, the procedure is governed by R.S.C., Ord. 39, r. 5. If the witness refuses to answer the question, an application can be made to the court to see whether he can be required to answer; and then the court will rule upon his claim. If privilege is claimed under the Fifth Amendment, the examiner will have to act under the new R.S.C., Ord. 70, r. 6. The examiner will have to take down the evidence, seal it up and send it across to the United States: and then the United States court will rule whether the claim is good or not.

The result will be that the order will be varied so as to make the variations I have indicated about the specification of the documents. So far as claims of privilege against self-crimination are concerned, they must await the examination of the witnesses to see if privilege is claimed or not: and then be dealt with on the lines I have stated.

ROSKILL L.J. Subject to hearing counsel as to its form, I agree with the order which Lord Denning M.R. has proposed but I venture to add to his judgment for two reasons. First, this appeal is of immense importance to the parties before this court, Westinghouse on the one hand and RTZ and the potential witnesses on the other; secondly, this is the first time that this court has had to consider the Evidence (Proceedings in Other Jurisdictions) Act 1975, a fact which makes this appeal of importance beyond its importance to the parties immediately concerned.

So far as the statute goes, Mr. Kidwell put in the forefront of his argument that MacKenna J. was wrong in having affirmed the order of Master Jacob because the letters rogatory were in truth designed to obtain discovery in this country against both the corporate witnesses and the individual witnesses. He put his submission thus: if, looking at the matter broadly, this was an exercise in discovery, then the whole request should be rejected. He founded much of his argument upon the line of cases which followed the Foreign Tribunals Evidence Act

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A 1856 which had governed matters of this kind until the Act of 1975 was passed. He invited us to approach our decision upon the construction of the Act of 1975 by reference to those earlier decisions. With all respect to the persuasive skill of that argument, I think it is a wholly erroneous approach to invite the court to consider the true construction of a statute passed in 1975 by reference to a line of judicial decisions, albeit of high authority, under a statute in different terms B passed in different circumstances about 125 years ago.

The Act of 1975, as Lord Denning M.R. has already said, enacted the Hague Convention of 1968 as part of the law of this country. Whether or not it is legitimate to construe the Act of 1975 by reference to that Convention (it is only right to say that the Convention itself is not referred to in the statute) none the less, treating that Convention C as what Lord Wilberforce recently called [*Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 997] part of the "factual matrix," it seems to me plain what the purpose of that Convention was, as indeed it states upon its face. It will be found in Command Paper 3991 and recites that the states signatory to the Convention desire "to facilitate the transmission and execution of letters of request and to further the accommodation of the different methods which they use for this purpose," D and also that they desire "to improve mutual judicial co-operation in civil or commercial matters." We move in 1975 in a very different world from that of 1856.

When one sees that this Convention was signed on behalf of some 25 signatories, some of them common law countries and some of them countries with systems of law vastly different from those either of this E country or of the United States of America or of any of its states, one realises how broad was its general intention. It is relevant, as Lord Denning M.R. pointed out both in his judgment and during argument, that article 23 of that Convention provides:

> "A contracting state may at the time of signature, ratification or F accession, declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."

There is authority in this country under the Act of 1856, the *Radio Corporation* case [1956] 1 Q.B. 618, that this court will not facilitate what I can, with sufficient accuracy, call the United States pre-trial dis- G covery procedure by allowing letters rogatory to be issued solely for the purpose of obtaining in this country pre-trial discovery in the strict sense of that phrase. It has been said that the evidence sought must be evidence directed to use at the trial itself.

Looking at the Act of 1975, I draw attention to the preamble. This, as Shaw L.J. pointed out during the argument, is no consolidating Act. It does not re-enact in any shape or form the Act of 1856 or any of H the other Victorian statutes which touch upon this question. On the contrary, it is described as

> "An Act to make new provision for enabling the High Court . . .

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to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions . . ." A

I need not read the rest of the preamble. It is obviously designed to give effect to the Convention.

This morning, during his reply, Mr. Kidwell said that we should not be astute to assist Westinghouse to obtain the relief which they seek in these proceedings. With respect, that submission is misconceived. B We are not concerned with assisting or not assisting Westinghouse. We are concerned with and only concerned with assisting the Federal Court for the District of Richmond in Virginia. It is that court which has enlisted our assistance by letters rogatory and it is that court which, to use Lord Denning M.R.'s phrase, it is both our duty and our pleasure and our power under the Act of 1975 to assist, so far as we properly can. The limitations upon the power and the duty of this court to C assist under that statute seem to me to be matters to be found not in decisions under the Act of 1856 at all, but within the language of the statute itself, bearing in mind that it is a statute designed to give effect to a convention to which many different countries with many different systems of law are parties.

Lord Denning M.R. referred in his judgment to a number of the D sections of the Act of 1975, and I will not lengthen mine by repeating what he has said. It seems to me that Mr. Kidwell's argument that we should apply the construction placed upon the Act of 1856, and hold that documents to be produced under the present Act have to be ancillary to the oral evidence of witnesses, is wrong. Whatever the true construction of the Act of 1856, as to which there is abundant authority, we are now dealing with a completely different statute: when E one looks at section 2 (1) and (2) of the Act of 1975, one finds that section 2 (2), which is described as being "without prejudice to the generality of subsection (1)" empowers the court to make provision for a number of matters (*a*) to (*f*) inclusive, of which (*a*) is "for the examination of witnesses, either orally or in writing" and (*b*) is "for the production of documents." Simply as a matter of construction, it F would be quite wrong, with all respect to Mr. Kidwell, to hold that the production of documents should be limited to documents ancillary to the evidence or oral testimony of witnesses whose evidence is to be adduced under the Act. That point, therefore, fails.

I think his other point, what he calls his "root and branch" point, also fails, indeed fails in limine, and for this reason. It was suggested, as I said a moment ago, that this was an attempt to obtain pre-trial G discovery. One should ascertain what is the nature of the letters rogatory by looking at the letters rogatory themselves. They are exhibited to an affidavit of Mr. Watson of Freshfields. It seems to me to be plain—and Lord Denning M.R. has already mentioned this—that those letters rogatory are designed to obtain evidence for use at the trial. If there ever were any doubt about it—and I do not think there was— H the matter is put beyond all doubt by an order of May 20 made by Judge Merhige for the benefit of this court. So that it seems to me that the first two grounds which Mr. Kidwell put forward, the "root

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and branch" argument and the "ancillary" argument, both fail. To that extent, I find myself in complete agreement with the orders made in the courts below.

But the matter does not stop there, because in this court another matter has been fully argued which was not argued before MacKenna J. or Master Jacob. It is said that even if the orders issue in the form ordered below, none the less the corporate witnesses, by which I mean RTZ and RTZ Services, are entitled, as of right, to decline to produce the documents sought on the ground that they are privileged from production under the well known long standing rule in this country by virtue of which witnesses are entitled to protection from self-incrimination.

I do not propose in this judgment to discuss either the historical origin of this rule, or its possible historical links with the Fifth Amendment to which much reference has been made, nor whether it is right that at the present time there should be a continued right to silence in this country or not. We are not concerned with anything other than the privilege against self-incrimination to the extent that that privilege has been preserved by section 14 of the Civil Evidence Act 1968.

The matter arises in this way. We are concerned here with the privilege accorded by the combined effect of section 3 of the Act of 1975, and section 14 of the Act of 1968. It was argued that the reference to penalties in the Act of 1968 should be given a strictly limited meaning and should be construed as limited to penalties such as those imposed by the Income Tax Act 1952 and the Taxes Management Act 1970.

It is true that when the law was altered in 1968 following the report of the Law Revision Committee in 1967 it appears that those penalties—those under the Act of 1952—and those alone were intended to be the subject of preservation, the other protection against self-incrimination having been recommended for abolition. But whatever the original intention may have been, and whatever penalties may have been in mind at that time, we have to consider the position under the Act of 1968 and the Act of 1975 having regard to the entry of this country into the European Economic Community in 1972. As Lord Denning M.R. has pointed out, under the European Communities Act 1972 it is clear that the regulations of the E.E.C. and indeed the Treaty of Rome itself, and in particular article 85, are now a part of the law of this country. We were referred to articles 14 and 15 of Regulation No. 17/62. It is plain that fines which are penalties can be inflicted under article 15 for (among other matters) breaches of article 85 of the Treaty. It is also plain from article 15, paragraph 4, that decisions to impose fines taken under paragraphs 1 and 2 of the article shall not be of a criminal law nature.

Those fines or penalties can be enforced by proceedings in this country. After the Act of 1972 was passed, the European Communities (Enforcement of Community Judgments) Order 1972 (S.I. 1972 No. 1590) was enacted by Her Majesty in Council and rules of court were thereafter made giving effect to those various pieces of legislation. It is

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sufficient to refer to the note 71/15–24/2 in *The Supreme Court Practice* (1976), R.S.C., Ord. 71, r. 15, which reads: A

> ". . . The most likely Community judgments enforceable under the provisions of the Community Treaties which would require to be registered and enforced in the United Kingdom are decisions of the Commission of the European Communities imposing fines or penalties, either of lump sums expressed in units of account or percentages of the offending firm's turnover, . . . under E.E.C. Regulation 17/62, relating to restrictive practices and monopolies." B

Notwithstanding Mr. Bingham's ingenious argument this morning, I cannot see any legitimate reason for limiting the construction of the word "penalties" in the Act of 1968 to revenue penalties formerly imposed under the Act of 1952 and presently under the Act of 1970. Like Lord Denning M.R., I have reached this conclusion with a certain C regret, because one has an instinctive feeling that there is an element of artificiality about this result, but that being the statutory position in this country, that being the express right of the persons concerned under the Act of 1975 which preserves the relevant privilege, including that preserved by the Act of 1968, I see no answer to the contention that this protection exists in principle. But it is important to remember, D as Lord Denning M.R. pointed out, that there may be qualifications upon the right to the protection. Whether there are relevant qualifications in particular instances is something which must be dealt with at the hearing and cannot be determined in advance.

Accordingly, for those reasons, I agree with what Lord Denning M.R. has said about privilege. So far as the Fifth Amendment is concerned, I propose to say very little. Mr. Kidwell has said that we should E make it a condition of the issue of the order that a master should act in place of the United States consul or vice-consul for the purpose of taking any evidence that may be given under the letters rogatory and that such a master should be appointed by the judge in Virginia. The purpose was that a ruling on this privilege on behalf of the judge might be given instantly so that no problem of delay would arise in F connection with any witness who invoked the Fifth Amendment. All I would say is that I think it would be quite wrong for this court to presume to dictate before whom these proceedings should take place. That, it seems to me, must be a matter for the court in Virginia and not for this court. If the proceedings are to be held in the near future in London, it must be a matter for the judge in Virginia to say by his order who is to sit where; possibly either he himself or a master G appointed on his behalf or a consul or vice-consul as the present order provides.

The only remaining point with which I have to deal is the width of the order. Lord Denning M.R. has referred to some matters arising on Schedule B. Like him, I think that some of the descriptions in Schedule B are too wide. If I may take one or two items as an H example, I refer first to item 11. That seems to me to be a legitimate use of the phrase "memoranda, correspondence or other documents relating thereto" because those documents are sufficiently specific. On

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the other hand, like Lord Denning M.R., I think number 16 is much too wide. Again, merely to take an example, I think number 7 is wide; although it only primarily refers to a single document I think the request must identify, for the protection of the person receiving it, with sufficient accuracy, the documents required either individually or generically so that that person concerned may know what it is he has to provide and does not have to search around among his files to make up his own mind whether or not he will be failing in his duty to the court if he does not produce a particular document. His task should be made easy and not difficult; I am sure that with goodwill, having regard to those who have charge of the matter on both sides, the order when issued will be sensibly operated.

For those reasons, as well as those given by Lord Denning M.R., I would in substance dismiss the appeal but with the qualifications on the existing order that Lord Denning M.R. has mentioned.

SHAW L.J. I agree with both judgments and there is nothing I wish to add.

Appeals dismissed with modifications varying order made by MacKenna J.
Declaration that fines, if any, which might be imposed under E.E.C Treaty are penalties within section 14 of the Civil Evidence Act 1968.
Each party to pay own costs in Court of Appeal. Order for costs below to stand.
Leave to both sides to appeal: examination not to be held up.

Solicitors: *Linklaters & Paines; Freshfields.*

A. H. B.

On June 21, 1977, MacKenna J. dismissed an application by Westinghouse Electric Corporation ("Westinghouse") for an order requiring the Rio Tinto Corporation Ltd. and RTZ Services Ltd. (both companies being referred to as "RTZ") to produce and/or produce for inspection the documents set out in the schedules to the orders of the Court of Appeal of May 26, 1977.

Westinghouse appealed on the grounds that the judge erred in law and in fact in failing to hold that the production of the documents would not expose RTZ to any proceedings for the recovery of a penalty to which they were not already exposed and/or that there was no real or appreciable danger to RTZ being exposed to any such proceedings by reason of their production of the documents; that he failed to pay due regard to section 14 (1) of the Civil Evidence Act 1968; and that he held that the issue was decided against Westinghouse by *Triplex*

Safety Glass Co. Ltd. v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395, which was wrongly decided. A

The facts are stated by Lord Denning M.R.

T. H. Bingham Q.C. and *Timothy Walker* for Westinghouse.
Brian Neill Q.C., *Michael Burton* and *Richard Wood* for RTZ.

LORD DENNING M.R. To make this case clear, I must repeat one or two things we all know. On the information placed before us, there is ground for thinking that from 1972 onwards there was an international cartel in uranium. This cartel was an association by which the big producers of uranium combined to regulate the output of uranium and the price of it. Its object is said to have been to manipulate the price of uranium, to limit competition, and to force prices up to excessively high levels. The parties to this cartel included Australia, Canada, South Africa, France—and companies in those countries—and also the English company of Rio Tinto. B C

There is also ground for thinking that, in belonging to this cartel, France and its companies and the Rio Tinto companies ("RTZ") were infringing article 85 of the E.E.C. Treaty. That article prohibits all "concerted practices" which restrict or distort "competition within the common market." If RTZ have infringed article 85, they can be fined by the European Commission at Brussels. The fine may be very large indeed. The European Commission can impose this fine under Regulation No. 17 of 1962, article 15 (2). It can be imposed by the European Commission at Brussels without the English courts having any say in the matter at all. RTZ can appeal to the European Court at Luxembourg: see Regulation No. 17, article 17. But if that court affirms the fine, that is final. The only role of the English court is that of a rubber stamp. The fine can be enforced by process of execution issued by our courts. D E

There is evidence now before us that the European Commission in Brussels knew all about the cartel almost from the beginning in 1972. They made some inquiries of the governments involved. But they took no action to interfere with the cartel. Then in 1976 in Australia a society calling itself the "Friends of the Earth" got hold of the files of an Australian mining company which was concerned with the cartel. They sent the files to California. Thence they came into the possession of influential quarters in the United States; and in particular into the hands of the Westinghouse Electric Corporation ("Westinghouse"). The European Commission in turn got hold of the "Friends of the Earth" documents late in 1976. Questions were asked about it in the European Parliament. No doubt with the view of the European Commission taking action against the cartel. On September 15, 1976, the member of the Commission made this answer: F G

> "Since 1972 the Commission has followed with interest the actions of the Uranium Club. The Commission is examining the information which has recently reached it on the subject and which is being studied also in the United States. It is continuing its analysis of the respective roles of the governments and the companies in the formation and operations of the club." H

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A supplemental question was asked: "Does the Commission admit in principle the existence of a cartel in this affair?" The answer was: "We are not able, at this point, to come to a conclusion as to the existence of a cartel." This answer seems to have provoked some amusement because the official report notes down in French "sourires." I suppose this was due to the lack of action by the Commission.

The present proceedings

On the last occasion ante, p. 558H I described the litigation now pending in the United States in which the courts there had issued letters rogatory to the courts here in England. They have requested the English courts to compel RTZ to produce to an examiner their documents relating to the uranium cartel. On May 26, 1977, we gave a ruling that on the examination in England RTZ could claim the privilege given by the common law against self-incrimination. That is, that they had a right to refuse to produce the uranium documents "if to do so would tend to expose them to proceedings" for a fine or penalty by the European Commission. Before the examiner RTZ did claim this privilege. We now have to decide whether the privilege should be upheld or not. I will take the arguments in the order which the advocates took them before us.

First, *the common law as to self-incrimination.* If the privilege is good, it must satisfy the common law rule about it. It is to be noticed that RTZ are not parties to the litigation in the United States. They are reluctant witnesses who have been ordered to give evidence and to produce documents.

There is, I think, a distinction to be drawn between a witness and a party to a suit. It happens sometimes that a defendant is sued for a matter which not only gives rise to a civil cause but also gives rise to a criminal offence such as libel or fraudulent conversion. The plaintiff then seeks to administer interrogatories or get discovery from the defendant so as to support his charge. In such a case the defendant has on occasion taken objection on the ground that the answer or the discovery may tend to expose him to proceedings for a criminal offence: and the objection has been upheld. Such were the libel cases of *Lamb* v. *Munster* (1882) 10 Q.B.D. 110 and *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395. I must say that I doubt if those cases would be decided in the same way today. The privilege should not be allowed in a libel case where there is no real risk of the defendant being prosecuted: and his objection is only put forward as a way of escaping his civil liability.

Today we are not dealing with a party to a cause: we are dealing with a witness. At common law, when a witness is being examined in the witness box or is subpoenaed to produce documents to the court, then, quite understandably, he may have something he wishes to keep secret to himself so that his neighbours or his competitors should not get to know of it. Something which he might reasonably believe he ought not to be compelled to disclose. Not, at any rate, if it exposes him to risk of some ill befalling him. The common law does in some

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circumstances cast its protection over him. It adopts the maxim nemo tenetur seipsum prodere. No one is bound to furnish evidence against himself. It says:

> "If a witness claims the protection of the court, on the ground that the answer would tend to incriminate himself and there appears reasonable ground to believe that it would do so, he is not compellable to answer": see *Reg.* v. *Garbett* (1847) 1 Den.C.C. 236, 257 by nine judges after two arguments.

Note that a witness is only given this protection if he can satisfy the court that there is reasonable ground for it. Lord James of Hereford said so in *National Association of Operative Plasterers* v. *Smithies* [1906] A.C. 434, 438. (If the court thinks that he has no reasonable ground but is making it as an excuse—for instance, so as to help or hinder one side or the other—it will overrule his objection and compel him to answer. That was pointed out by Sir George Jessel M.R. in *Ex parte Reynolds* (1882) 20 Ch.D. 294, 300.) It is for the judge to say whether there is reasonable ground or not. Reasonable ground may appear from the circumstances of the case or from matters put forward by the witness himself. He should not be compelled to go into detail—because that may involve his disclosing the very matter to which he takes objection. But if it appears to the judge that, by being compelled to answer, a witness may be furnishing evidence against himself—which could be used against him in criminal proceedings or in proceedings for a penalty—then his objection should be upheld.

There is the further point: once it appears that a witness is at risk, then "great latitude should be allowed to him in judging for himself the effect of any particular question": see *Reg.* v. *Boyes* (1861) 1 B. & S. 311, 330. It may only be one link in the chain, or only corroborative of existing material, but still he is not bound to answer if he believes on reasonable grounds that it could be used against him. It is not necessary for him to show that proceedings are likely to be taken against him, or would probably be taken against him. It may be improbable that they will be taken, but nevertheless, if there is some risk of their being taken—a real and appreciable risk—as distinct from a remote or insubstantial risk, then he should not be made to answer or to disclose the documents. That is, as I read it, the judgment of the court in *Reg.* v. *Boyes.* I am sure that in *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253, 257 Goddard L.J. did not mean to say anything different because he had referred in a previous sentence to *Reg.* v. *Boyes* itself. In applying that principle in *Reg.* v. *Boyes*, where a witness was given a pardon, he was under no appreciable risk and was made to answer. Again in *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253, where the offence had become obsolete, he was made to answer. And in the Australian case of *Brebner* v. *Perry* [1961] S.A.S.R. 177, where he had already given a like statement to the police—and by giving evidence there was no increase in risk by his being made to answer—he was made to answer. But where there is a real and appreciable risk—or an increase of an existing risk—then his objection should be upheld.

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The powers of the European Commission

The powers of the European Commission are not directly relevant to this case. But they arose in the course of argument because it is said that the European Commission have large powers which they have not used: and that shows that they intend to take no action against the cartel.

On the face of it, this appeared to be the case where it is the duty of the European Commission to investigate. Article 89 of the Treaty says that "the Commission *shall* investigate cases of suspected infringement of these principles," that is, articles 85 and 86. If it finds that there has been an infringement, it *shall* propose appropriate measures to bring it to an end. In making the investigation, the European Commission is entitled to call upon the Director General of Fair Trading in England, and he is bound to give his assistance: no doubt by placing his officers at the disposal of the Commission.

In making an investigation, the European Commission is armed with great powers given by Regulation No. 17 of 1962, articles 11 to 20. These will come as a surprise to those of us who have been brought up in the common law. Long before any proceedings have been instituted—and before any prima facie case is shown—the European Commission is entitled to interrogate an undertaking like RTZ and require them to give any information which the Commission thinks is necessary: see article 11. If RTZ refuse to answer the interrogatories, or if they answer them incorrectly, the Commission can impose fines and penalties on RTZ. In addition the European Commission can require an undertaking like RTZ to disclose their books and business records, to take copies of them, to ask for oral explanation on the spot, and to enter any premises of RTZ: see article 14. Here again, if RTZ refuse, the Commission can impose fines and penalties on them.

There is a provision by which RTZ are entitled to be heard at the various stages: see article 19. But, after giving a hearing, the European Commission can impose a fine or penalty. RTZ could appeal to the Court of Justice at Luxembourg, but if they affirm the fine or penalty it is final.

The decision then is enforceable in England. Article 192 of the Treaty says: "Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than states shall be enforceable." The decision is equivalent to a judgment of an English court. It can be registered in England; and on registration can be enforced by writs of execution: see the European Communities (Enforcement of Community Judgments) Order 1972, S.I. 1972 No. 1590.

There is a provision that any information obtained is only to be used for the purpose of the investigation: see article 20. But under community law (differing herein from the common law) an undertaking like RTZ has no privilege by which it can refuse to answer the interrogatories, or refuse to disclose its books and records. Community law does not recognise any privilege against self-incrimination. It would obviously stultify an investigation if RTZ could say: "We fear this would expose us to a fine for infringing article 85 of the Treaty." (Somewhat

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similar to the investigation in *Parry-Jones* v. *Law Society* [1969] 1 Ch. 1.) So RTZ would be bound to answer and give discovery when requested by the European Commission.

In addition there is some doubt whether in community law (differing again from the common law) an undertaking like RTZ could rely on legal professional privilege—so as to protect it. In *In re Quinine Cartel* [1969] C.M.L.R. D41, D71, it appears that the European Commission looked at the record of a legal consultation so as to show the guilty mind of an infringer.

All this shows that the European Commission have great powers of investigation which they could exercise against RTZ if they so desired. They could compel RTZ to produce all these documents if they so desired.

The facts

After all these digressions I come back to the question in the case. To what extent is there a real or appreciable risk that RTZ may be subjected to a fine or penalty by the European Commission?

It was submitted by Mr. Bingham that there was no real risk. The European Commission, he said, had known of the cartel for five years and had taken no action. It had known of the "Friends of the Earth" documents for 10 months and had made no investigation of either one. It had the great powers (which I have summarised) but it had not sought to interrogate RTZ or to require discovery of its documents. Its inaction has provoked amusement in the European Parliament. It may reasonably be inferred, said Mr. Bingham, that for some reason best known to itself the Commission has decided not to take any proceedings against RTZ. So RTZ are in no risk of being fined: and they should be compelled to give discovery of their documents.

But on the other hand, in answer, Mr. Neill relied on the affidavit of Mr. Jeremy Lever. He gives a good deal of detail, but summarises his conclusions in these matters as a result of his discussions with some of the members of the staff of the Commission:

> "(a) on the material at present available to it, the Commission still has an open mind whether the arrangements relating to uranium of which it is aware constituted a 'cartel' in the sense of a contravention of article 85 of the E.E.C. Treaty; (b) the Commission has not taken any decision to ignore such arrangements but, on the contrary, is keeping the position under constant review; (c) it is impossible for anyone to say whether disclosure of further information not already in the Commission's hands might lead the Commission to 'open proceedings' in respect of such arrangements . . . (d) it is equally impossible for anyone to say whether if proceedings under article 85 of the E.E.C. Treaty were successfully taken by the Commission against RTZ and/or RTZS, the Commission would impose a fine upon either of those companies."

It is to be observed that no application has been made and the Com-

mission have not given "negative clearance" under article 2 of Regulation No. 17.

To this I would add, as I said at the beginning, that the European Commission are under a duty under the Treaty itself to investigate the cartel; and, if the evidence is sufficient, to take steps in respect of it. The Commission have no prerogative, so far as I know, to dispense with the law enacted by article 85.

In these circumstances, it seems to me that there is reasonable ground to believe that, if RTZ were compelled to disclose the documents requested by the United States courts, there is a risk of those documents being used against them in this way—they might be brought to the knowledge of the European Commission and be used by the Commission in support of proceedings for a fine or penalty. They might afford additional evidence of such cogency that the European Commission could no longer hold its hand: but would be bound to act under article 85 of the Treaty. Seeing that RTZ reasonably believe there is such a risk, I think they are entitled to the privilege against self-incrimination. I would therefore dismiss the appeal.

ROSKILL L.J. The only question for decision on this appeal is whether the respective claims of RTZ and RTZ Services ("RTZS") for privilege from the production of the documents sought by the appellants should be upheld. It is important to remember that RTZ are not parties to the pending litigation against the present appellants, Westinghouse, who seek the order against them. RTZ say that such production will tend to expose them to proceedings for penalties in the form of fines exigible at the instance of the European Economic Community for breach of article 85 of the E.E.C. Treaty and that, having regard to our decision on the previous occasion on May 26, 1977, to which Lord Denning M.R. has referred, such fines are penalties within section 14 of the Civil Evidence Act 1968, and therefore they are entitled to the protection for which section 3 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, from which the present proceedings arise, makes express provision.

Westinghouse say that such production will not tend to expose RTZ to any such penalties—or at least to any such penalties beyond those to which they already stand exposed in the light of the state of knowledge of the Commission at the present time. Mr. Bingham, for Westinghouse, pressed us on Friday with the argument that the documents sought were only those which Westinghouse thought were likely to exist, and that they had founded their demand upon, and only upon, those documents, copies of which they had already obtained from sources in Australia. He pointed out that there was now clear evidence before us that the existence of the so-called cartel (or "club," as the Commission's officials prefer to call it, claiming that the existence of a cartel properly so called has not yet been proved) has been known to the Commission and its staff since 1972, though copies of the documents to which I have just referred only came into the Commission's possession last year, 1976. Mr. Bingham drew our attention to the question to which Lord Denning M.R. has just referred which was asked in the European Parliament on this subject and to the overt signs of scepticism—described in the official report in French as

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" sourires "—with which the answer given was received, as if to emphasise that the truth as he claimed it to be was and had for some time been widely known both to the Commission and to the press, namely, that this agreement did infringe article 85; yet for some four years past or more nothing whatever had been done by the Commission. If that were the position today and no action had yet been taken by the Commission, either itself to investigate or to call for those documents and others under article 14 of Regulation No. 17 or to require the competent authorities of the British government to investigate the position under article 13 of Regulation No. 17, the overwhelming inference must be that the production of these further documents would not at this time lead to any action by the Commission. Mr. Bingham said that the privilege against self-incrimination could not be used to stultify the Commission's powers of investigation since the Commission were vested with powers to investigate a political mischief. The privilege, such as it was, was a privilege only in legal proceedings and not in an investigation which might or might not proceed. Mr. Neill made no admission that the privilege against self-incrimination could not be used to resist a demand by or at the instigation of the Commission for production of documents in any investigation under articles 13 or 14 of Regulation No. 17. The determination of this appeal does not involve the determination of that question, and I express no opinion whatever upon it. The determination of this appeal depends upon whether in these proceedings, which are legal proceedings, RTZ are entitled to the protection to which section 14 (1) of the Act of 1968 entitles them if production would " tend to expose " them to " proceedings . . . for the recovery of a penalty."

It has long been a rule of English law, as Lord Denning M.R. has pointed out, that a person cannot (subject only to certain statutory exceptions, of which *Parry-Jones* v. *Law Society* [1969] 1 Ch. 1 affords an interesting and modern example) be required to answer questions or produce documents which may lead to his being, if I may be forgiven a colloquialism, " convicted out of his own mouth." There is a long line of authorities dealing with this topic of which the earliest cited to us was *Reg.* v. *Boyes*, 1 B. & S. 311, a decision of the Court of the Queen's Bench subsequently expressly approved by this court in *Ex parte Reynolds*, 20 Ch.D. 294. Those two cases—and there are others to the same effect—show clearly that a mere assertion of a claim for privilege on the ground of an alleged risk of self-incrimination is not enough to enable the privilege to be successfully claimed. Nor, of course, will the court uphold such a claim for privilege when it is made in bad faith. Nor indeed, as the authorities show, will the courts automatically uphold every such claim for privilege when, as is of course accepted here, it is made by RTZ in complete good faith.

The first question which a court must ask itself is whether the facts proved in evidence disclose the commission of an offence—in some cases a criminal offence. The first question here is whether those facts disclose that there is a liability upon RTZ for what Mr. Neill called " a penalty offence." To my mind there can be no doubt but that they do, and indeed it was not seriously in dispute that the documents which we saw on the last occasion do disclose a breach of article 85.

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What then is the degree of risk of penalty proceedings following? It seems to me that once a party to legal proceedings who is resisting production of documents can show facts which establish the existence of a penalty offence (or in other cases the commission of a criminal offence) the courts should be slow to deprive that party of his privilege against self-incrimination, which the common law now for some three centuries, and section 14 of the Civil Evidence Act 1968 today accords him. In the absence of bad faith, to say that there is no risk of proceedings may in all but the plainest cases involve a court claiming for itself a degree of prescient foresight to which it would not be wise to pretend for if its forecast were wrong and if proceedings and penalties were to follow, damage will or at least may be done by an erroneous decision of the court which it would not be easy thereafter to undo or redress.

I do not propose in this judgment to go through all the cases which have been cited to us and which, with all respect to the authors of the various judgments, are not always helpful because of the varying language used from time to time in different cases to indicate where the dividing line comes. The problem is not made any easier for us because in the several reports of *Short* v. *Mercier* (1851) 3 Mac. & G. 205 where the claim for privilege was upheld, the language used by Lord Truro L.C. is not identical in the several reports. In the report in Macnaghten and Gordon, reproduced in 42 E.R. 239, 299, the language is different from that in both 15 Jur. 93 and 20 L.J.Ch. 289. Nor is it necessary to consider whether certain passages in the judgment of du Parcq L.J. in the *Triplex* case [1939] 2 K.B. 395 (which plainly influenced MacKenna J.) are entirely reconcilable with Goddard L.J.'s later judgment in *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253, during the argument in which the decision three years earlier in the *Triplex* case was seemingly not cited. Like Lord Denning M.R. I find it impossible to think that in the passage in Goddard L.J.'s judgment in *Blunt*, at p. 257, upon which Mr. Bingham relied both this morning and on Friday, where he asked whether there was any "reasonable likelihood" of the answers to the interrogatories in question exposing a person to ecclesiastical censure, Goddard L.J. was intending to substitute his phrase for the words used by Cockburn C.J., in *Reg.* v. *Boyes*, 1 B. & S. 311, 327–330, to which Goddard L.J. had referred a moment or two earlier in his judgment.

It cannot, I think, be right in these cases for the court to attempt a quantitative assessment of the probability one way or the other of the risk of proceedings ultimately being taken, and then to seek to draw the line, one way where the probabilities in the view of the court are thought to be more or less evenly balanced and the other where the balance is more disparate. It is not for the court to resolve problems of this kind by calculating odds. I think that the right question to ask is that posed by Shaw L.J. on Friday afternoon. Can exposure to the risk of penalties (or in other cases to the risk of prosecution for a criminal offence) be regarded as so far beyond the bounds of reason as to be no more than a fanciful possibility? Examples of such cases are *Reg.* v. *Boyes*, 1 B. & S. 311; *Ex parte Reynolds*, 20 Ch.D. 294 and *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253. Examples of cases where the claims have been upheld

are, to name but a few, *Short* v. *Mercier*, 3 Mac. & G. 205 and *Triplex* [1939] 2 K.B. 395.

Like Lord Denning M.R., I confess to a feeling of unease, sitting in this court in 1977, about cases where claims to privilege have been upheld because of the alleged risk of prosecution for criminal libel and wonder whether some of them would have been decided the same way today. Those cases might on some suitable occasion usefully be reconsidered by the appropriate tribunal, for times do change and the policy of the law changes with the times, just as this court in *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253 refused to follow the earlier decision of this court in *Redfern* v. *Redfern* [1891] P. 139 (a matrimonial dispute), and in particular a passage in the judgment of Bowen L.J. at p. 147 regarding the right to claim privilege because of the risk of ecclesiastical censure. In saying that, I have not lost sight of the figures of prosecutions for criminal libel which Mr. Neill gave us on Friday afternoon.

Asking myself the question which Shaw L.J. posed, I am afraid I am not persuaded by Mr. Bingham's argument that one should assume from the inaction to date which must be taken to have been on the basis of the Commission's present knowledge that there is no future risk of proceedings for an alleged breach of article 85. In his reply this morning Mr. Bingham stressed the position as it is today in Australia and Canada and indeed in France. Of course neither Australia nor Canada are parties to the E.E.C. Treaty, and we have been told that special legislation has been passed in each of those countries to deal with the situation in relation to the Australian and Canadian corporations concerned. France is of course a member of the community but that does not affect the position we have to consider. Bureaucracy moves slowly, perhaps international bureaucracy may move even more slowly. These problems are immensely complex, and the present documents have only been available since 1976.

Even if I am wrong in that view on the basis of the documents which the Commission presently have, I am even less persuaded, with all respect to Mr. Bingham, that I should assume that these other documents, even though designed only to fill in the gaps in the existing documents, might not supply just that extra information which might move the Commission to decide to proceed further, a step which in the absence of seeing those other documents they would not or might not have taken. The fact, if it be the fact, that there may not be immediate damage to RTZ from the Commission's present possession of documents does not mean that there may not be some future damage from the production of the other documents presently sought. I do not think it is relevant that the Commission might be able by the use of their own inquisitorial powers to obtain some or all of these other documents for themselves. Unless and until they make a move either directly or through a member state, I think RTZ are entitled to maintain their claim of privilege in these legal proceedings, legal proceedings to which they are not directly parties—they are merely being sought to be brought before the court as reluctant witnesses.

For those reasons, which I think substantially are in accord with those of Lord Denning M.R., I would dismiss the appeal.

A SHAW L.J. Mr. Bingham has contended for Westinghouse that the court must seek to reconcile two principles of law. The first is that which accords to a witness the privilege which entitles him to refuse to answer questions or to produce documents which will tend to expose him to proceedings for an offence or for the recovery of a penalty. The second is that which requires that justice should be done between the parties to a cause.

B He cited in support of this proposition passages from the respective judgments of Lord Truro L.C. in *Short* v. *Mercier*, 3 Mac. & G. 205; and Cockburn C.J. in *Reg.* v. *Boyes*, 1 B. & S. 311; Jessel M.R. in *Ex parte Reynolds*, 20 Ch.D. 294; Goddard L.J. in *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253. I do not read any of those judgments as requiring a court to decide in a given case whether upholding a claim for privilege will do C such a disservice to justice as to justify rejecting the claim for that reason. What does emerge from the passages cited is that before a claim for privilege is upheld the court must be satisfied that there is a real and genuine basis for the assertion by the witness that he will tend to be exposed to proceedings or penalties. The precise measure or degree of the risk to the witness is something which the court is not called upon to assess so long as there is a degree of risk which cannot be dismissed D as tenuous or illusory or so improbable as to be virtually without substance. The question is, whether there is a recognisable risk? The principle which protects a witness from obligatory self-incrimination is not to be qualified by or weighed against any opposing principle or expedient consideration so long as the risk of self-incrimination is real in the sense that what is a potential danger may reasonably be regarded as E one which may become actual if the witness is required to answer the questions or to produce the documents for which privilege is claimed.

In *Short* v. *Mercier*, 3 Mac. & G. 205, there is a passage in the judgment of Lord Truro L.C. where he says:

> "Now, a defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought may affect him, F for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances, consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable."

In my view the words "extremely probable" relate in that passage to the existence of the risk and not to the magnitude of the chance that G proceedings may be brought. It is sufficient if it is shown that there is an appreciable chance that they may.

Accordingly I agree with the judgments which have been given by Lord Denning M.R. and Roskill L.J., and I too would dismiss the appeal.

Appeal dismissed with costs.
Leave to appeal refused.

H

Solicitors: *Freshfields; Linklaters & Paines.*

A. H. B.

July 27, 1977. The Appeal Committee of the House of Lords (Lord Wilberforce, Lord Edmund-Davies and Lord Fraser of Tullybelton) allowed petitions by the persons named in the orders for leave to appeal.

On July 18, 1977, the Department of Justice of the United States applied to Judge Merhige for an order to compel testimony under U.S.C. sections 6002–6003 applicable when a witness claimed privilege on the ground of self-incrimination but under which no testimony compelled might be used against the witness in a criminal case. The judge made the order.

The two original appeals to the House of Lords were by Rio Tinto Zinc Corporation Ltd. and R.T.Z. Services Ltd. (both hereinafter called "R.T.Z."). Peter Daniel, Jean Loup Dherse, Lord Shackleton of Burley, Sir Ronald Turner, Roy William Wright, Andrew Gilward Buxton and Kenneth Bayliss by leave of the Court of Appeal. The three cross-appeals of the respondents, Westinghouse Electric Corporation, concerned the interpretation of section 14 of the Civil Evidence Act 1968.

Kenneth Rokison Q.C. and *Michael Burton* for the appellants. The statute which is relevant to the letters rogatory is the Evidence (Proceedings in Other Jurisdictions) Act 1975. Section 2 deals with the powers of the United Kingdom court, assuming that the requirements of section 1 are satisfied. Section 3 deals with privilege of witnesses. This gives them a double privilege, English law privilege and also any privilege which they would enjoy under the law of the requesting court. A corporation is not recognised as having any privilege under United States law, so the individuals in this case were claiming under United States law privilege against self-incrimination but the companies, in respect of the documents, were only claiming privilege under English law. There is a procedure under 18 U.S.C. sections 6002–6003 whereby the Department of Justice can in certain circumstances require a witness to testify if his evidence is necessary in the public interest. Evidence so given will not be the subject matter of any prosecution; immunity is granted in respect of it.

The witnesses attended before Judge Merhige and claimed privilege. He upheld the claim and that was an end of the matter. The English court should not require them to go back again just because the Department of Justice subsequently took another course.

The appellants' submissions fall under three heads: (1) discovery; (2) privilege and (3) other proceedings. As to those other proceedings, the order made under section 6002 pursuant to an application by the Department of Justice to obtain evidence for the purposes of the grand jury proceedings was made, not in respect of a civil proceeding, but in respect of a criminal investigation, and the immunity which followed from that order did so only if the evidence was given pursuant to that order. But no evidence could be given pursuant to that order.

The whole tenor of the Act of 1975 is against its being used for the purpose of "fishing." It replaced the Foreign Tribunals Evidence Act 1856. It was to some extent a product of the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters signed at The

A Hague on March 18, 1970, and ratified by the Government on July 16, 1976.

Under the Act the court has a discretion and is not under an obligation. The application must be in respect of evidence "to be obtained for the purposes of civil proceedings," instituted or contemplated.

As to discovery: (1) The request by the Virginia court was not for an order for evidence to be obtained for the purpose of proceedings B pending before that court but for discovery against persons not parties to the proceedings. It was not within the letter or the spirit of the Act and was contrary to the common law developed before and under the Act of 1956.

(2) The schedule of documents the production of which is requested in effect requires the companies to state what documents relevant to the proceedings are in their possession, custody or power and requires the C production of documents other than particular documents specified in the letter of request.

(3) If the court is satisfied that, so far as the documents are concerned, the request seeks discovery and so should not be given effect to, the court should not in the exercise of its discretion order the oral examination of directors or employees of the companies since Westinghouse could then D get by the back door what was denied by the front.

The Act of 1975 refers repeatedly to "evidence." The essence of discovery, when contrasted with evidence, is that it goes beyond material which is directly relevant to the matters in issue in the proceedings. Section 2 (3), embodying a reservation made in the ratification of the convention, says that no order shall require steps to be taken other than "steps which can be required to be taken by way of obtaining evidence E for the purposes of civil proceedings." See also section 2 (4) in relation to documents. An order to answer questions in the course of a wide-ranging "fishing" expedition could be a breach of the subsection. If an examiner tried to insist on an answer, R.S.C., Ord. 70, r. 4, would provide the procedure to be adopted. See also note 70/4/3 and Order 39, r. 5. The English court would ultimately have to decide whether F the question was lawful by applying English rules. It must be satisfied that the foreign court is seeking an order for evidence and should look at the material before it. This applies both to oral evidence and documents. If the foreign court did not consider what relevant evidence the witness could give, that would demonstrate that it was a "fishing" expedition. The applicant must show that he is seeking relevant material in that the documents are directly relevant to the existence of a cartel G and that what he is seeking is the questioning of witnesses in relation to the activities, existence and effects of the cartel. But Westinghouse is seeking a "fishing" licence. One can go behind the form of the request and look at the realities. Reliance is placed on *Burchard* v. *Macfarlane*, *Ex parte Tindall* [1891] 2 Q.B. 241, 244–245, 246–247 and on *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618, 622, 626–627, H 628–629, 633, 634, 635, 636, 637, 639–640, 640–641, 643–645, 646–649; *Penn-Texas Corporation* v. *Murat Anstalt* [1964] 1 Q.B. 40, 52, 53, 59, 60, 61–62, 62–63, 72–73, 75; *Penn-Texas Corporation* v. *Murat Anstalt* (*No.* 2) [1964] 2 Q.B. 647, 660, 663–664, 667–668; *Panthalu* v. *Ramnord*

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Research Laboratories Ltd. [1966] 2 Q.B. 173, 184–185, 188, 189, 190–191, 192, 193; *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222, 224–226, 226–227 and *Seyfang* v. *G. D. Searle & Co.* [1973] Q.B. 148, 151–152.

These cases establish (1) that English courts will not make an order on the request of a foreign court which is in substance or effect seeking discovery from a non-party and (2) that the test whether or not discovery is so sought is whether the application is for direct evidence as defined in the *Radio Corporation* case [1956] 1 Q.B. 618 or whether it extends to indirect evidence; so if the application is not limited to directly relevant material, the order should not be made even though in the course of the "fishing" fish may be caught; (3) that the test applies equally to documents and oral depositions; (4) that the court will be prepared to go behind the face of the letters rogatory; (5) that the court will look at the matter as a whole to form a view of the substance of the request and (6) that if the court considers that discovery is sought against a non-party no order should be made.

The mere fact that one must use the "blue pencil" on one item does not demonstrate that the whole exercise is "fishing," but a "blue pencil" exercise may be sufficient to show it.

Apart from the fact that the Act of 1975 removed the requirement that the documentary evidence must be ancillary to the oral testimony, the common law principles still remain. There is no difference between the word "evidence" used in the Act of 1975 and the word "testimony" used in the Act of 1856.

The mere assertion by the applicant that he wants to get the evidence for the trial does not establish that it is not discovery. The following factors show that this is in substance an application for discovery: (1) The parties themselves regarded this as simply part of the American pre-trial discovery process. (2) The American judge in dealing with the application treated it as being for discovery. (3) He did so too in the terms in which he expressed his decision to issue the letters rogatory. (4) He did not decide what relevant evidence, if any, the witnesses could give or which, if any, of the listed documents existed or contained or were likely to contain relevant material. (5) Neither side invited him to consider these questions. If he had considered these questions on the evidence before him he would not have concluded that all the named persons had or were likely to have relevant evidence to give. The same is true of the documents.

A subpoena duces tecum will not be given effect to if it is in substance asking for discovery. That also applies to letters rogatory. In relation to them there is a requirement that the documents must be sufficiently specified: see section 2 (2) of the Act of 1975. Throughout the schedule there occur the words "and any memoranda, correspondence or other documents relating thereto." That indicates "fishing," which the English courts should not assist by making the order sought. It is an exercise in discovery to say: "Do you have any documents in relation to such and such? If so, produce them." The schedule is seeking discovery under a disguise, picking out every document which the applicants can identify and using it as a peg to hang a wide request on.

A "fishing" expedition is not justified by the suggestion that other memoranda, letters or notes are, no doubt, in existence because that is discovery, in effect a query to the party asked to produce the documents whether they do in fact exist. The underlying principle that discovery will not be required of a person not a party to the action is based on a wider principle that a person's documents are his own, subject to the interests of justice.

Both under the Foreign Tribunals Evidence Act 1856 and under the Act of 1975 the English court must be satisfied that what the foreign court requires is evidence; otherwise the English court has no power to make an order. Under the Act of 1975 there are two areas of limitation. If the English court considers that the application is for discovery, section 1 (*b*) is not satisfied and if there is not a request for evidence the power under section 2 does not arise. If there is power under section 2 that power is limited by sub-sections (3) and (4).

As to the terms of the letters rogatory: (1) Their terms are not consistent one with the other and so it has not been shown to the court that justice cannot be done without the material requested. (2) In the context the reference to evidence being used at the trial is no more than a statement that the relevant parts of the depositions will be put in at the trial, as opposed to the witness being recalled. (3) The letters rogatory were drawn up in advance by Westinghouse and their terms were not discussed before the American judge. (4) The "meat" of the letters rogatory is more significant than the recitals in revealing the true nature of the application. (5) The House can and should go behind the face of the letters rogatory. (6) The most important factor in determining the nature of the exercise is what the American judge said in the course of making the order. He regarded the application as extending to indirect material.

In this matter there are two steps. The first is whether discovery is being sought. Secondly, if it is not, and if a subpoena duces tecum is ordered the documents must be specified with sufficient particularity to inform the person receiving it what he must find. Section 2 (4) of the Act of 1975 is the parallel of the subpoena duces tecum in that respect but section 2 (3) goes much wider. No order should be made under section 2 (3) requiring discovery from a non-party, whether discovery by way of documents or, under the American procedure discovery by oral examination on depositions.

Should the "root and branch" argument that the order should be set aside altogether fail, there remains the "blue pencil" argument that the House should not confirm in form or in substance an order either "to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power" (section 2 (4) (*a*)) or "to produce any documents . . . specified in the order as being documents appearing to the court . . . to be, or to be likely to be, in his possession, custody or power" (section 2 (4) (*b*)). There are there three requirements: (1) The order must not require a person to state what documents relevant to the proceedings he has. (2) An order must not require a person to produce documents other than the particular documents specified. (3) It must not require a person to produce other documents than

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those appearing to the court to be, or to be likely to be in his possession. The mere possibility of the existence of the documents is not enough. The words "particular documents specified in the order" must be literally and strictly construed. The words are not "classes of documents." The word "specified" forbids one to describe types of documents. If the House confirms any order in relation to the documents it should be restricted to letters or other documents identified by reference to date, author and addressee or title. The House is not applying the common law but is construing the limitations in the Act of 1975. The documents asked for are not "particular documents specified." Merely because for the purposes of a subpoena it is enough to particularise the documents to such a degree that the person to where it is directed will know what to bring, it does not follow that the same applies under the Act of 1975 which introduced a greater degree of particularity. Minutes of identified meetings are "particular documents specified" but not agenda or "notes."

As to the rule in the case of a subpoena duces tecum, see *Phipson on Evidence*, 12th ed. (1976), p. 588, paras. 1464, 1465; and *Newland* v. *Steere* (1865) 13 W.R. 1014 where the principle is correctly stated. *Soul* v. *Inland Revenue Commissioners (Practice Note)* [1963] 1 W.L.R. 112 does not assist. So far as the witnesses are concerned a similar approach should be adopted under section 3 (3) of the Act of 1975 so that, unless the court is satisfied that they have or are likely to have relevant evidence to give, it is not permissible to order them to be examined on the chance that they may have something relevant to say.

If it is accepted that this is an exercise in discovery and no effect should be given to the application, so far as the documents are concerned, there remains the "back door" argument, in case the "root and branch" argument did not prevail as regarded the witnesses.

The main purpose of the application is to obtain the documents and the evidence of the witnesses is ancillary to that. The individuals are named in the letters rogatory as directors, employees, former directors or former employees. Now, though a company produces documents and answers interrogatories through its proper officers, it cannot give oral evidence. Otherwise the request would have been directed to R.T.Z. because the activities of the companies are in question. If the English court considered that no effect should be given to the request for discovery, it would be wrong for it in its discretion to order the individuals as officers or employees of the company to give evidence as to the existence or contents of documents, secondary evidence of matters in respect of which the best evidence was denied: see the *Radio Corporation* case [1956] 1 Q.B. 618, 649, *per* Lord Goddard C.J.

As regards privilege of documents the companies have a privilege under English law against production of the documents sought because it might expose them to a penalty or alternatively proceedings for the recovery of a penalty under articles 15 and 17 of the E.E.C. Council Regulation No. 17/62 for infringement of article 85 of the treaty which is now part of English law as a result of section 2 of the European Communities Act 1972.

As regards the oral examination there are two heads of privilege: (1) The individuals have a privilege against self-incrimination under the

Fifth Amendment to the United States Constitution; Judge Merhige upheld it. (There has been no decision by an English court.) (2) In so far as the examination of witnesses is sought in their capacity as directors or employees or former directors or former employees of R.T.Z. and in so far as the main object is to get a complete record of the cartel's activities, if the companies are entitled to privilege in respect of their documents, then, as a matter of discretion, the court should not order the oral examination of the individuals in relation to those matters. Alternatively, as a matter of law there is a privilege which can be invoked either by the company or the individual.

The enactment which enables a witness to take a foreign claim of privilege is section 3 (1) (*b*) and (2) of the Act of 1975. Here the claim for privilege was taken by the witnesses and was referred to Judge Merhige who upheld it in the terms of the Act of 1975. Accordingly the letters rogatory had run their course so far as the individuals were concerned and they should not be required to return for further questioning. The judge had no power to make them subject to recall. Anything that happened subsequently could only give rise to new letters rogatory.

As to the application by the Department of Justice for an order to compel testimony under U.S.C. sections 6002–6003 Judge Merhige had no power to make orders that an English court would recognise. It is an order compelling testimony for the purposes of a grand jury investigation. As a matter of American procedural law the judge was obliged to make the order and any testimony given pursuant to it would carry immunity. Since the immunity applies only to testimony given pursuant to the order, there is no immunity which the English courts will recognise, because there is no order which they will recognise. It does not follow from the order that the privilege claimed has been removed. The whole application for letters rogatory was tainted by this new order.

Under the Act of 1975 there is a discretion in relation to privilege (a) whether to make an order and (b) as to the terms on which it should be made: see section 2. There is also a discretion as to privilege at common law which survives the Act of 1968. Under section 14 (1) there is a right to claim privilege but that right is not exhaustive and there is a discretion to recognise privilege in other circumstances. The 16th report (Privilege in Civil Proceedings) of the Law Reform Committee 1967 (Cmnd. 3472) shows what was considered to be the state of the law before the Act: see p. 3, para. 1, p. 7, para. 11 and p. 17, para. 41.

Westinghouse are interested in the activities of the companies. The examination of the individuals is claimed because, it is said, they were involved in or had knowledge of the activities of the cartel of which the companies were members. If the officers and employees could be asked about the matters to which the documents relate, they could also be asked about the existence and contents of the documents which the company, through its proper officer, had declined to produce, the claim to privilege being then upheld. That would make the privilege useless and create an absurd situation. The company has a right to privilege and the court in its discretion may afford a privilege in respect of the oral examination of the company's officers and employees. If Westinghouse cannot get at the company's activities directly they ought not to be able to get at them

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indirectly. The judge could allow or disallow the privilege in a particular case. As there is a residual discretion which goes beyond section 14 of the Act of 1968, so there is a discretion in the court to take into account privilege beyond section 3 of the Act of 1975. Read in its context, it means that a witness should have the same privilege in an examination under the Act as he would in English proceedings.

In relation to privilege the relevant authorities are *Halsbury's Laws of England*, 4th ed., vol. 13 (1975), para. 92, p. 75; *McFadzen* v. *Liverpool Corporation* (1868) L.R. 3 Ex. 279, 281–282; *Bray on Discovery* (1885), pp. 82–85, 342–344; *Gibbons* v. *Waterloo Bridge Co. Proprietors* (1818) 5 Price 491; 1 Coop.Temp.Cott. 385; *Parkhurst* v. *Lowten* (1819) 2 Swans. 194, 214–216, which support the submission that, once it is established that the company has privilege, it should not be circumvented, just as it would not be circumvented in relation to legal professional privilege.

As to the collateral use of materials obtained, even if the matters in respect of which Westinghouse, through the application to the Virginian court, sought evidence by the letters rogatory, were relevant to the issues in that court, they were also central to the anti-trust suit in Illinois and to the grand jury investigation. Since it is likely that the material obtained would be used by Westinghouse in these proceedings, the court should make no order pursuant to the letters rogatory. If documents are obtained by one person from another, whether by discovery or under subpoena, they must not be used for a collateral purpose by the party who obtains them. There is an implied undertaking to that effect and the court may refuse to order production if the party requiring the documents cannot or will not give such an undertaking: see *Bray on Discovery*, pp. 238–239; *Richardson* v. *Hastings* (1844) 7 Beav. 354, 355–356; *Alterskye* v. *Scott* [1948] 1 All E.R. 469; *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613, 618–619, 620, 621; *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, 895–896, 901, 902. In the case of one who is not a party to the proceedings the court must balance the interests of justice against the principle that a party's documents are his own. It is an a fortiori case. In this case an English court could not supervise the carrying out of any undertaking given. R.T.Z. might well be prejudiced by the material being used in the anti-trust proceedings. In any event, the principle is that material obtained by compulsion of law should not be used for any collateral purpose, not merely one to the prejudice of the person supplying the documents.

The subpoena in the grand jury proceedings overrides any confidentiality order. It is inconceivable that this material, if provided pursuant to the letters rogatory, will not get into the hands of the Department of Justice for the purposes of the grand jury investigation involving an investigation into the activities of R.T.Z. inter alios.

As to the intervention of the Department of Justice, to compel production under the letters rogatory would be to compel something which R.T.Z. would not have to do in like circumstances in English proceedings. It would be in breach of section 2 (3) of the Act of 1975. The purpose of grand jury proceedings is to consider whether criminal proceedings should be instituted and no application has been made under section 5 of the Act, dealing with criminal proceedings. If material is sought for that

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purpose, it is not required solely for civil proceedings. The material required must be for the purposes and only for the purposes of civil proceedings in the requesting court. No request could be made to the English courts for the purposes of the grand jury investigation.

Judge Merhige had no jurisdiction which the English courts would recognise to make the order under U.S.C. sections 6002–6003 and it should be ignored for the purposes of the letters rogatory. He had already ruled on the question of privilege. The examination is subject to the supervision of the English court, which is in overall charge of the examination and should not compel the witnesses to go back to answer questions.

The English courts should construe and apply the Act of 1975 in a spirit of comity but that does not require them to help the Department of Justice in relation to the activities of English companies outside the United States with a view to their possible prosecution in the United States or to confirm the order made under U.S.C. sections 6002–6003.

Samuel Silkin Q.C., A.-G., Harry Woolf and Nicholas D. Bratza for the Crown. Leave is sought to intervene and place before the House matters of public interest and importance involving the policy of Her Majesty's Government. Authorities establish the Attorney-General's right and, in some circumstances, duty to intervene in private litigation for this purpose. The relevant matter of public policy is one which is material to the exercise of the court's discretion in deciding whether or not to make an order under section 2 of the Act of 1975. Her Majesty's Government considers, as do the Governments of Canada, Australia and France, that the circumstances in which the United States is seeking evidence abroad through the Virginia proceedings give rise to a serious excess of sovereignty. The Attorney-General does not intervene in litigation concerning private rights unless there is an important public interest. The courts are most willing to accept the intervention where there would otherwise be a danger that the public interest represented by the courts and that represented by the executive would part company: see *Adams* v. *Adams* (*Attorney-General intervening*) [1971] P. 188, 197–198; *Reg.* v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388, 400, 405–406, 407, 412; *The Fagernes* [1927] P. 311, 323–324, 324–325, 329–330.

Considerations of public policy relevant to the functions of the English courts under the Act of 1975 and in particular the exercise of the discretion conferred by section 2 arise.

In the exercise of its discretion the court and now the House are not confined to the facts and matters existing when the application to give effect to the letters rogatory was first made. Subsequent events made it imperative for Her Majesty's Government to intervene.

The grand jury proceedings do not fall within the ambit of the Act of 1975, although they could lead ultimately to proceedings falling within the terms of section 5. Anti-trust proceedings are being simultaneously carried on in the Illinois court. The claim is for treble damages. Although the proceedings are in form civil, there is a strong penal element in them. *Jones* v. *Jones* (1889) 22 Q.B.D. 425, 427 was a case of somewhat analogous proceedings. The proceedings in the Illinois court are in personam and the principles which govern the matter are summarised in *Dicey & Morris, The Conflict of Laws*, 9th ed. (1973), rule 180, pp. 993–994. The

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Fifth Case is proceedings under the Foreign Judgments (Reciprocal Enforcement) Act 1933. The draft convention between the United Kingdom and the United States providing for the "Reciprocal Recognition and Enforcement of Judgments in Civil Matters" 1977 (Cmnd. 6771) excludes from enforcement judgments "to the extent that they are for punitive or multiple damages" (article 2 (2) (b)), the very type of proceedings initiated in Illinois. The Illinois court would not be recognised as having jurisdiction over the appellants. *Huntington* v. *Attrill* [1893] A.C. 150, 157–158, 159, 161 was dealing with quite a different question. Even though the sanction of enforcement consists of a private remedy for multiple damages, the matter is still penal. The Illinois proceedings were commenced on the very day of the issue of the letters rogatory, indicating a close connection between the two. Clearly, the evidence was desired for the grand jury proceedings. The order under U.S.C. sections 6002–6003, even apart from the question of excess of jurisdiction, could not be regarded as made pursuant to the Act of 1975 and it could not be right to require the witnesses to comply with it. The United States government were not only seeking to use the machinery of the Act of 1975 to get material for the grand jury investigation but were also seeking thereby to get evidence which the witnesses had been held privileged from disclosing in the Virginia proceedings.

The following submissions are made: (1) Section 2 of the Act of 1975 leaves to the court a discretion whether not to make an order. (2) That discretion enables, and where relevant requires, the court to take into account whether the giving effect to the letters of request would amount to an invasion of, or would prejudice, United Kingdom sovereignty. (3) In deciding whether the making of an order would amount to an invasion of, or would prejudice, United Kingdom sovereignty, the court should have regard to the questions (a) whether the United Kingdom considers that its sovereignty would be prejudiced by the making of an order; and (b) whether, in the light of all material circumstances, the court itself considers that the making of an order would amount to such invasion or prejudice. (4) In relation to the question contained in (3) (a), the court will take judicial notice of the information given to it by the Attorney-General on behalf of Her Majesty's Government. (5) As Attorney-General, I inform the House, on behalf of Her Majesty's Government, that the United Kingdom considers that its sovereignty would be prejudiced by the making of an order in the instant case. (6) In its consideration of the matters material to the question contained in (3) (b), where the court itself considers the matters, the court will have regard (a) to the principles affecting jurisdiction recognised by English law and (b), subject thereto, to the principles accepted as a settled policy by Her Majesty's Government. (7) On each of the questions set out in (3) the court should, in the instant case, conclude that the making of an order would amount to an invasion of, or prejudice, United Kingdom sovereignty. (8) If, contrary to the preceding submission, the court is not satisfied on the material before it that the making of an order would amount to such invasion or prejudice, it should, in the exercise of its discretion, give very great weight and, so far as possible, effect to the considered view of Her Majesty's Government. (9) In balancing the public

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A interest for the purpose of the exercise of its discretion, the court should hold that the conclusions to be drawn in accordance with the foregoing statements outweigh any countervailing factors which may be apparent in the instant case. (10) The House should, in the exercise of that discretion, hold that effect should not be given to the order and should allow the appellants' appeal.

As to submission (1) reliance is placed on the plain meaning of sections B 1 and 2 of the Act of 1975.

As to submission (2), what it means is that, when the court comes to decide whether it should make an order, it should ask itself whether the reality of the matter is that the foreign state is seeking, through this court, to invade or prejudice the sovereignty of the United Kingdom.

The purpose of the Act of 1975 was not simply the ratification of the convention. It applies on its face to requests from the courts of C countries which have not signed or ratified the convention. It would be strange if Parliament had not intended the court's discretion to extend to the consideration of international factors brought to their notice by Her Majesty's Government. So far as the discretion is concerned the convention should be read in the light of the paramouncy of the United Kingdom: see articles 9 and 10 of the convention. Parliament cannot D have intended to abandon the right to refuse to execute letters of request on the grounds of excess of sovereignty or prejudice to sovereignty. Although Her Majesty's Government did not take action under article 5 of the convention, that does not deprive the court of its discretion to decide whether it is proper for an order to be made. It is in accord with modern practice that the courts should assess competing claims of public interest.

E As to submissions (3) and (4), in the context of the convention and this Act Her Majesty's Government speaks for the United Kingdom and the House will take judicial notice of the information the Attorney-General gives it.

As to submission (5) that information, given on behalf of Her Majesty's Government, is that the United Kingdom considers that the sovereignty F would be prejudiced by the making of the order. The United Kingdom cannot speak for itself. The information goes further, in that it is submitted that it is a proper view for the United Kingdom to take. Her Majesty's Government's view is not the only matter to be considered, but, given a conflict, the court should give it the greatest possible weight.

As to submissions (6) and (7), it is necessary to look at the relevant matters from the point of view of English law. The two organs of the G Crown should speak, as far as possible, with one voice on matters affecting sovereignty and international relations. On this the following additional submissions are presented:

1. *U.S. Anti-Trust Laws.* (1) The anti-trust laws of the United States of America ("U.S.") should not provide jurisdiction for U.S. courts to investigate non-U.S. companies and non-U.S. individuals in respect of H their actions outside the U.S., although the U.S. claims to have such jurisdiction. (2) For the purposes of United Kingdom sovereignty the U.K. does not recognise any such investigation as having any validity or as being proper. (3) The matters set out above are rendered a fortiori by

virtue of the penal character of the anti-trust laws. (4) Any use of the U.S. anti-trust laws or procedures for the above purposes, except with the authority of the U.K., is an invasion of and prejudicial to U.K. sovereignty. (5) In the instant case no such authority exists.

2. *The Grand Jury.* (1) The purpose of the grand jury is to investigate anti-trust activities related to uranium. (2) In the absence of evidence establishing that the R.T.Z. companies registered in the U.K. ("R.T.Z.–U.K.") carried on anti-trust activities in the U.S., the grand jury has, so far as English law is concerned, no jurisdiction to investigate them. (3) For the purposes of U.K. sovereignty the U.K. does not recognise any such investigation as having any validity or as being proper. (4) The matters set out above are rendered a fortiori by virtue of the grand jury's power to initiate criminal proceedings based upon its investigation. (5) The grand jury proceedings are proceedings of an inquisitorial character and are not such proceedings, either civil or criminal, as are within the contemplation of the Act of 1975.

3. *The U.S. Department of Justice.* (1) The proper inference to be drawn from all the evidence is that the U.S. Department of Justice is seeking to obtain for the purposes of the grand jury investigation evidence which is only obtainable through the Virginia proceedings. (2) Having regard to the claim to privilege upheld by Judge Merhige, that evidence cannot be obtained without the intervention in the Virginia proceedings of the Department of Justice. (3) The proper inference from that evidence is that the intervention of the Department of Justice in the Virginia proceedings is not for the purpose of enabling justice to be done between the parties to the Virginia proceedings, but for the purpose of the use of such evidence in the grand jury investigation; or alternatively that such is the predominant purpose. (4) The Department of Justice is seeking to enable evidence to be obtained through the Act of 1975 machinery for purposes other than those provided for by Parliament in that Act. (5) The Department of Justice is seeking to enable evidence to be obtained through the Act of 1975 machinery for purposes other than those provided for in the Hague Convention. (6) The Department of Justice is seeking to enable evidence to be obtained through the Act of 1975 machinery for purposes not recognised as proper by the U.K. and in the knowledge that the U.K. considers such purposes not to be proper. (7) The Department of Justice is seeking to enable evidence to be obtained through the Act of 1975 machinery for purposes for which and in circumstances in which there is no jurisdiction for the Department of Justice to obtain it, so far as English law is concerned. (8) For the said purpose the Department of Justice caused Judge Merhige to make a purported order which was ineffectual and an invasion of U.K. sovereignty and was penal in character in that in the U.S. disobedience to this order would be visited by penalties. (9) By its use in these circumstances of U.S.C. 6002–6003, admitted to be unique or virtually unique for such a purpose, the Department of Justice placed the U.K. in a position of considerable embarrassment in respect of the proper protection of its nationals and companies, as will be explained in greater detail later. (10) But for the said action of the Department of Justice the present proceedings would

have become academic since the order made under the Act of 1975 would, even if still alive in law, have been exhausted in fact.

4. *The Illinois proceedings.* (1) There is no jurisdiction in the Illinois court to investigate the actions of or to pronounce judgment upon R.T.Z.–U.K. because (a) R.T.Z.–U.K. have not brought themselves within the jurisdiction of the Illinois court; (b) The proceedings have been brought for the purpose of enforcing U.S. anti-trust laws by penal provisions against R.T.Z.–U.K. which are not subject or amenable to such laws and provisions according to English law. (2) The machinery under the Act of 1975 could not lawfully be used to obtain evidence for the purposes of the Illinois proceedings, both for the reasons already explained and because in Her Majesty's Government's submission Illinois proceedings are not civil proceedings for the purposes of section 1 or criminal proceedings for the purposes of section 5 of the Act of 1975. (3) Notwithstanding the foregoing, evidence obtained in the present proceedings would be available for the purposes of the Illinois proceedings. (4) The proper inference to draw from the evidence as a whole is that the respondents are using the machinery of the Act of 1975 in the Virginia proceedings for the purpose, or predominantly for the purpose, of obtaining evidence in the Illinois proceedings.

When regard is had to the matters set out under paragraphs 1–4 as a whole to allow the order in the present proceedings to take effect would involve that evidence so obtained: (a) would be obtained for purposes other than those intended by Parliament; (b) would be obtained for purposes other than those for which there is jurisdiction to obtain it; (c) would be obtained for purposes and by methods which would amount to an invasion of or prejudice to U.K. sovereignty; (d) would be obtained for purposes and by methods which Her Majesty's Government considers to be improper and has represented to the U.S. to be improper and unjustifiable.

As to submission (8), on matters of sovereignty and international relations the Crown should not speak with two voices: *The Fagernes* [1927] P. 311, 313, 315–317, 319, 323, 324–325, 329–330. Even if the House is not wholly satisfied on submissions (6) and (7), it should, in exercising its discretion at the very least give the greatest possible weight to the considered view of Her Majesty's Government.

As to submission (9), what is in issue is a statute intended to give effect to a convention. The two states immediately concerned have long been at issue as to the use of the convention, to assist extra-territorial jurisdiction in anti-trust matters in a manner prejudicial to the sovereignty of another state. The United Kingdom has taken a clear stand and the United States are seeking to circumvent it. In the circumstances no consideration of comity should carry any substantial weight. Other states have taken steps to prevent what they too regard as an invasion of their sovereignty. If there is to be a choice of comities Her Majesty's Government must choose that which would be prejudiced if we unlocked the door which other states have bolted. Canada, Australia and France associate themselves with the Attorney-General's intervention. The following additional submissions are made: (a) Matters relating to sovereignty and the limits of jurisdiction of the U.K. and of foreign

countries are matters affecting the prerogative and are primarily for the executive to determine. (b) It is undesirable that the U.K. courts and Her Majesty's Government should take differing views on a question of this kind. Consequently unless Her Majesty's Government's conclusions are manifestly unreasonable or manifestly contrary to international law the courts should adopt the view taken by Her Majesty's Government. (c) Her Majesty's Government's conclusions are in fact reasonable for the reasons outlined in the principal submission and this is further confirmed by the fact that other governments agree and have adopted the same line as Her Majesty's Government.

No authority supports the United States claim to exercise penal jurisdiction over the actions outside the United States of non-United States nationals or companies of another country's nationality. *The Lotus* (1927) Permanent Court of International Justice Series A, No. 10, p. 27 is not an analogous case. The European Court has never applied the effects doctrine to justify a situation of substantive legislation against a party situated outside the European Community: see *Imperial Chemical Industries Ltd.* v. *E.C. Commission* [1972] C.M.L.R. 557; *Béguelin Import Co.* v. *G. L. Import Export S.A.* [1972] C.M.L.R. 81; *Brownlie, Principles of International Law*, 2nd ed. (1973), pp. 305–306; *American Banana Co.* v. *United Fruit Co.* (1909) 213 U.S. 347, 356 and *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.* [1953] Ch. 19, 24–25.

The application of the effects doctrine to found jurisdiction in penal matters is regarded by Her Majesty's Government as being particularly objectionable in the field of anti-trust legislation. (1) The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognised as unlawful. Offences in the anti-trust category are wholly different from such offences as piracy which are universally regarded as unlawful. (2) The assertion of extraterritorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states. (3) The effects doctrine is particularly uncertain in operation when applied in the field of anti-trust legislation. As the United States courts have recognised, almost any limitation of competition effected between economic units acting outside the United States may have repercussions, direct or indirect, on the economic interests of the United States; so the potential application by United States legislation of the United States courts of the effects doctrine introduces some insecurity into the relations of corporate bodies carrying on business outside United States jurisdiction; this is highly undesirable. (4) The penal sanctions attaching to violations of United States anti-trust legislation include severe criminal penalties and penal damages. In this respect no valid distinction can be drawn between proceedings brought by the State and those brought by private individuals to enforce a monetary penalty.

The objection of Her Majesty's Government to the assumption of United States extraterritorial jurisdiction in the field of anti-trust legislation is exemplified by section 2 of the Shipping Contracts and Commercial Documents Act 1964. Similar protective legislation exists in the Netherlands, Switzerland, Denmark, Australia and Canada. Through the Act a modus vivendi with the United States was achieved whereby

comity was preserved through their recognition of the primacy of territorial jurisdiction under that Act. It is important to establish a similar principle of comity and a modus vivendi operating through the discretion in the Act of 1975. This case presents such an opportunity. Here there are difficulties in the use of section 2 (1) (*b*) of the Act of 1964 but if at any stage it turned out to be available Her Majesty's Government would not hesitate to use it.

Here the considerations of comity are not of sufficient weight to justify the conclusion that the order should be upheld.

As to submission (10), the question of the discretion under section 2 of the Act of 1975 only arises if the respondents surmount the hurdle of section 1 of the Act. If the House is satisfied that the real and predominant purpose is to use the evidence in the Illinois or grand jury proceedings, the requirements of section 1 are not met. If the discretion under section 2 is invoked, again the House should consider the real and predominant purpose of the application. It is clear that the real and predominant purpose is to use the evidence in the grand jury and Illinois proceedings.

On all the material before the House the order should be set aside.

John Vinelott Q.C. and *Timothy Walker* for the respondents. There are three issues before the House: (a) Is the possible exposure to a fine under the E.E.C. regulations exposure to proceedings for the recovery of a penalty within section 14 of the Civil Evidence Act 1968? On this the respondents lost and have leave to appeal. (b) If the respondents are wrong on the first question, would the production of the documents specified tend to expose the R.T.Z. companies to proceedings for a fine? The respondents lost and were refused leave to appeal. (c) Did the intervention of the United States Attorney-General have the result that the application for letters rogatory ceased to be an application for evidence to be obtained for the purposes of civil proceedings? This relates to oral evidence.

The respondents seek leave to appeal on the second question for five reasons: (1) With the help of R.T.Z. cases have been prepared and are ready to be lodged, so there will be no administrative delays.

(2) The construction of the word " penalty " and the " tendency " point are closely related. In the field of the E.E.C. the penalty is imposed by administrative action by a body with unrestricted powers to make its own inquiries. If that is a penalty for the purposes of section 14 of the Act of 1968, how could the production of evidence which the E.E.C. has power to obtain tend to expose anyone to a penalty? It could only be because the public production might result in political pressure. That would be an extension of the words " tend to expose " in section 14.

(3) The penalty point was argued when the application of section 14 was hypothetical, no privilege having then been claimed. When privilege was claimed the " tendency to expose " point was argued later. The argument was split in two. If it had not been, leave to appeal on both points would have been given.

(4) The range of additional evidence is very small and would add little to the length of the hearing.

(5) The claim is very great and there is a very wide range of issues.

Rokison Q.C. Five reasons were advanced for leave being given to pursue a fifth appeal: (1) The first was that cases had been prepared and exchanged in advance. Weight should not be given to that. The appellants only co-operated in that exercise to save time.

(2) The next was the "penalty" point, which is closely connected with the "tendency" point in that they both arise out of this dispute in relation to the letters rogatory and both arise in relation to the construction of section 14 of the Act of 1968. Under that there are three separate points: (a) Is the fine under the E.E.C. regulations a penalty? (b) Are the procedures for imposing or enforcing that fine a penalty? (c) Would the production of the documents requested tend to expose R.T.Z. to such proceedings? This last is the point of the fifth appeal. It was not raised in the Court of Appeal and depends on wholly separate evidence and argument. In the Court of Appeal Westinghouse were not handicapped by arguing the first two points and not the third.

(3) It was said that it was only by accident that Westinghouse did not have leave from the Court of Appeal to argue this point before the House of Lords. But that court, when it refused leave to appeal on the "tendency" point, was well aware that it had already given leave for the other points to be raised in the House.

(4) It was said that the range of additional evidence and the additional cost would be small and that it would add little time to the argument. But it would extend the hearing.

(5) Reliance was placed on the magnitude of the claim being made. But that in itself is not a ground for giving leave.

No real issue of principle arises on the fifth appeal. Westinghouse have not shown that they have a good arguable case on it.

On the assumption that the fine under the E.E.C. regulations is a penalty and that the procedure amounts to proceedings for the recovery of a penalty, the question, which is essentially one of fact, is: Would the production of the documents tend to expose the companies to that penalty? But if a party is seeking to obtain from the House of Lords leave to appeal when the Court of Appeal has refused leave the burden is on him to show that he has a good arguable case on a real point of principle. There is no point of substance to be raised here.

Vinelott Q.C. An important issue of principle is raised. The question is what test is to be applied. There is an unbroken line of authority from the early 19th century till 1939 to the effect that one who relies on privilege must show that there is a reasonable probability, a real risk, that the evidence, if disclosed, would lead to the imposition of a penalty: *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395. There is no real difference between the parties as to the effect of the evidence. It is the test which would have to be considered. The real issue is whether *Triplex* was wrongly decided.

[LORD WILBERFORCE: Their Lordships think it right to give leave to appeal.]

There are two questions: (1) Is a fine imposed by the E.E.C. a penalty? (2) If so, would the imposition of a fine be the result of proceedings for the recovery of a penalty within section 14 (1) of the Act of 1968? Section 16 is also relevant. The section must be con-

strued in the context of the law as it was in 1968, when there was a very broad and ill-defined category of cases where privilege could be claimed extending to all cases where to produce a document or answer a question might tend to expose a witness to any penalty or forfeiture. See *Mitford, Chancery Pleadings*, 5th ed. (1847), pp. 229–235. A large area covered by the privilege was that of penalties recoverable in a civil action by common informers but they were abolished by the Common Informers Act 1951. There remained a vague field of penalties recoverable on the one side by the Crown and on the other by someone who had an interest in that he might have suffered by the offence. Sometimes a person injured is given a right, not simply to damages, but to a sum which bears no relation to actual damage, and that is a penalty: *Jones* v. *Jones*, 22 Q.B.D. 425. The only penalties remaining recoverable by the Crown in civil proceedings at the time of the Act of 1968 were those recoverable under section 499 (1) and (2) of the Income Tax Act 1952. The penalty under section 59 of that Act is imposed summarily, without proceedings, for a failure to appear and give evidence. It is hard to see how a question of privilege could arise in relation to it.

The rule was stated in very wide terms in the 19th century and applied to a penalty which might result from the disclosure of evidence, even though it did not result from any proceedings, e.g., deprivation of the Sacraments. Section 14, when it refers to "proceedings," in effect restricts the privilege to the case of penalties imposed as a result of proceedings. The draftsman may have had in mind the Act of 1952. The privilege should be construed in the limited sense.

The only question is whether the E.E.C. legislation relating to fines falls within or without the principle correctly defined. The relevant provisions are articles 85 and 86 of the E.E.C. Treaty. These are supplemented by E.E.C. Council Regulation No. 17, articles 1, 2, 11, 14, 15, 17. To imply in these provisions a rule against self-incrimination would stultify the power which is only to be used in cases where there is a suspected abuse of the treaty.

When a fine has been imposed by decision, the first stage, the person fined can appeal to the Court of Justice, an appeal against a penalty, liability for which has already arisen, the second stage. The third stage is that if, after an unsuccessful appeal, the fine is not paid, it can be recovered in this country by registration and an action founded on the registered entry: see the European Communities (Enforcement of Community Judgments) Order 1972 (S.I. 1972 No. 1590), paragraphs 1–4. A distinction must be drawn between proceedings which give rise to a liability for a penalty and ancillary proceedings under the orders which are necessary for the enforcement of a liability already created. The case of penalties under the revenue statute is different because the proceedings are necessary to establish the facts on proof of which the liability for a penalty becomes an immediate liability.

The E.E.C. can obtain the information by administrative action and in the circumstances it is unreal to apply the privilege on the ground of self-incrimination to the disclosure now sought. The E.E.C. have the Friends of the Earth documents and have known of the existence of the cartel since 1972.

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Should the construction submitted be rejected the effects in English law would be far reaching. In civil litigation there would be many cases where, before our entry into the Community, discovery would have been plainly relevant and necessary to justice, but after it the request would be met with the claim that the defendant might have been guilty of an infringement of article 85, incurring liability to a penalty.

On the "tendency" point two conflicting requirements of public policy must be reconciled: (a) that a witness should not be required to answer questions which might tend to expose him to criminal proceedings or to a penalty; (b) that parties to litigation should be free to obtain and adduce all relevant documentary or other evidence so that justice may be done between the parties. A witness who relied on the rule against self-incrimination had to show (1) that the facts which the document or answer would reveal would assist in proving something which would be a crime or which would expose him to a penalty and (2) that the production of the document or the giving of the answer would give rise to a reasonable probability that proceedings would result. In 1939 it was laid down that the witness can rely on the rule against self-incrimination if he can show that the facts which the document or answer would tend to establish would be an offence and that the risk of proceedings is not merely fanciful: the *Triplex* case [1939] 2 K.B. 395, 402–408. See also *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253, 257. The burden is on the person who relies on the self-incrimination rule, whatever the test may be. The rule in *Reg.* v. *Boyes* (1861) 1 B. & S. 311, was that a person relying on the rule must show a real risk.

Hitherto it has been easy for the court to weigh the necessary matters asking: (1) Is the suggested offence really an offence? and (2) Is what would emerge relevant to proving it? If the answers are affirmative the court will allow great latitude in claiming the privilege. But here it is hard to evaluate the risk that the Commission will be stirred out of inaction by the effect of public opinion. Although it is the initiating body, it does not act without a direction from the Council of Ministers. The Commission having known of the cartel since 1972, how does the production of the documents in question increase the risk that action will be taken under article 85? The only risk would be the activation of the Commission's powers. The question is how far the production of the documents involves a real risk that the Commission will be tempted to do what it can already do.

Two earlier cases on the rule were *Short* v. *Mercier* (1851) 3 Mac. & G. 205, 214, 217–218, and *Reg.* v. *Boyes*, 1 B. & S. 311, 312–313, 329–331. The test is that the judge must insist on a witness answering unless he is satisfied that the answer will tend to put him in peril, not an unsubstantial danger, a bare, remote possibility by which no reasonable man would be affected, but one which, looking at the ordinary course of law and the nature of the offence, was not an imaginary risk. Other 19th century cases like *Reynolds* v. *Godlee* (1858) 4 K. & J. 88 state the rule in the same terms. It was not till *Triplex* [1939] 2 K.B. 395 that the court declined to enter into the possibilities, save to say that they must not be so negligible that no serious man would entertain them. That shifted the burden away from free disclosure.

A Article 85 (3) of the E.E.C. Treaty is inapplicable and the members of the cartel could not bring themselves within it. They cannot even be safe as a matter of legal theory. The question is whether in the context of this case, this is a foreseeable or real risk which could influence their conduct. The only explanation of the inactivity of the Commission is that this is a politically sensitive matter and if the extent and nature of the cartel becomes a matter of international debate, there may be political B pressure on the Commission to do what article 85 requires. Article 89 provides that the Commission shall ensure the application of the principles of articles 85 and 86. The production of the documents, resulting in their becoming public property, would not lead to the risk of the Commission doing anything it would not otherwise have done. That the publicity might give rise to political pressure is the sort of risk the C courts cannot evaluate. It is a wholly novel situation that a prosecution or the imposition of a penalty feared should be by someone wholly free as to when and how he makes the investigation, what evidence he requires and what fine he imposes. Article 175 of the treaty deals with the persons who can bring proceedings against the Commission for breach of duty.

The purpose of the application for the letters rogatory was to obtain D evidence for the Virginia proceedings. The complaint by Westinghouse is that the cartel had effect in the United States and deliberately aimed at injuring Westinghouse there. The system of tendering meant that no real competition existed and it was designed to mislead. The cartel set out to eliminate powerful middlemen like Westinghouse. The domestic market in the United States was affected.

On the discovery point, the main question under section 1 of the Act E of 1975 is the meaning of the words " to be obtained for the purpose of civil proceedings." In section 2 (1) the words " to be appropriate " are related to subsection (2) which says in effect what steps are appropriate. When there is a request for evidence the court has power to give effect to it by making an order which is appropriate, having regard to the nature of the request. What must appear to the court to be appropriate is the F means to give effect to the request. In the context the court referred to in subsection (3) would be an English court. It is not directed to discovery, which is dealt with in subsection (4). Under subsection (4) there can be no order for discovery or production save one which would satisfy a subpoena duces tecum. The sort of pre-trial discovery which is permissible in the United States is wholly outside the contemplation of the Act. Lines of inquiry by interrogatories are not evidence for the G purposes of these proceedings; it is preliminary material for the purpose of getting evidence for the proceedings. The wide pre-trial discovery of the United States cannot be the subject of an order under this Act. The limits are production of documents in a form which would answer a subpoena duces tecum or interrogatories which do not answer some preliminary " fishing " purpose.

H The evidence sought by Westinghouse falls within the Act of 1975. Judge Merhige deliberately framed his order in a normal form so as to comply with the requirements of English law. The documentary evidence is directly relevant to the defence in the Virginian proceedings and

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Westinghouse intended to produce it. The oral evidence is equally relevant. The evidence passes the test in section 1 of the Act. The documents are sufficiently specified to form the subject matter for a subpoena duces tecum. They were so before the "blue pencil" used in the Court of Appeal, but, alternatively, they certainly are now. The Court of Appeal can make an order giving effect to the letters rogatory in part. If the court rejected the whole of the letters rogatory, they could be reissued in part. The court cannot widen the letters rogatory and, strictly speaking, it should not use a "blue pencil," but it can give effect to it in part.

For the purposes of a subpoena duces tecum a document must be specified with reasonable distinctiveness, giving the witness a description which will enable him to find the document sought with reasonable ease. If the person served with the subpoena has already identified and got together the documents requested (as is the case here) he cannot be heard to say that the description was too vague to enable him to do so. See *Lee* v. *Angas* (1866) L.R. 2 Eq. 59, 63–64. R.T.Z. cannot be asked to do more than search their records and files, see what they have which answers to the description and bring all those documents to the court. That they have already done. In the context of a subpoena duces tecum they can be compelled to produce precisely those documents. Having looked at section 1 of the Act and at section 2 (3) one must show that the letters rogatory sufficiently specify the documents: section 2 (4) (*b*).

Judge Merhige's ruling on privilege on June 14, 1977, did not exhaust the letters rogatory, as the appellants contend. They could not be exhausted until the statutory machinery represented by R.S.C., Ord. 70, r. 6 had been put into operation.

The "back door" argument for the appellants is that if a company claims privilege and is entitled to do so its servants cannot be examined on matters which might disclose what the privileged documents would have disclosed. But there is no authority for the proposition that a company's privilege can spill over to its servants. There is no authority either way: see *Gibbons* v. *Waterloo Bridge Co. Proprietors*, 5 Price 491, 493; *McFadzen* v. *Liverpool Corporation* (1868) L.R. 3 Ex. 279, 280, 281; *Parkhurst* v. *Lowten*, 2 Swans. 194, 215–217. The privilege against self-incrimination never applies to an agent, even one as confidential as a legal adviser.

The origin of the present letters rogatory is *American Express Warehousing Ltd.* v. *Doe* [1967] 1 Lloyd's Rep. 222, 224–247. It is plain from the background documents and the nature of the documents requested that they are directly relevant to the issues and the intention is to seek to adduce them in evidence. They are related to the existence and terms of the cartel, which are relevant to the matters in issue. Justice cannot be done without the testimony intended to be given at the trial; it is implicit that the documents will be produced at the trial. Admittedly it is not stated in the affidavit that the documents, when produced, will be admissible, but to require that it should be so stated would stultify any letters rogatory.

The appellants submitted that since the documents, if disclosed, would be used in the Illinois proceedings, the House of Lords has a discretion

whether or not to order their production. The Illinois proceedings are civil, not criminal. Though proceedings for double or treble damages are proceedings for a penalty for the purposes of the rule against self-incrimination, it does not follow that proceedings for a penalty are not civil proceedings for the purposes of other rules, in particular the rule that English courts will not enforce penal laws of another state: see *Huntington* v. *Attrill* [1893] A.C. 150, 156, 157–158, 159. An action for treble damages given to a person who has suffered damage is remedial and not criminal.

Any documents and information obtained by a party to proceedings in the course of proceedings are privileged in the sense that that person is not bound to disclose them in other proceedings. They are privileged from disclosure in other proceedings and cannot be used for a collateral purpose. But once documents or depositions from interrogatories are actually read at the trial of an action, they enter the public domain and questions of privilege and duty disappear. See *Goldstone* v. *Williams, Deacon & Co.* [1899] 1 Ch. 47. There is an implied undertaking to the court not to use documents produced for a collateral purpose. But when documents are asked for by letters rogatory there can be no implied undertaking to the English court, which must leave it to the foreign court to say what use of the documents is to be permitted. Under American law Westinghouse, once it had got hold of the documents, could not be stopped effectively from using them in the Illinois proceedings. Westinghouse did not apply by letters rogatory in the Illinois proceedings as well as the Virginian proceedings because under American law the evidence was available for both.

As to the effect of the intervention of the United States Attorney-General, it is initially submitted: (1) The grand jury proceedings and later the subpoena of March 2, 1977, issued by the State Department to Westinghouse requiring production for the purposes of the grand jury of any documents in its possession are not a new factor. Once the evidence requested had been given in the Virginian proceedings it would be in the public domain and, subject to United States rules of admissibility, would be available in the grand jury proceedings.

(2) The Illinois proceedings are civil and not penal for the purposes of the rule of international law that one State does not enforce the penal laws of another.

(3) Judge Merhige's ruling on privilege did not exhaust the letters rogatory.

(4) The question whether the order under 18 U.S.C. 6002 and 6003 was properly made and what was its effect is one of American law. It was never contemplated that, so far as it required witnesses to attend, it was enforceable in England.

(5) As regards the orders of Master Jacob upheld by MacKenna J. and the Court of Appeal, strictly on appeal the court should consider whether it was justifiable in the circumstances which existed at that time, but the respondents are willing that the House of Lords should consider the evidence as if the order had been made in a subsequent application.

The substantial question is whether if a litigant in country A applies to the local court for letters rogatory addressed to country B and the

person charged with the administration of the criminal law in country A, in order to make the examination under the letters rogatory more effective in extracting evidence or information of use to him, grants the witness immunity it can be said that the purpose of the letters rogatory is no longer that of obtaining evidence for use in civil proceedings. The answer is that the effect of the grant of immunity is that the purpose will be more effectively achieved and the motive of the person who granted the immunity is irrelevant.

Section 1 of the Act of 1975 is satisfied in the present case. Westinghouse applied for letters rogatory and judge Merhige issued them to obtain evidence in the Virginian proceedings. The fact that the request will be more effective because an order of immunity has been granted on the application of the State Department and the motive of the State Department is making that application are both irrelevant. The motive does not change the nature of the letters rogatory so as to make them no longer an application for evidence to be obtained in civil proceedings. The evidence was to be obtained for civil proceedings and for no other purpose.

There is a discretion under section 1, but this appeal should not be allowed on the ground that the evidence will be used in the grand jury proceedings. There is no want of good faith in Westinghouse in trying to use the letters rogatory to get evidence for some other proceedings. It should not fail to get vital evidence only because the fetter on compelling answers has been removed by the United States Attorney-General for some different purpose.

No order made under the Act of 1975 can violate United Kingdom sovereignty because such an order and any evidence taken under it are enforced under the powers of the United Kingdom courts. The convention ratified by the United Kingdom in 1976 is a treaty between the States which adhered to it, ratified it and signed it. The United Kingdom in effect undertook to introduce legislation giving effect to the principles of the convention. It did so in a way which did not prejudice its sovereignty. Therefore there was no need for the Act of 1965 to make any reservation giving a right to refuse letters of request if it was considered that sovereignty would be infringed. But it was necessary to preserve the right to object on grounds of security: see section 3 (3). Everything had to be done through the courts of the United Kingdom and enforcement was for them. Sovereignty was preserved. If there were any difficulties as to whether a letter of request was proper or within the spirit of the convention that was to be dealt with at a diplomatic level: see article 36 of the convention.

The effect of article 2 (2) (*b*) of the draft convention between the United Kingdom and the United States providing for the "Reciprocal Recognition and Enforcement of Judgments in Civil Matters" 1977 (Cmnd. 6771) is that, by reason of the words "to the extent" the judgments referred to would be enforceable to the extent of damages but not in excess of what is properly considered damage. This would apply to any damages recovered by Westinghouse in the Illinois proceedings.

As to *Imperial Chemical Industries Ltd.* v. *E.C. Commission* [1972] C.M.L.R. 557, 628–629 the court there looked to see whether there was

a concerted practice and whether the conduct had effects within the Common Market, holding that because it had such effects it was carried on within the Common Market. Thus, if the acts complained of in the Illinois proceedings had taken place within the Common Market while R.T.Z. were outside it, the Common Market would have asserted jurisdiction. Article 85 of the treaty does not bring into English domestic law the whole of the effects doctrine because England has its own restrictive practices law but if what is alleged to have taken place in the United States were alleged to have taken place in Europe that would constitute an infringement of article 85, which is part of English law. Accordingly the United States are not asserting a jurisdiction over commercial matters which English law would regard as wholly improper.

No question of comity is properly before the court. If public interest privilege is claimed, the claim must be supported by a certificate and affidavit of the Minister.

To satisfy the test the evidence must be shown to be required for the purpose of civil proceedings in the court issuing the letters rogatory. If that is the present purpose it is no objection that there is also a present intention to hand the evidence on, when it becomes public, to use it in other civil proceedings or even to hand it to the criminal authorities to enable them to start criminal proceedings, but if it can be shown that there is no real intention to use the evidence in the civil proceedings in the court issuing the letters rogatory, the test is not satisfied. But that is not the position here.

Rokison Q.C. in reply. The letters rogatory should not be looked at simply on their face value. Looking at the matter as a whole, this is a "fishing" operation not limited to directly relevant material for use at the trial.

On the claim of privilege under section 14 of the Act of 1968 the question is: Would the production of the documents requested by Westinghouse tend to expose the companies to proceedings for the recovery of a penalty? Two points are now raised: (1) whether the imposition of the fine results from "proceedings" and (2) whether the production of the documents would be likely to result in the imposition of a fine. The first question is misconceived. It should be whether R.T.Z. would be exposed to proceedings for the recovery of a penalty.

The method whereby any penalty imposed by the Commission would be enforced against R.T.Z. would be by proceedings for the recovery of the appropriate penalty. Before the Act of 1968 the privilege in respect of exposure to penalties was very wide and was not restricted to penalties which resulted from legal proceedings. There is a principle that a statute should be construed, as far as possible, as not altering the common law.

If the appellants are wrong on the point of proceedings for enforcement under the English order, then the imposition, as opposed to the recovery, of a fine in these circumstances would be the result of "proceedings" broadly construed.

On the point of "tendency to expose" the questions are: (a) What is the test? (b) Have R.T.Z. satisfied it? The test depends on two principles: (1) A witness claiming privilege must depose on oath or affirmation to a belief that the answer to the question or the production of

the document will or may tend to expose him to incrimination or a penalty; the mere assertion that advice has been received to that effect is not enough. (2) The oath will not be conclusive and the court must also be satisfied from the subjective point of view that the claim is not made in bad faith and also, objectively, that there is a reasonable apprehension of a real risk as opposed to an imaginary or fanciful risk. If these tests are satisfied the court will allow great latitude to the witness to judge for himself the extent of the exposure and will not balance the degree of likelihood that proceedings may result: see *Maccallum* v. *Turton* (1828) 2 Y. & J. 183; *Reg.* v. *Boyes*, 1 B. & S. 311; the *Triplex* case [1939] 2 K.B. 395. Here it cannot be said that there is only a fanciful risk, one of which a reasonable man would not take account.

Under the Act of 1975 there is a double filter. (1) If the request is not for the obtaining of evidence as there exposed the discretion of the court under section 2 does not arise, since the court has no power to make an order. (2) If it is a request for the obtaining of evidence, section 2 imposes limits on the orders the English court can make to steps which could be compelled in English proceedings. In any event, section 2 (3) precludes the making of an order for discovery in the wide sense from a non-party, whether oral or documentary, which section 2 (4) imposes a filter as to documents. The court has an overall discretion.

The important features in considering whether or not this is discovery: (1) The request was in effect at the time of the application for all the documents relating to uranium. The witnesses included "any other person with knowledge." Clearly this is "fishing." (2) From what Judge Merhige said when he decided to issue the letters rogatory it appears that this was a fishing expedition not restricted to directly relevant material which might lead to the discovery of directly relevant material. (3) Westinghouse did not deny that this was pre-trial discovery. (4) The circumstances of the making of the application were that the cases were only consolidated before Judge Merhige for pre-trial purposes; the issues which would be before the court had not been finally determined and the process of discovery in a wide sense was going on among domestic producers. (5) The evidence Westinghouse were seeking from the foreign producers was regarded by them in the same light as the pre-trial discovery they were taking from the domestic producers. (6) The scope of the discovery has not been been limited by the order of the court, nor is there anything in the letters rogatory in relation to the oral testimony limiting the scope of the examination. This is relevant to the stage of the first filter in section 1 when one is considering whether this is a fishing expedition. It is only when one reaches section 2 and the second filter that the court must consider whether to make an order and on what terms.

The extent to which the documents are sufficiently specified is relevant to the question whether this is a "fishing" expedition. If the documents are of very broad categories that would indicate a "fishing" expedition. Under section 2 (4) (*b*) of the Act of 1975 the question arises whether the documents are "particular documents specified." The filter there is very fine. Cases before that Act are not helpful, since before it there was no definition of the degree to which documents had to be specified.

A It is not helpful to consider whether the document would have been sufficiently specified for the purposes of a subpoena duces tecum.

If the appellants fail on the discovery point the order made should be limited to the minutes of meetings, with date and location, and letters, with dates and addressee. When Westinghouse ask for the reply to such a letter the onus is on them to show, on a balance of probabilities, the likelihood that there was a reply and that it is in the possession, custody B or control of R.T.Z.

Lee v. *Angas*, L.R. 2 Eq. 59, 64, has no application to the present case. No question of waiver could arise in this case. Further the position there contrasts with the limitations of section 2 (4) of the Act of 1975.

On privilege in respect of the oral testimony, the letters rogatory were exhausted by the ruling of Judge Merhige. Even if they were not C exhausted the examination of the witnesses who attended was completed. The Act of 1975 contemplates that they should face questioning once and that the requesting court should rule on privilege once: see section 3 (2). The judge of the requesting court, so far as procedure under the Act is concerned, has one function only i.e. to rule on the question of privilege referred to him.

When purporting to sit in London as a judge of the Virginia court D and purporting to keep the witnesses under recall Judge Merhige misunderstood his position and his powers. He had no power to keep them under recall. He was purporting to act in three capacities, ruling on privilege as judge of the requesting court, taking the examination of the witnesses as examiner and making orders for the future conduct of the proceedings as judge of the Virginia court.

E As to the point that it does not make sense, if one can get round a company's privilege by getting the same information out of its servants, its officers are no more than its mouthpiece; cf. *Earl of Suffolk* v. *Green* (1739) 1 Atk. 450. Where the interest of the company and the individual are the same and the individual is being questioned because he is the very person alleged to have been concerned in the relevant activity of the company it is an abuse to ask for the material through his mouth. It F is the company's privilege, but he can claim it on behalf of the company. Effect should be given to the company's privilege which it has claimed directly by allowing that privilege to be claimed indirectly.

The question in what circumstances the individual is to be identified with the company arises in other areas of the law. The admission of an employee is evidence against a company if he has overall control of its G activities or is responsible for the particular business in question: see *Phipson on Evidence*, 12th ed., p. 316, para. 728, p. 317, para. 731, p. 318, para. 732; *Reg.* v. *Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118.

Apart from the discretionary privilege, there is the overall discretion vested in the court under the Act of 1975 and by virtue of the discretion the court would not confirm an order to testify if the individuals through H their oral testimony would be likely to render the company's privilege nugatory.

As to the other proceedings in America, where it is apparent to the English courts that the material sought is also required for other purposes,

no order should be made. The court in the exercise of its discretion can prevent the material getting into the public domain by refusing to make the order sought. When an English defendant is not within the jurisdiction of the foreign court and has taken no part in the proceedings there the English court will not help the foreign court or the foreign plaintiff through it to get evidence from the defendant. That is independent of the submission that the anti-trust proceedings which have been initiated are penal and will not be given effect to by an English court.

As to the intervention of the Department of Justice, it made it clear that the oral depositions are required for a collateral purpose, which is now the dominant one. It has also made the evidence compellable in the United States. Judge Merhige's order under U.S.C. sections 6002/3 may have been valid under American law but the question whether an English court will give effect to it is one of English law. Judge Merhige was purporting to exercise an extra-territorial jurisdiction by making an order compelling Englishmen to testify in England. The order compelling testimony has no effect in England and the English courts should not disregard the compulsion and concentrate on the immunity from prosecution given to the witnesses. Since the intervention of the Department of Justice the demand has been for evidence for the purposes of the grand jury investigation.

Westinghouse could not apply the letters rogatory procedure to the grand jury investigation because no proceedings were pending. Both Westinghouse and the Department of Justice were blocked in their tracks. Therefore they tried to ride on the back of the letters rogatory in the Virginia court, to get evidence which otherwise they could not.

Vinelott Q.C. in reply on the cross-appeal. The relevant words are "proceedings . . . for the recovery of a penalty" in section 14 (1) of the Act of 1968. The question is whether they should be read as proceedings to impose liability to a penalty or proceedings for payment of a penalty. The Act plainly altered the pre-existing law. Section 14 looks to penalties imposed as a result of proceedings.

As to the "tendency" point, the documents sought would add nothing to what the Commission already knew and it is under a duty to act and has the power to act.

Their Lordships took time for consideration.

December 1, 1977. LORD WILBERFORCE. My Lords, on October 28, 1976, an ex parte order was made in the High Court, Queen's Bench Division, under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, giving effect to letters rogatory issued out of the United States District Court for the Eastern District of Virginia, Richmond Division, at the instance of Westinghouse Electric Corporation ("Westinghouse"). In the Richmond Court Westinghouse are defendants in a number of actions (civil proceedings) consolidated in that court, by utility companies producing electricity, alleging breaches of contract by Westinghouse for the supply of uranium and claiming very large sums

in damages. Westinghouse put forward (inter alia) a defence of commercial impracticability arising from an alleged uranium producers' cartel.

The letters rogatory, issued on October 21, 1976, and addressed to the High Court of Justice in England, seek the examination of nine named persons described as present or former directors or employees of two British companies, the Rio Tinto Zinc Corporation Ltd. ("R.T.Z.") and R.T.Z. Services Ltd. ("R.T.Z. Services") which collectively I shall refer to as "the R.T.Z. companies" or of "such other director or other person who has 'knowledge of the facts as to which evidence is desired'." The letters also seek the production of documents according to a lengthy schedule alleged to be in the possession of the R.T.Z. companies. The present appeals are brought by the R.T.Z. companies and seven of the nine named persons, the other two being out of the jurisdiction. In effect they seek to have the order giving effect to the letters rogatory set aside or discharged.

Since the order of October 28, 1976, there have been a number of applications to the English courts and appeals arising therefrom. The appellants sought to have the order set aside but their application to that effect was rejected by the High Court. On May 26, 1977, the Court of Appeal (1) dismissed the appellants' appeal against that rejection but ordered that the schedule of documents attached to the letters rogatory should be amended by the deletion of certain categories of documents. The court also ruled (2)—in favour of the R.T.Z. companies—that penalties provided for by article 15 of regulation 17 of the General Regulations of the European Economic Community for breach of articles 85–86 of the Treaty of Rome (which deals with restrictive or concerted practices) constituted a "penalty" within the meaning of section 14 of the Civil Evidence Act 1968 so as to provide the foundation for a claim for privilege against the production of documents. The R.T.Z. companies now appeal against the first part of this order and Westinghouse against the second.

Since that decision of the Court of Appeal there have been two further developments. The first of these concerns a claim by the individual appellants to privilege under the law of the United States, viz., the Fifth Amendment to the Constitution (self-incrimination). I shall state the facts relevant to this claim later when I come to consider it. The second concerns the documents. On June 10, 1977, in proceedings under the letters rogatory at the United States Embassy in London, the R.T.Z. companies, pursuant to the judgment of the Court of Appeal of May 26, 1977, claimed privilege against production of all (save six) of the scheduled documents on the ground that production would tend to expose the R.T.Z companies to proceedings for the recovery of a penalty (section 14 of the Civil Evidence Act 1968). This claim was challenged by Westinghouse but on July 11, 1977, the Court of Appeal upheld it. By leave of this House Westinghouse now appeals against that judgment.

There are thus three main issues before the House.

1. Ought the order of October 28, 1976, giving effect to the letters rogatory to have been set aside?

2. Can the R.T.Z. companies claim privilege against production of the scheduled documents?

3. Can the individual appellants claim privilege against self-incrimination under the law of the United States?

1. The law in England which provides for giving effect to letters rogatory is the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Act of 1975"). Before 1975 this matter was regulated by the Foreign Tribunals Evidence Act 1856, as amended and supplemented by various later statutes. The Act of 1975 was passed in order (inter alia) to give effect to the principles of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (Cmnd. 3991, 6727) which the United Kingdom ratified in 1976. The Act is, as I think, clear in its terms so that reference in aid of interpretation to previous statutes is not required. But one background matter requires mention in order that the Act—particularly section 2—may be understood. This arises from the United States pre-trial procedure, as laid down in the Federal Rules of Civil Procedure and particularly rules 26 and 30. These rules give wide powers, wider than exist in England, of pre-trial discovery against persons not parties to a suit. (The R.T.Z. companies are not parties to the Richmond proceedings.) The nature of these powers was well summarised by Devlin J. as follows:

> "... it is plain that that principle [of discovery] has been carried very much further in the United States of America than it has been carried in this country. In the United States of America it is not restricted merely to obtaining a disclosure of documents from the other party to the suit, but there is a procedure . . . which allows interrogation not merely of the parties to the suit but also of persons who may be witnesses in the suit, or whom it may be thought may be witnesses in the suit, and which requires them to answer questions and produce documents. The questions would not necessarily be restricted to matters which were relevant in the suit, nor would the production be necessarily restricted to admissible evidence, but they might be such as would lead to a train of inquiry which might itself lead to relevant material": see *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618, 643–644.

That case—not dissimilar on its facts from the present—arose under the Act of 1856, section 1 of which referred to the obtaining of "testimony." The decision was that there was a distinction between "direct" material immediately relevant to the issue in dispute, as to which testimony could be obtained, and "indirect" material by way of discovery, testimony for which could not be obtained.

There is no doubt that this distinction was in the mind of the draftsmen of the Act of 1975.

In the first place, the 1970 convention by article 23 enabled a contracting state to declare that it would not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents. The United Kingdom in fact made a declaration to this effect coinciding with section 2 (4) of the Act of 1975. In the Act itself, section 1 refers to "evidence" in place of "testimony" but if there is any difference between the two words it must be in the sense of "directness" rather than the reverse. The distinction drawn in the *Radio Corporation* case [1956] 1 Q.B. 618

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is preserved in section 2 (3) and (4). Subsection (3) states that an order (s.c. of the English High Court) giving effect to the request "shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order . . . " and subsection (4) that an order under section 2

> "shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

These provisions, and especially the words "particular documents specified in the order" (replacing "documents to be mentioned in the order" in the Act of 1856) together with the expressed duty of the English court to decide that the documents are or are likely to be in the possession, custody or power of the person called upon to produce, show, in my opinion, that a strict attitude is to be taken by English courts in giving effect to foreign requests for the production of documents by non-party witnesses. They are, in the words of Lord Goddard C.J., not to countenance "fishing" expeditions: *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618, 649.

My Lords, I have referred to these background matters because misinformation as to some of them appears to have influenced the Court of Appeal. Lord Denning M.R. referred to a submission for R.T.Z. that the case was similar to the *Radio Corporation* case, and that the letters rogatory ought to be rejected. He referred to the Hague Convention and said that the United Kingdom when it ratified the convention did not make any declaration under article 23. (Unfortunately the print of Cmnd. 3991 does not contain the reservation.) So he could not accept counsel's general submissions. Roskill L.J. seems to have been under the same impression for he too put the *Radio Corporation* case on one side. I think that the Court of Appeal, while correctly stating that the Act of 1975 was a new Act, may have been led to treat it as dealing more liberally than its predecessor with pre-trial discovery. I do not so regard the Act: on the contrary, it appears to me that it takes a stricter line.

The other argument accepted by the Court of Appeal against total rejection of the letters rogatory was based upon the terms of the letters rogatory and some observations by the learned United States District Judge at Richmond (Judge Merhige). The letters in relation to the R.T.Z. Corporation recite that,

> "*it has been suggested to us* that justice cannot be done among the said parties without the testimony *which is intended to be given at the trial of the actions*, of the following persons . . . nor without the production of certain documents in the possession of the Rio Tinto-Zinc Corporation Ltd. such testimony and such documents being related to the existence and terms of various agreements, arrangements or concerted practices between Rio Tinto-Zinc Cor-

poration Ltd. and" (numerous other named companies) "and further that the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court . . .". (My emphasis.)

The letters in relation to R.T.Z. Services Ltd. are in similar form except that for the words "it *has been suggested to us*" there are substituted "*it has been shown to us*"—the difference suggesting that neither phrase is significant. Both letters rogatory were drafted by lawyers for Westinghouse and, as they frankly claimed, were drafted after consultation with eminent counsel from England. "The phrasing of the letters rogatory themselves . . . are the product of those gentlemen's experience and knowledge." It does not take much percipience to see that the words italicised are directed to the distinction drawn by Devlin J. in the *Radio Corporation of America* case [1956] 1 Q.B. 618, 645 between "a process by way of discovery and testimony for that purpose" and "testimony for the trial itself." But which it is in fact is not to be determined by the drafting of Westinghouse's lawyers but objectively by the nature of the testimony sought. The fact that any evidence obtained is intended to be put in at the trial, is quite consistent with the inquiry extending (impermissibly) to trains of inquiry which might produce such evidence.

My Lords, I have much doubt whether the letters rogatory ought not to be rejected altogether. They range exceedingly widely and undoubtedly extend into areas, access to which is forbidden by English law. As regards some at least of the individual witnesses no grounds are given for supposing that they could have any relevant evidence to give—I have already commented on the words "it has been shown to us." As regards the schedule of documents, this extends far beyond "particular documents specified in the order," includes categories and classes of documents which, though obtainable under an English order for discovery, cannot be called for under the Act of 1975 and provides little or no material as to many of the scheduled documents, apart from the statement in the letters rogatory themselves, which would enable the English court to form a view whether or not they are or are likely to be in the possession, custody or power of the R.T.Z. companies.

On the other hand, the schedule does list a number of particular and specified documents. These documents (many of which appear to be copies of originals not listed) came into the possession of Westinghouse from an environmentalist group in September 1976 and are claimed to amount to hard evidence of a uranium producers' cartel. Some of these, on the face of the descriptions, or copies, or originals of them, might be in the possession of one of the R.T.Z. companies or of a subsidiary over which they have power, and many of them appear on the face of the description to be relevant to the existence or terms of a uranium cartel. It is possible that the existence and terms of a uranium cartel may be relevant to Westinghouse's defence of commercial impracticability in the Richmond proceedings. The Court of Appeal, as regards the scheduled documents, applied a "blue pencil," i.e., it deleted (as under section 2 of the Act of 1975 it is entitled to do) a number of items, and (more doubtfully)

substituted for the words "relating thereto" the words "referred to therein." For my part I would have applied the blue pencil still more vigorously, so as to leave in the schedule only "particular documents specified" together with replies to letters where replies must have been sent. But this leaves the question whether any "blue-pencil" approach is appropriate in relation to this request or whether the whole request is so far-reaching and so far of the nature of "fishing" that, even though a portion of it can be salved it ought to be rejected out of hand, or should the court, which under the Act of 1975 has powers to limit its action to what it considers appropriate, make an order confined to what can be supported under the Act. Before I give my answer on this issue, I must deal with the position as regards the individual witnesses and with a separate argument.

As regards the named individual witnesses, the position can be broadly stated. There are some individuals employed by one or other of the R.T.Z. companies who appear from the scheduled documents to have attended or to have knowledge of meetings of uranium producers at which matters relevant to the existence of a cartel may have been discussed. In the case of others (a minority) no connection is shown between them and any such meeting or any scheduled document. So the question again is whether there is sufficient basis for the assertion that there is testimony of some identified individuals which is needed for the trial or whether the generality of the request invalidates the whole application.

The separate argument arises in this way. On October 15, 1976, soon after the "environmentalist" documents reached them, Westinghouse commenced in the United States District court for the Northern District of Illinois Eastern anti-trust proceedings against the R.T.Z. companies and 27 other alleged members of a uranium cartel. Westinghouse claimed, in accordance with United States anti-trust legislation, treble damages against all defendants. The R.T.Z. companies have not accepted jurisdiction in these proceedings and have taken no part in them. The letters rogatory in the Richmond actions were requested on the same day. This coincidence has given rise to a contention by the R.T.Z. companies that the real, or predominant purpose of the letters rogatory is to further the anti-trust proceedings, and that as those proceedings are of a penal character, because of the treble damages claim, the letters rogatory should not be acceded to. I need not express any opinion whether if the letters rogatory had been issued in the Illinois proceedings they could be implemented in England, for I am of opinion that the appellants' argument fails at an earlier stage. Unless a case of bad faith is made against Westinghouse (which is expressly disclaimed) it is impossible to deny that the letters rogatory were issued for the purposes of obtaining evidence in the Richmond proceedings. The fact, if it be so, that evidence so obtained may be used in other proceedings and indeed may be central in those proceedings is no reason for refusing to allow it to be requested: all evidence, once brought out in court, is in the public domain, and to accept the argument would largely stultify the letters rogatory procedure. I must therefore reject this separate contention, and express my conclusion on the other factors. This is that,

on the whole, I am of opinion that following the spirit of the Act which is to enable judicial assistance to be given to foreign courts, the letters rogatory ought to be given effect to so far as possible: that it would be possible to give effect to them subject to a severe reduction in the documents to be produced, and to the disallowance of certain of the witnesses. Exactly what these should be I need not specify in view of my conclusions on other aspects of the case. It is enough to say that agreeing in principle, if not totally in detail, with the Court of Appeal, I would not set aside the order of October 28, 1976, on the ground that it provided for illegitimate discovery.

2. I now deal with the question whether the R.T.Z. companies can claim privilege against production of the documents requested under section 14 of the Civil Evidence Act 1968. This, as section 3 (1) (*a*) of the Act of 1975 makes clear, is a matter of English law. I shall deal with it briefly because I agree with the decisions of the Court of Appeal of May 26, 1977, and July 11, 1977, and I am satisfied with their reasoning. These judgments establish: (a) that fines imposable by the Commission of the European Communities under articles 85 and 86 of the Treaty of Rome and article 15 of general regulation 17 are penalties—this was not disputed in this House; (b) that section 14 of the Act of 1968 is not limited to such penalties as are imposed as the result of proceedings, but covers penalties imposed by administrative action and recoverable by proceedings; (c) that since these penalties are recoverable under English law by virtue of the European Communities Act 1972 they are "penalties provided for by such law" (Civil Evidence Act 1968, section 14 (1) (*a*)); (d) that production of the documents would tend to expose the R.T.Z. companies to proceedings for the recovery of a penalty, none the less though the Commission: (i) has knowledge of the "environmentalist" documents; (ii) has extensive powers of investigation; (iii) has a duty to enforce articles 85 and 86—see article 89.

I base that conclusion in part upon evidence which was before and considered by the High Court and the Court of Appeal and in part upon the proposition that the tendency to expose to a penalty would be increased if the documents in question were to be validated and connected with the R.T.Z. companies by sworn evidence, as opposed to being, as they are now, pieces of paper found in a file. The test of this proposition which was, in effect, and correctly, applied by the Court of Appeal was that laid down in *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395.

In my opinion the R.T.Z. companies make good their claim to privilege against production of the scheduled documents except those conceded and quoad these documents the order cannot be implemented.

3. The individual witnesses claim privilege against giving any oral evidence on the ground that to do so might incriminate them. This claim attracts the protection of the Fifth Amendment to the United States Constitution. Since it is a claim for privilege under United States law, its validity has to be determined as if it had been made in civil proceedings in the United States of America (Act of 1975, section 3 (1) (*b*)).

It is necessary to state the facts in detail since this is a matter which has arisen since the judgment of the Court of Appeal.

A On June 8, 1977, one of the individual appellants, Kenneth Bayliss, attended at the United States Embassy in London before a consular officer designated to take evidence under the letters rogatory. He claimed privilege under the Fifth Amendment. After argument, the officer did not direct the witness to answer as she had power to do so under section 3 (2) of the Act of 1975. Instead she permitted guidance to be sought from Judge Merhige—the judge in charge of the Richmond B proceedings—by telephone. Judge Merhige came to London in order to rule upon this question and sat at the United States Embassy from June 13–16. All the seven witnesses—appellants—claimed the Fifth Amendment privilege and on June 14, 1977, his Honour ruled that the privilege was well taken and that the witnesses need answer no questions except to give their names and addresses. There can be no doubt that this C ruling has the status of a decision of the competent United States District Court.

On June 15, 1977, Judge Merhige received a letter from the United States Department of Justice stating that the department required the evidence of the witnesses for the purposes of a grand jury investigation. This investigation had been started early in 1976 into possible violations of United States anti-trust laws by members of the alleged uranium D cartel. A grand jury had been empanelled in Washington D.C. in June 1976 to pursue this investigation and to initiate criminal proceedings if thought fit. It was represented in the letter that depositions taken pursuant to the letters rogatory might well be the sole opportunity for the grand jury to obtain information vital to its investigation. Further it was represented that the Department of Justice would not utilise the E testimony of any of the named witnesses as the basis for a criminal prosecution of that witness in the United States. On June 16, 1977, a representative of the United States Attorney-General appeared before Judge Merhige and stated that it was the firm policy of the Department of Justice not to make any application in a civil case to which the United States Government was not a party for an order under 18 U.S.C. sections 6002–6003 (see below) and that accordingly such an order F had not been sought and was not intended to be sought. However, Judge Merhige was invited to rule that, in the light of the representation contained in the letter, the Fifth Amendment privilege was no longer available. Judge Merhige declined to accede to this invitation and ruled that the privilege was still effective. This ruling also has the status of a decision of the competent United States District Court.

G However, notwithstanding its "firm policy" the United States Department of Justice on July 18, 1977, made application to Judge Merhige in Richmond for an order to compel testimony under 18 U.S.C. sections 6002–6003. These provisions are, so far as relevant, as follows:

> "6002. Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in H a proceeding before or ancillary to (1) a court or grand jury of the United States . . . (3) . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his

privilege against self-incrimination; but no testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except . . ." (not relevant)

" 6003. (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part. (b) A United States attorney may, with the approval of the Attorney-General, the Deputy Attorney-General, or any designated Assistant Attorney-General, request an order under subsection (a) of this section when in his judgment—(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

The request was accompanied by two letters:

1. A letter dated July 11, 1977, signed by the Deputy Assistant Attorney-General, Anti-Trust Division to the United States Attorney, Eastern District of Virginia. It was headed " Grand Jury Investigation of the Uranium Industry." It authorised the addressee to apply to Judge Merhige, pursuant to sections 6002–6003, requiring a named witness " to give testimony or provide other information *in the above matter* and in any further proceedings resulting therefrom or ancillary thereto." (My emphasis.)

2. A letter dated July 12, 1977, signed by the Attorney-General of the United States also addressed to the U.S. Attorney, Eastern District of Virginia, stating that the writer concurred in the request. This letter contained the following:

" These immunity requests are for the purpose of permitting testimony to be compelled in a civil litigation to which the United States is not a party. As you know, the Department of Justice has a firm policy against seeking such orders in private litigation except in the most extraordinary circumstances. In my judgment, the testimony of the individuals for whom orders are to be sought is necessary to the public interest. The extraordinary circumstances which led me to this conclusion include the following: (1) Those persons . . . have refused to testify on the basis of their privilege against self-incrimination and they are outside the personal jurisdiction of the United States courts; . . . (3) These persons are British subjects and we have determined that it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom . . . (5) The testimony these persons give may well be indispensable to the work of the grand

jury, and (6) The subject matter of this grand jury is of particular importance."

On July 18, 1977, Judge Merhige, as he was obliged to do under section 6003 (a), made an order in respect of each of the witnesses named compelling his testimony in the terms provided for by sections 6002–6003. He expressed the opinion that the matter of sanctions might be tested in the English court and said that he encouraged that course. On July 25, 1977, the witness appellant Bayliss attended at the United States Embassy in London and declined to answer questions put to him on the ground that he wished to seek the assistance of the English court. It is now for this House, on these appeals, to decide whether, in the light of this situation, the letters rogatory should be given effect to so far as regards these witnesses.

My Lords, it is my clear opinion that effect should not be so given. The position is that so far as the civil proceedings in Richmond, Virginia, are concerned, a ruling was given by the learned District Judge that the witnesses were entitled to the Fifth Amendment privilege. Though the procedure followed was, in certain respects, which I need not particularise, short-circuited in the interest of time saving, there is no doubt that the course taken, with agreement of the parties, was in accordance with the Act of 1975. The ruling was given by the competent judicial authority that the evidence sought was evidence which the witnesses could not be compelled to give in civil proceedings in the country in which the requesting court exercises jurisdiction: section 3 (1) (*b*). I am not prepared to go so far as to say (as the appellants submitted) that thereafter the requesting court was functus officio, or the letters rogatory exhausted: the procedure allows of sensible flexibility. But when a considered ruling in law has been given and not displaced by appeal, it is necessary to look very carefully at action which is said to negative that ruling.

The action relied upon is the order made by the District Judge under the provisions of 18 U.S.C. sections 6002–6003. Looking at this order and the application for it, there is no doubt as to its character and purpose. This is shown beyond doubt by the letters of June 15 and July 11 and 12, documents of complete frankness and totally without subterfuge or disingenuousness. The evidence to obtain which the order was made and the immunity granted was on the face of these documents evidence required for the grand jury investigation set up by the United States Department of Justice, Anti-Trust Division. This is the first objection: the request for it does not comply with section 1 (*b*) of the Act of 1975, so that to use the procedure of the Act of 1975 in order to obtain the evidence is a misuse of that procedure. Secondly, the evidence, as the letters explicitly state, is sought for the purpose of a grand jury investigation which may lead to criminal proceedings (see above). Now the Act of 1975, section 5, provides for the obtaining of evidence for criminal proceedings but expressly the section only applies to proceedings which have been instituted (none have been instituted), and impliedly, to a request by the court in which the proceedings have been instituted. The case is therefore not within section 5, and the procedure is an attempt to get the evidence in spite of that fact. Thirdly, the evidence is sought

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for the purpose of an anti-trust investigation into the activities of companies not subject to the jurisdiction of the United States. I think that in such circumstances the courts would properly, in accordance with accepted principle refuse to give effect to the request on the grounds that the procedure of the Act of 1975 was being used for a purpose for which it was never intended and that the attempt to extend the grand jury investigation extra-territorially into the activities of the R.T.Z. companies was an infringement of United Kingdom sovereignty—see *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.* [1953] Ch. 19. But in the present case, there has been an intervention by H.M. Attorney-General on behalf of the Government of the United Kingdom. In this intervention the Attorney-General brought to the notice of your Lordships the following matters.

1. Her Majesty's Government considers that the wide investigatory procedures under the United States anti-trust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom.

2. That the grand jury have issued a subpoena to Westinghouse requiring that company to produce to the grand jury documents and testimony obtained in discovery in the Virginia proceedings. Therefore evidence given in pursuance of the letters rogatory will be available to the United States Government for use against a United Kingdom company and United Kingdom nationals in relation to activities occurring outside United States territory in anti-trust proceedings of a penal character.

3. That the intervention of the United States Government followed by the grant of the order and immunity of July 18, 1977, shows that the execution of the letters rogatory is being sought for the purposes of the exercise by United States courts of extra-territorial jurisdiction in penal matters which in the view of Her Majesty's Government is prejudicial to the sovereignty of the United Kingdom.

My Lords, I think that there is no doubt that, in deciding whether to give effect to letters rogatory, the courts are entitled to have regard to any possible prejudice to the sovereignty of the United Kingdom—that is expressly provided for in article 12 (b) of the Hague Convention. Equally, that in a matter affecting the sovereignty of the United Kingdom, the courts are entitled to take account of the declared policy of Her Majesty's Government, is in my opinion beyond doubt. Indeed, this follows as the counterpart of the action which the United States Government has taken. For, as the order of July 18, 1977, and the letter of July 12, 1977, make plain, the order compelling testimony and granting immunity is made in extraordinary circumstances relating to the public interest of the United States. That the making of the order is a matter of government policy, and not related to the civil proceedings in Richmond, is confirmed beyond doubt by the statement made before Judge Merhige on June 16, 1977, and repeated in the letter of the Attorney-General of the United States of July 12, 1977, that there is a firm policy against seeking orders under sections 6002–6003 in private litiga-

tion. It appears that the present is the only case in which such an order has been made. (One other instance cited is not comparable.) But if public interest enters into this matter on one side, so it must be taken account of on the other: and as the views of the executive in the United States of America impel the making of the order, so must the views of the executive in the United Kingdom be considered when it is a question of implementing the order here. It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.

The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive (see *The Fagernes* [1927] P. 311): they have, as I have stated, no difficulty in doing so.

For these reasons, I am of opinion that recognition should not be given to the order of July 18, 1977, granting immunity to the individual witnesses, that the matter should be treated as governed by the ruling—properly given in the civil proceedings in question—of June 14, 1977, that the witnesses were entitled to privilege under the Fifth Amendment.

A further point was taken by the appellants that the individual witnesses should not be compelled to give evidence which would, in effect, remove the corporate privilege of their company against production of documents—an argument, in effect, that evidence that cannot be obtained directly from the companies, should not be obtainable indirectly through their employees. This raised some novel and interesting contentions which may merit consideration in another case, or by the Law Commission. It is unnecessary, and therefore inappropriate, to decide upon it now.

I would allow the appeals of the R.T.Z. companies and of the individual appellants and order that the order giving effect to the letters rogatory be discharged. I would dismiss the appeals of Westinghouse. I would order Westinghouse to pay the appellants' costs of the appeals and cross-appeals in this House.

VISCOUNT DILHORNE. My Lords, on March 18, 1970, the United Kingdom signed at The Hague a convention "on the Taking of Evidence Abroad in Civil or Commercial Matters" designed "to improve mutual judicial co-operation in civil or commercial matters" (Cmnd. 6727). It was ratified on July 16, 1976. Among the other states which signed and ratified the convention was the United States. Article 1 of the convention stated that a letter of request should not be used to obtain evidence not intended for use in judicial proceedings commenced or contemplated. Article 12 stated that the execution of a letter of request might be refused only to the extent that the execution of the letter did not fall within the functions of the judiciary of the state to which the request was directed, or that state considered that its sovereignty or security

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would be prejudiced thereby: and article 23 stated that a contracting state might at the time of signature, ratification or accession declare that it would not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

Pursuant to that article, Her Majesty's Government on ratifying the convention, declared that the United Kingdom would " not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents " (Reservations and Declarations, United Kingdom, paragraph 3) and understood letters which required a person

> " (*a*) to state what documents relevant to the proceedings to which the letter of request relates are or have been in his possession, custody or power; or (*b*) to produce any documents, other than particular documents specified in the letter of request, as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power "

to be " letters of request issued for the purpose of obtaining pre-trial discovery of documents."

To enable the United Kingdom's obligations under the convention to be implemented, the Evidence (Proceedings in Other Jurisdictions) Act 1975 (hereafter referred to as " the Act of 1975 ") was passed. That Act went further than was necessary for the purposes of the convention for it made provision for the taking of evidence not only for civil or commercial proceedings but also for criminal.

In the interests of comity, it is, and I trust will continue to be, as Lord Denning M.R. said in this case in the Court of Appeal (ante, p. 560H) " our duty and our pleasure to do all that we can to assist " the requesting court.

The powers possessed by United Kingdom courts in this regard are now contained and defined in the Act of 1975 which, its long title states, was

> " to make new provision for enabling the High Court . . . to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions."

Section 1 of that Act provides that where an application is made for an order for evidence to be obtained in the United Kingdom

> " and the court is satisfied—(*a*) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (' the requesting court ') exercising jurisdiction . . . in a country or territory outside the United Kingdom; and (*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,"

then, and I stress only then, has the court the powers conferred by the following provisions of the Act and able to give effect to the request.

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A So the first question that a court must consider when such an application is made, is whether it is satisfied that each of these conditions is fulfilled.

In *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618 the letters rogatory, which emanated from the President of the United States, stated that "the testimony of the following witnesses" (and then followed a long list of members of boards of directors of B English companies), was "necessary in the trial of the issues in the said cause and without the testimony of whom justice cannot be completely done between the parties." The production of documents was also asked for.

Despite the statement in the letters rogatory that such testimony was necessary at the trial, the Court of Appeal held that what was being C sought was material relating to pre-trial discovery, material which might lead to a line of inquiry which itself would disclose relevant material, and that it had not been shown that the United States court was desirous of obtaining "testimony" (the word in the Foreign Tribunals Act 1856, section 1, now replaced by "evidence" in the Act of 1975) "which is in the nature of proof for the purpose of the trial": and that consequently the court had no jurisdiction to make the order sought.

D In the course of the argument Lord Goddard C.J. said at p. 641 that the court had to look at the substance of the matter and regard was had to what was said in the court in Illinois when the letters rogatory were issued. In his judgment, he said that it was an endeavour to get in evidence by examining people who may be able to put the parties in the way of getting evidence. "That," he said, at p. 649, "is mainly what E we should call a 'fishing' proceeding which is never allowed in the English courts."

I do not think that "evidence" in the Act of 1975 has a different meaning to "testimony" in the Act of 1856. The distinction drawn in that case and in the cases cited therein between the obtaining of evidence for use in a trial and the obtaining of information which might lead to the procurement of evidence is equally relevant in construing F the Act of 1975. In that Act and in the convention the emphasis is on the obtaining of evidence. If the court is not satisfied that evidence is required, direct evidence for use at a trial as contrasted with information which may lead to the discovery of evidence, however much the court may be disposed to accede to the request, it has no power to do so. As I see it, it has no discretion in the matter.

G In this case no difficulty arises with regard to section 1 (*a*). It is clearly satisfied.

The appellants contend that section 1 (*b*) is not. They say that the letters rogatory are directed to obtaining information from and discovery by persons not parties to the litigation in Richmond, Virginia, which might lead to the procurement of evidence; that it is sought primarily H for the purpose of civil proceedings brought by the respondents against the appellant companies and others in Illinois and now also for a grand jury empanelled in Washington D.C.

The material put before us does not suffice to enable me to decide

that use in the Illinois proceedings is the respondents' predominant purpose. If it is—and it may well be—that would not in my opinion prevent section 1 (*b*) being satisfied for it is not disputed that what is being sought is for the purpose of the civil proceedings in Richmond, and the proceedings in Illinois are civil proceedings.

Between 1966 and 1974 the respondents entered into a number of contracts under which they undertook to supply 79 million lbs. of uranium in the period up to and including 1994. They were fixed price contracts subject to escalation with increases in the cost of living. By 1976 the price of uranium had risen from about $6 a lb. in 1973 to about $41 a lb. The respondents had not covered themselves against this liability and by September 1975 were short of approximately 75 million lbs. of uranium. In that month they gave notice to the other parties to the contracts that they would be unable to carry them out with the consequence that 16 utility companies started actions against them in which a sum in the region of $2,000 million was claimed. On the respondents' application 13 of these actions were consolidated in the United States District Court at Richmond for the purpose of the pre-trial procedures.

In their defence to these actions the respondents relied on the defence of "commercial impracticability" under section 2–615 of the United States Uniform Commercial Code and asserted the existence of an international cartel of uranium producers which they alleged had had a serious impact on the uranium market and had caused artificially high prices. They admit that at that time they had not any hard evidence of the existence and activities of the cartel.

In March 1976 the United States Department of Justice started an investigation into possible violations of the United States anti-trust laws by members of the cartel and in June 1976 a grand jury was empanelled to pursue this investigation and to initiate criminal proceedings should that be warranted.

The convention made no provision for obtaining evidence for the purpose of criminal proceedings and under section 5 of this Act an order can only be made for the purpose of obtaining evidence for criminal proceedings where proceedings have been instituted. So no order could be made for the obtaining of evidence to go before the grand jury.

In September 1976 the respondents received through an organisation called "The Friends of the Earth" documents relating to the existence and activities of such a cartel, of which the appellant companies, with uranium producers (including governments) from France, Canada, Australia and South Africa, were members.

On October 15, 1976, the respondents started civil proceedings for breach of anti-trust laws in Illinois against the appellant companies and many others. In that action they claimed treble damages, a sum in the region of $6,000 million.

On the same day, in the course of the pre-trial proceedings in Richmond, they filed applications for the issuance of letters rogatory seeking the taking of depositions and the production of documents in Canada, Australia and the United Kingdom. The plaintiffs in the actions in Virginia lodged a memorandum in opposition in which they alleged (1) that the court

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had a discretion whether to issue the letters; (2) that the information sought was irrelevant, one ground for that assertion being that the cartel deliberately excluded the United States market and its existence had been known to the respondents for more than four years; (3) that the issuance of the letters would cause substantial delay in the preparation of the cases for trial; (4) that the depositions and documents sought were "really in aid of Westinghouse's claim . . . in its anti-trust action"; and (5) on the ground that the granting of the letters rogatory would be a futile act as, if the letters rogatory were issued in the form sought, they would not be honoured by the courts of England.

The application was heard by Judge Merhige at Richmond on October 21. It was contended for the respondents that the issuance of the letters was a matter of routine and that the court had no discretion as to it. In the course of the argument their counsel said: "As far as exploring areas of possible evidence abroad is concerned, it would be done with despatch," and: "We are here seeking to discover critical evidence to the defence in this case from several of the international giants in the mining and milling business."

It appears that American pre-trial discovery operates over a far wider field than discovery in this country. Parties may obtain discovery regarding any matter not privileged

> "including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

And such discovery may be obtained from persons not parties to the action.

The applications were made in the course of pre-trial proceedings and the shorthand notes of the hearing do not reveal that there was any consideration of the law of England or regard to the difference between the obtaining of evidence in the strict sense and the obtaining of information which might lead to the obtaining of evidence. Counsel for the respondents told the judge that the phrasing of the letters was in accordance with the advice of eminent counsel and that their form was "acceptable in these foreign jurisdictions." Most of the discussion appears to have been on the effect the issuing of the letters would have in causing delay in the trial.

The judge who said that he did not see the relevance of the material sought and who did not say whether or not he had any discretion in the matter, issued the letters in the form submitted by the respondents.

In the circumstances it seems to me probable that the issuing of the letters was regarded as a step in the normal process of discovery in American courts which included the obtaining of material which might lead to the obtaining of evidence; in other words, what we would call a "fishing" operation. Support for this view is to be found in the observations of the respondents' counsel cited above.

The two letters rogatory were similar in all material respects. It will suffice to consider one of them and I must do so in some detail in view of their importance.

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Each contained recitals, one saying:

"It has been suggested to us that justice cannot be done among the said parties without the testimony, which is intended to be given in evidence at the trial of the actions, of the following persons . . . being directors and/or employees and/or former directors and/or former employees of the Rio Tinto Zinc Corporation . . ."

Then five persons are named and the recital goes on

"or such other director or other person who has knowledge of the facts as to which evidence is desired as hereinafter stated, nor without the production of certain documents in the possession of" that company "such testimony and such documents being related to the existence and terms of various agreements, arrangements or concerted practices, between" that company "as well as others whose identities are presently unknown."

Then follow the names of 40 companies of which 26 were Canadian, Australian, South African, French and English. The letter goes on:

"Said agreements, arrangements or concerted practices identities relate to past, present and future uranium prices, uranium supply, uranium demand, allocation of uranium markets, relationships of uranium producers with 'middlemen,' including their willingness or lack, of same to make sales to 'middlemen' and the terms and conditions under which such sales should be made, if at all, the terms of contracts for the sale of uranium to uranium consumers and the United States embargo on the importation of enriched uranium. And whereas the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court."

These recitals were followed by the request that the persons named "or other person having knowledge of the facts" should be caused to appear before any consul or other consular officer of the United States "to be examined orally as a witness in the above entitled actions" as to "the existence and terms of the above-mentioned agreements, arrangements or concerted practices."

This was followed by the request that the proper officer of the Rio Tinto Zinc Corporation should be ordered to produce "the documents enumerated in schedule B hereto, being documents which appear to be or to be likely to be in the possession, custody or power of" that company. Schedule B contains 73 paragraphs of which no less than 57 ended with the words "and any memoranda, correspondence or other documents relating thereto."

I do not propose to refer in any detail to the contents of each paragraph. The pattern followed appears to have been to relate each paragraph to a letter or meeting or agenda etc. of which the respondents had received information from the Friends of the Earth organisation, and then to request the production of anything that might be connected therewith. I will only cite paragraph 16 which asked for the production of

"copies of all contracts, letters of intent, enquiries and quotations

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> together with invoices of actual deliveries of uranium, thorium and their ores and compounds provided by members of the organisation or organisations known variously as the 'Uranium Marketing Research Organisation,' the 'Uranium Producers' Club,' the 'Secretariat' and 'Société D'Études et de Recherches D'Uranium' ('S.E.R.U.')."

The wide ranging and at the same time vague description of the documents sought makes it to my mind even clearer than it was in the *Radio Corporation of America* case [1956] 1 Q.B. 618 that this was a fishing operation.

In that case, as in this, oral testimony was sought as well as the production of documents. The letters rogatory asked that Sir George Nelson and Mr. Nelson should be examined on "such of the above-mentioned agreements and documents and the conversations, transactions, activities and negotiations referred to therein as may be within the knowledge of them or either of them." In this case the letters rogatory asked that the persons named "or other persons having knowledge of the facts" be examined as to "the existence and terms of the above-mentioned agreements, arrangements or concerted practices."

In that case Barry J. had affirmed the order giving effect to the letters rogatory to the extent that Sir George Nelson and Mr. Nelson were to be required to give oral testimony but allowed the appeal against the order in so far as it related to the production of documents. On appeal Devlin J., with whose judgment Lord Goddard C.J. and Hilbery J. agreed, expressed the view [1956] 1 Q.B. 618, 648 that Barry J. ought logically to have gone on and disallowed the order for the examination of Sir George Nelson and Mr. Nelson,

> "because exactly the same principle applies to both. If he had not power to do one he had not power to do the other, and the reason why he had not power to do it was because it was not made clear to him that the foreign court was desirous of obtaining . . . evidence which may be used at the trial and not in proceedings for inspection and discovery before the trial."

In my view Devlin J.'s observations apply to this case.

In the Court of Appeal it was held that the words which so often appear in schedule B "any memoranda, correspondence, or other documents relating thereto" were too wide and the words "relating thereto" were struck out. In their place the words "referred to therein" were inserted.

The court thus recognised that a part of the letters was of a fishing character. Letters of request may take a variety of forms. Some, it may clearly appear, are wholly directed to the obtaining of evidence; some, it may equally clearly appear are not; one part of a request may be for evidence and the remainder not. The language of others may be such that it is not possible with any degree of certainty to decide into which category they fall.

If it is clear that part of the request is for the obtaining of evidence and that part is severable from the rest, it might be right to hold that

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that part satisfies section 1 of the Act. If it is clear that the request is substantially for the obtaining of evidence although a minor part is not, again it might be right to hold that the barrier imposed by that section was passed. The order made by the court could ignore the fishing part. A

In this case, as in the *Radio Corporation of America* case [1956] 1 Q.B. 618, the request for the examination of named persons is linked with the request for the production of documents. One is supplementary to the other. The witnesses would be examined on the very matters to which the documents, of which production is sought, relate. In the *Radio Corporation* case Barry J., as I have said, sought to sever the examination of witnesses from the production of documents and it was held that he was wrong to do so. It would, I think, be equally wrong to do so in this case. B

Nor can it be said that the amendments made by the Court of Appeal were of a minor character. With those amendments made and paragraph 16 of schedule B deleted, it appears that the court thought that the letters were restricted to the obtaining of evidence and that the "fishing" elements were eliminated. I do not think they were but that is by the way. The amendment of no less than 57 paragraphs of the schedule and the deletion of paragraph 16 was a substantial alteration. It is not, in my opinion, open to the courts of this country to convert letters rogatory into letters which comply with section 1 by the use of a "blue pencil" or to insert words in place of those struck out, though, as I have said, where it is clear that the letters are substantially for the obtaining of evidence, a minor part which is not might be ignored. C D

In relation to section 1 of the Act of 1975 the letters have to be considered in the form in which they are received. E

In this case, as in the *Radio Corporation of America* case, the letters stated that without the evidence of the named persons justice could not be done between the parties. I do not ignore the fact that in this case, unlike that, it is said that it is intended that the "evidence" shall be given at the trial. Whether or not that was inserted on the advice of eminent counsel, one does not know but, as Lord Goddard C.J. said at p. 641 in that case, one must look "at the substance of the matter." F

I have naturally carefully considered the judgments of Lord Denning M.R., of Roskill L.J. and of MacKenna J. and I regret that I cannot come to the conclusion to which they came. That the ultimate object was to obtain evidence for use at the trial, I do not doubt but the substance of the letters, in my opinion, shows that the discovery and examination of the named persons sought was of a fishing character. It might produce some direct evidence and it might result in getting information which would lead to the securing of evidence. G

Looking at the letters alone, I cannot say that I am satisfied that they were directed to the obtaining of evidence either only or mainly. What occurred in the court at Richmond when they were issued, in my opinion strongly supports the conclusion that they were not. Even if they were not issued as a matter of routine, there are a number of indications that their issue was part of the normal American pre-trial discovery, H

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which, as I have said, includes discovery of matters which may lead to the securing of evidence.

Not being so satisfied, as section 1 requires the court to be, I do not think the court had power to make orders giving effect to the requests and in my opinion it was wrong to do so.

On this ground I would allow the appeals.

It was also contended on behalf of the appellants that if section 1 of the Act was satisfied and the court was entitled to exercise the powers contained in its later provisions, nevertheless, in the exercise of its discretion, it should have refused to make the order. The following provisions of the Act give the court powers, subject to certain restrictions, and impose no duty. The court is clearly entitled to exercise its discretion whether or not to make an order.

Before I consider the exercise of discretion it is necessary to refer to other provisions of the Act.

Section 2 (1) gives the court power by order

> "to make such provision for obtaining evidence . . . as may appear to the court to be appropriate for the purpose of giving effect to the request . . ."

Section 2 (3) and (4) contain restrictions on the exercise of that power, subsection (3) providing that:

> "An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order. . . . ."

Subsection (4) reads as follows:

> "An order under this section shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

This subsection states in statutory form the reservation made by Her Majesty's Government on the signing of the convention.

It was argued that if documents were sufficiently specified for the purposes of the subpoena duces tecum, they were sufficiently specified in a letter of request for the court to be able to make an order for their production. I do not agree. The only documents which a person can be ordered to produce under section 2 of the Act are particular documents.

It follows that, if it were the case that the court was satisfied that the application for the order was for the purpose of obtaining evidence for civil proceedings, the court could only order the production of particular documents which it specified. It could not order the production of "any memoranda, correspondence or other documents relating thereto" or, in my opinion, of "any memoranda, correspondence or other documents referred to therein," for those formulae do not specify particular

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documents. Subsection (3) is of general application. As Lord Goddard said in the *Radio Corporation of America* case [1956] 1 Q.B. 618 "fishing" proceedings are never allowed in the English courts; and, if one concludes, as I do, that this was a fishing operation, then the consequence is that no order should, even if section 1 of the Act is satisfied, have been made for the examination of any witness or for the production of any documents.

On October 28, 1976, Master Creightmore ordered the examination of the persons named in the letters rogatory and the production of the documents asked for in schedule B.

On February 22, 1977, Master Jacob refused to set aside his order and MacKenna J. dismissed the appeal from his decision. On May 26, 1977, the Court of Appeal as I have said, amended schedule B, and subject thereto, allowed the order to stand.

On June 8, consequently, three of the persons named attended before a consular officer at the United States Embassy and on June 10 the appellant companies appeared by their proper officer. Those persons and the companies claimed privilege.

Section 3 (1) of the Act provides that

> "A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—(*a*) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or (*b*) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction."

Subsection (2) reads as follows:

> "Subsection (1) (*b*) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—(*a*) supported by a statement contained in the request . . . ; or (*b*) conceded by the applicant for the order; and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim."

The three named persons claimed that under the Fifth Amendment to the United States Constitution they could not be compelled to give evidence and the companies claimed privilege under section 14 of the Civil Evidence Act 1968 on the ground that to produce the documents "would tend to expose" them to "proceedings . . . for the recovery of a penalty" being a penalty provided for by the law of England.

It will be convenient to consider this latter claim first.

Article 85 of the Treaty of Rome (E.E.C. Treaty) prohibits it.

> "1. . . . incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . ."

For infringement of this article the Commission may impose a fine of "from 1,000 to one million units of account, or a sum in excess thereof but not exceeding 10 per cent. of the turnover in the preceding business year" of the infringing undertaking: see E.E.C. Council Regulation No. 17 of February 6, 1962, article 15, paragraph 2.

In this House it was not contended that a fine imposed for breach of article 85 was not a penalty within the meaning of section 14 of the Civil Evidence Act 1968. But two points were taken on behalf of the respondents. First it was contended that the privilege recognised by that section did not extend to cases where the penalty could be imposed without an action or proceedings and that it could only be claimed where there were proceedings to establish liability to the penalty and for its recovery. This argument when advanced in the Court of Appeal was rejected and in my view rightly. A person may be exposed to proceedings for the recovery of a penalty consequent upon the imposition of a penalty by a body such as the Commission.

Secondly, it was argued that the discovery of the document would not in the circumstances tend to expose the appellant companies to such proceedings. It was said that as the Commission had knowledge from the Friends of the Earth documents for a considerable time of the existence of the cartel and had taken no action, there was no real risk of such proceedings if the documents in the possession of the companies were disclosed.

In *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395 the judgment of the Court of Appeal, of which Sir Wilfrid Greene M.R. was a member, was delivered by du Parcq L.J. He said at p. 404 that it was not in doubt that the power of the court to insist on an answer to interrogatories extended to any case in which it was not made to appear to the court "that there is reasonable ground to apprehend danger to the witness from his being compelled to answer: *Reg.* v. *Boyes* per cur. (1861) 1 B. & S. 330." That was the test applied in the *Triplex* case and the same test is to be applied in relation to the discovery of documents. In the present case Lord Denning M.R. said (ante, p. 573F–G) that he doubted whether that case would be decided in the same way today. It may be that it would now be held that answering interrogatories as to libel would not be a reasonable ground for apprehending a prosecution for criminal libel. I do not read Lord Denning as criticising the reasoning in the *Triplex* case but only its application.

Lord Denning M.R. went on to say at p. 574 that if it appears that a witness's answer could be used against him in criminal proceedings, his objections should be upheld; and that if it appears that a witness is at risk "'great latitude should be allowed to him in judging for himself the effect of any particular question.'" He went on to say:

> "It may be improbable that they" (proceedings) "will be taken, but nevertheless, if there is some risk of their being taken—a real and appreciable risk—as distinct from a remote or insubstantial risk, then he should not be made to answer or to disclose the documents."

With these observations I respectfully agree. It was suggested that the

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reasoning in the *Triplex* case had reduced the burden which formerly lay on a person claiming privilege but I do not think that that is the case. In his judgment du Parcq L.J. reviewed the earlier cases and based his conclusions on them. Lord Denning contrasted a real and appreciable risk with a remote or insubstantial one, and once it appears that the risk is not fanciful, then it follows that it is real. If it is real, then there must be a reasonable ground to apprehend danger, and, if there is, great latitude is to be allowed to the witness and to a person required to produce documents.

If the appellant companies are compelled to produce the documents which they were asked to produce, I cannot reach the conclusion that it would be fanciful to suppose that that would expose them to no greater risk than at present of proceedings for the recovery of a penalty being brought against them. The documents might well authenticate and support the information now in the hands of the Commission. They might afford conclusive proof of a breach of article 85 and, when in possession of such evidence, the Commission might decide to take action.

In my opinion the decision of the Court of Appeal was right on this and it follows that the respondents' cross-appeal should be dismissed.

I now turn to the claims of privilege under the Fifth Amendment. Instead of the procedure laid down by R.S.C., Ord. 70, r. 6 being followed Judge Merhige came to London to the United States Embassy and there, on June 14, 1977, ruled that the claims to privilege were well taken. In so doing he must have acted as judge of the Richmond court. He appears to have been under the impression that the witnesses who had appeared at the United States Embassy in obedience to the order of the High Court, had become subject to his jurisdiction. I do not think that that was so but it matters not.

On June 15, 1977, Judge Merhige received a letter from the Deputy Assistant Attorney-General, Anti-Trust Division, of the United States in the following terms:

> "Dear Judge Merhige,
>
> "The United States Department of Justice ('Department') has been informed by counsel for Westinghouse Electric Corporation that to date the depositions of certain employees of the Rio Tinto Zinc Corporation, which are being taken in England pursuant to letters rogatory issued by your court . . . have been totally unproductive due to assertions of the United States Fifth Amendment privilege by the witnesses. We have also been informed that counsel for the letters rogatory deponents have indicated that all future witnesses will likewise assert their privilege against self-incrimination and refuse to testify.
>
> "As you undoubtedly know, the department is currently conducting a grand jury investigation into certain aspects of the domestic and international uranium industry, including the possibility that non-U.S. uranium producers, one of which is Rio Tinto Zinc Corporation Ltd., have engaged in conduct violative of United States anti-trust laws. In the course of this investigation the Department has attempted, with little or no success, to obtain information directly from foreign uranium

producers and their officers and employees. We therefore believe that the depositions taken pursuant to the letters rogatory issued by this court might well be the sole opportunity for our grand jury to obtain information vital to its investigation and deem it necessary to its orderly functioning that full discovery pursuant to the letters rogatory be had.

"Accordingly to eliminate what may be a major obstacle to discovery in the letters rogatory proceedings, the Government represents to this court and to the letters rogatory deponents listed below that it will not utilise, either directly or indirectly, the deposition testimony of a witness which is given pursuant to letters rogatory issued by this court as a basis for criminal prosecution of that witness for a violation of any United States law. This representation applies to the following individuals."

Then the individuals are named and the letter concludes with the sentence: "If you have any questions, please feel free to contact C. Forrest Bannan."

On June 16, 1977, Mr. Bannan appeared on behalf of the United States Department of Justice at a resumed hearing before Judge Merhige at the United States Embassy. In the course of his observations, Mr. Bannan stated that it was the firm policy of the Department of Justice not to grant immunity to a witness "in a private litigation—in any litigation to which it is not a party" and that only government witnesses would be granted immunity. He went on to say that the investigation by the department was considered to be of paramount importance and to stress the importance of the evidence of those it was wished to examine, pointing out that efforts to obtain such evidence in Canada, Australia, South Africa and France had not been successful. At the conclusion of the hearing Judge Merhige ruled that the witnesses should not be required to answer any questions which they deemed might incriminate them.

During the course of the argument it is to be noted that Judge Merhige stated that, when he issued the letters rogatory, he gave no thought as to the use of the evidence for any purpose except civil litigation and that he doubted, if the Justice Department had asked him to issue letters rogatory, whether he would not have done so as there was no case before his court of a criminal nature.

An aide-mémoire dated June 27 was delivered to the State Department expressing Her Majesty's Government's concern at this attempt by the Department of Justice to obtain evidence for a criminal anti-trust investigation by intervening in a civil case, stressing the great importance to be attached to the strict observance of agreed procedures as a protection for the rights of individuals and expressing the "strong hope that the Department of Justice will desist from its attempts to undermine these procedures and discontinue its intervention. . . ."

In spite of this aide-mémoire, on July 11, 1977, the United States Deputy Assistant Attorney-General, Anti-Trust Division, authorised an application to Judge Merhige at Richmond for an order under U.S.C. paragraphs 6002–6003 that Lord Shackleton should give evidence.

U.S.C. paragraph 6003 provides that a United States District Court shall, on the request of the United States Attorney for the district, issue an

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order requiring a witness to testify despite his refusal to do so on the ground that it might incriminate him; and U.S.C. paragraph 6002 provides that on such an order being communicated to the witness, he may not refuse to comply with it on the ground that to do so might incriminate him, but that evidence so given cannot be used against the witness in any criminal case except a prosecution for perjury or for a similar offence.

On July 12 the Attorney-General for the United States wrote to the United States authority for the district a letter which, so far as material, reads as follows:

> "These immunity requests are for the purpose of permitting testimony to be compelled in a civil litigation to which the United States is not a party. As you know, the Department of Justice has a firm policy against seeking such orders in private litigation except in the most extraordinary circumstances. In my judgment, the testimony of the individuals for whom orders are to be sought is necessary to the public interest. The extraordinary circumstances which led me to this conclusion include the following: (1) Those persons whose testimony is sought have refused to testify on the basis of their privilege against self-incrimination, and they are outside the personal jurisdiction of the United States courts; (2) These persons are not likely to come within the personal jurisdiction of United States courts so long as the Department of Justice continues a sitting grand jury investigation of the international uranium industry; (3) These persons are British subjects and we have determined that it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom; (4) The Department of Justice has been largely unable to obtain information from these foreign persons about the subject matter of this investigation; (5) The testimony these persons give may well be indispensable to the work of the grand jury and (6) the subject matter of this grand jury is of particular importance. It is on this basis that I approve of the requests for orders requiring these individuals to give testimony."

On July 18 Judge Merhige made the order sought by the United States Attorney. Whether or not he had a discretion in the matter I do not know, but I observe that in the course of the proceedings at the United States Embassy on June 16 he said that he had no discretion.

This action by the United States Attorney-General led to the intervention of the Attorney-General before the House, an intervention which, if I may say so, it was, in my opinion, not only his right but also his duty to make on the ground that despite the representations made by Her Majesty's Government, the sovereignty of this country had been prejudiced and that there had been "an excess of sovereignty or an excess of jurisdiction" on the part of the United States.

But for the intervention of the United States Attorney-General, it is clear that the claims to privilege under the Fifth Amendment would have been upheld. That intervention materially altered the character of the proceedings under the letters rogatory. Whether or not such letters would have been issued in the first place by Judge Merhige on the application of the United

States Attorney, it is clear that the High Court could not, if they had been issued on his application, have made an order under section 2 of the Act of 1975 to give effect to them for it had no power to do so.

The convention to which the United States was a party only relates to evidence for civil or commercial proceedings. It cannot be right for a state to seek to avail itself for the purpose of securing evidence for criminal proceedings, of the obligations accepted by another state in respect of the furnishing of evidence for civil or commercial proceedings. While, as I have said, the Act of 1975 goes beyond the convention in providing for the supplying of evidence when criminal proceedings have been instituted, no such proceedings have been instituted.

In this case if the proceedings had ended on June 16, it is clear that the persons named could not have been compelled to testify. The question now is, should they now be required to do so consequent upon the intervention of the United States Attorney-General who wants to compel the giving of evidence by persons who, his letter of July 12, 1967, recognises, are British subjects and outside the jurisdiction of the United States courts.

I have no hesitation in expressing the opinion that in these circumstances it would be wrong for the High Court even if it had power under section 2 of the Act to make an order compelling them to give evidence, to make such an order in the exercise of its discretion even if in consequence of the United States Attorney-General's intervention, they would no longer be in peril of prosecution on account of such evidence and so not entitled under American law to rely on the Fifth Amendment.

In this case it is now clear beyond all doubt that the evidence is required for the grand jury. Indeed it may have been throughout for, as I have said, the grand jury was empanelled in June 1976 and in March 1977 the respondents were served with a subpoena duces tecum to produce to the grand jury documents obtained by them as part of the discovery in the actions in Richmond, the letters rogatory having been issued in October of that year.

In other cases it may not be so clear that one of the main purposes which the issue of letters rogatory seeks to achieve—and whatever may have been the purpose when they were issued, it is now one of the main purposes of the letters in this case—is the securing of evidence for a grand jury in an anti-trust investigation from British nationals and British companies not subject to United States jurisdiction. But I hope that the courts of this country will always be vigilant to prevent a misuse of the convention and will not make an order requiring evidence to be given by such persons unless it is clearly established that even if it is required for civil proceedings, it is not also sought for criminal.

For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.

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Having reached these conclusions I do not find it necessary to consider whether the intended use by the respondents in the Illinois proceedings of the evidence, if secured, should have led the High Court to refuse to make orders under section 2 of the Act of 1975, or whether the fact that those proceedings are penal and against, among others, the appellant companies not subject to United States jurisdiction, justifies the conclusion that they constitute an invasion of sovereignty of the United Kingdom in so far as they relate to those companies.

Mr. Rokison advanced the interesting argument that the privilege to which the appellant companies were entitled and which was claimed by their proper officers, could not be evaded by seeking the evidence which the companies could not be compelled to give, from officers and servants of the company through, as he said, "the back door." He was unable to cite any authority for that proposition and I express no opinion on it, save to say that it renders a company's privilege of little value if it can be got round in that way. This appears to me to be a proper matter for consideration when a revision of company law is being considered.

My conclusions can be summarised as follows:

1. The orders should not have been made requiring the giving of evidence and the production of documents.

2. If the view of the majority of the House is that those orders were properly made, then the appellant companies could not be compelled to produce the documents requested as to do so would tend to expose them to proceedings for the recovery of a penalty.

3. If the orders were properly made, the other appellants' claims to privilege upheld by Judge Merhige on June 16 meant that, in consequence of section 3 (1) (*b*) of the Act of 1975, they could not then be compelled to give evidence.

4. If the order made by Judge Merhige at the instance of the United States Attorney-General destroyed their privilege by granting them immunity from prosecution, that order materially changed the character of the letters rogatory from requests for the obtaining of evidence for civil proceedings into requests for the obtaining of evidence for criminal and civil proceedings, and the High Court should consequently, in the exercise of its discretion rescind the order.

LORD DIPLOCK. My Lords, the jurisdiction and powers of the High Court to make the orders that are the subject of this appeal are to be found in sections 1 and 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, and nowhere else. The Act of 1975 was passed, in part (which includes sections 1, 2 and 3), to enable the United Kingdom to ratify the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters done at The Hague on March 18, 1970. Ratification by the United Kingdom took place on July 16, 1976, with certain reservations and declarations. The convention had previously been ratified by the United States of America.

Your Lordships have been invited to construe the Act of 1975 in conformity with previous decisions of English courts as to the meaning of different words used in a previous statute, the Foreign Tribunals Evidence

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Act 1856, which was repealed by the Act of 1975. For my part, I do not think that any assistance is to be gained from those decisions. The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory. There is no presumption that Parliament, in repealing one statute and substituting another in different terms, intended to make the minimum changes in the previous law that it is possible to reconcile with the actual wording of the new statute, particularly where, as in the instant case, the new statute is passed to give effect to a new international convention.

So disregarding any previous authorities, I turn to the actual terms of the Act of 1975. Section 1 is the section which confers upon the High Court jurisdiction to make an order under the Act; section 2 defines what provisions the court has power to include in such an order; while section 3 deals with the right of witnesses to refuse to give oral or documentary evidence under the order.

Under section 1, three conditions precedent must be fulfilled before the court has jurisdiction to make any order under the Act. First, there must be an application for an order for evidence to be obtained in England and Wales, and secondly, the application must be made pursuant to the request of a court exercising jurisdiction outside England and Wales. The third condition precedent as to which the court must be satisfied is in the following terms:

> "(*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."

My Lords, I would not be inclined to place any narrow interpretation on the phrase "evidence . . . to be obtained for the purposes of civil proceedings." The Act applies to civil proceedings pending or contemplated in courts and tribunals of all countries in the world. It is not confined to countries that are parties to the Hague Convention of March 18, 1970; nor is it limited to courts of law. It extends to tribunals. These courts and tribunals make use of a wide variety of different systems of procedure and rules of evidence in civil matters. In many of these systems it is not possible to draw a distinction between what would be regarded in England as the actual trial of a civil action and what precedes the trial. I do not think that in relation to those countries the expression "civil proceedings" in section 1 (*b*) can have the restricted meaning of the actual trial or hearing of a civil action; and, if this be so, it cannot bear a more restricted meaning in relation to those countries such as the United States of America, where as in England, it is possible to draw a distinction between the trial and what precedes the trial. In my view, "civil proceedings" includes all the procedural steps taken in the course of the proceedings from their institution up to and including their completion and, if the procedural system of the requesting court provides for the examination of witnesses or the production of documents for the purpose of enabling a party to ascertain whether there exists admissible evidence to support his own case or to contradict that of his opponent, the High Court has jurisdiction to make an order under the

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Act. Any limitation on the use of this procedure for the purpose of "fishing" discovery is, in my view, to be found in section 2.

The English court cannot be expected to know the systems of civil procedure of all countries from which request for an order under the Act of 1975 may come. It has to be satisfied that the evidence is required for the purpose of civil proceedings in the requesting court but, in the ordinary way in the absence of evidence to the contrary, it should, in my view, be prepared to accept the statement by the requesting court that such is the purpose for which the evidence is required.

The letters of request from the United States District Court for the Eastern District of Virginia ("the letters rogatory") contained in the preamble what on a fair reading is, in my view, an adequate statement to this effect; so the High Court had jurisdiction to make an order. It was not bound to do so, but I think that the court should hesitate long before exercising its discretion in favour of refusing to make an order unless it was satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the court.

The letters rogatory requested the oral examination of directors and employees of the two R.T.Z. companies and the production of documents by these companies. The relevant limitations on the power of the court to grant these requests are contained in subsections (3) and (4) of section 2 of the Act of 1975. They read as follows:

> "(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court. (4) An order under this section shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

Subsection (3) applies to both oral and documentary evidence. It is this provision which prohibits the making of an order for the examination of a witness not a party to the action for the purpose of seeking information which, though inadmissible at the trial, appears to be reasonably calculated to lead to the discovery of admissible evidence. This is permitted by rule 26 of the United States Federal Rules of Civil Procedure. Under the procedure of the High Court of England depositions of witnesses, either at home or abroad, may be taken before examiners for use at the trial, but the subject matter of such depositions is restricted to the evidence admissible at the trial. So the evidence requested in the letters rogatory can only be ordered to the extent that it is confined to evidence which will be admissible at the trial of the action in Virginia.

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The difficulty involved in the application of subsection (3) to proceedings in the United States courts lies in the fact that the examination for discovery of witnesses who are not parties to the action serves a dual purpose; the ordinary purpose of discovery with the wide line of inquiry which that permits and also the purpose of obtaining in the form of a deposition evidence from the witness which will be admissible at the trial in the event of the witness not being called in person.

Westinghouse and the United States District Court Judge (Judge Merhige) appear to have done their best to limit the request to evidence admissible at the trial; and, as respects the oral evidence of the named directors and employees of the two R.T.Z. companies, I think that, in the main, they have succeeded. To ask for oral evidence from "such other person who has knowledge of the facts" is obviously excessive, but this has never been part of the order as originally made by Master Creightmore. As regards the named witnesses, however, Westinghouse were in possession of photostat copies of documents of considerable probative weight, even if technically inadmissible at the trial in the Virginia proceedings, which linked the two R.T.Z. companies and the named persons with operations of an international cartel of uranium producers and gave strong prima facie grounds for believing that those persons could give admissible evidence about the operations; a belief which has been confirmed by their subsequent claims to privilege against self-incrimination.

The request for the production of documentary evidence by the two R.T.Z. companies must not only satisfy the requirements of subsection (3) which exclude fishing discovery, but also the stricter requirements of subsection (4). Under the procedure of the High Court of England there is no power to order discovery of documents by a person not a party to the action, but such a person can be required by subpoena duces tecum to produce documents to the court or, where his evidence is taken before an examiner prior to the trial, at such examination. There is a good deal of authority cited by Lord Denning M.R. in his judgment as to how specific the reference to documents must be in subpoena duces tecum. Classes of documents provided the description of the class is sufficiently clear, may be required to be produced on subpoena duces tecum.

The requirements of subsection (4) (*b*), however, are not in my view satisfied by the specification of classes of documents. What is called for is the specification of "particular documents" which I would construe as meaning individual documents separately described.

In the letters rogatory most of the many requests for particular documents are followed by a request for "any memoranda, correspondence or other documents relevant thereto." This is far too wide and these words were struck out wherever they appeared by the Court of Appeal in its order of May 26, 1977. The Court of Appeal were, in my view, bound by subsection (4) (*b*) to strike from the master's order the words referred to. However, they did not limit themselves to using a blue pencil. In a number of cases they substituted the phrase "any memoranda, correspondence, or other documents referred to therein"—s.c. in the particular document specified. Quite apart from the fact that although it may be sufficient for a subpoena duces tecum I do not think that this is sufficiently specific to

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satisfy the requirements of subsection (4) (*b*), I do not consider that the court had any power to substitute a different category of documents for the category which had been requested by the United States court.

Subject, however, to this minor amendment which in the events that have happened has ceased to be of any significance, I think that the order of the Court of Appeal of May 26, 1977, was right. Accordingly, Westinghouse were entitled to proceed with the examination of witnesses and production of documents under Master Creightmore's order subject to any claim to privilege upon which the R.T.Z. companies or the individual witnesses were entitled to rely under section 3 (1) (*a*) or (*b*) of the Act of 1975. This reads as follows:

> "(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—(*a*) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or (*b*) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction."

When the examination was held, the companies claimed privilege under paragraph (*a*),—the individual witnesses under paragraph (*b*).

The privilege claimed by the companies under paragraph (*a*) is a privilege under English law. It arises under seection 14 of the Civil Evidence Act 1968, which provides as follows:

> "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(*a*) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; . . ."

So far as it relates to offences and penalties provided for by the law of the United Kingdom this provision is declaratory of the common law. Its purpose is to remove the doubt as to whether the privilege against self-incrimination extends to offences and penalties under foreign law—a question on which the previous authorities were not wholly consistent: see Law Reform Committee 16th Report (1967) Cmnd. 3472.

The penalty to which, the companies claim, discovery of documents would tend to expose them is a fine imposed by the Commission of the European Communities under article 15 of regulation 17 of February 6, 1962, for intentionally or negligently acting in breach of article 85 of the Treaty of Rome. This article of the Treaty prohibits cartels which have as their object or effect the prevention, restriction or distortion of competition within the common market. It is directly applicable in the member states; it forms part of the law of England; so does regulation 17. For the reasons given by the Court of Appeal in their judgments of May 26, 1977, I agree that a fine imposed by the Commission under the regulation is a "penalty" for the purposes of section 14 of the Civil Evidence Act 1968, and that it is enforced by proceedings for recovery of a penalty under the European Communities (Enforcement of Community Judgments) Order 1972.

The companies took their claim to privilege under section 3 (1) (*a*)

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before the examiner. It was upheld by MacKenna J. and on appeal by the Court of Appeal in their judgment of July 11, 1977. The argument for Westinghouse, rejected by the Court of Appeal, that has been pressed in this House was that whatever risk the R.T.Z. companies ran of having a fine imposed upon them by the Commission it would be in no wise enhanced by the production in the United States proceedings of documents that constituted evidence of their participation in a cartel prohibited by article 85 (1) of the Treaty of Rome. The argument does not involve the proposition that the companies are not infringing article 85 (1) of the Treaty. On the contrary Westinghouse not only assert that they are but also deny that the cartel could be brought within article 85 (3), which empowers the Commission to declare article 85 (1) to be inapplicable to cartels which satisfy certain conditions.

My Lords, article 89 of the Treaty imposes upon the Commission the duty of seeing to the application of article 85, of investigating infringements and of taking steps to remedy the situation. If contrary to their duty the Commission fail to act they may be called upon to do so under article 175 by any other institution of the Community including the European Parliament, or by any member state, and on continued failure may be proceeded against before the European Court of Justice. It is not for your Lordships to speculate why the Commission have hitherto remained quiescent in the matter, nor what might stir them into activity. Under regulation 17 they have wide powers of investigation under which they could, if they thought fit, themselves compel the companies to produce the very documents of which Westinghouse seek to obtain production in the instant proceedings. This may be so, but there is a proverb "let sleeping dogs lie" which may have some application in the international politics of uranium production and enrichment which it would be disingenuous to pretend are not lurking in the background of this case.

I do not think that your Lordships are entitled to dismiss as fanciful the risk that if the documents relating to the cartel were produced at the trial in the Virginia proceedings and came, as they then would, into the public domain, the resulting publicity in this sensitive political field might result in pressure on the Commission to take against the companies speedier and severer action than they might otherwise have done and that such action might well include the imposition of penalties under article 15 of regulation 17. The Court of Appeal in my opinion were right in upholding the refusal of the two R.T.Z. companies to produce the documents requested in the letter rogatory.

It was submitted that since the companies were entitled to withhold the documents from production, they had a privilege in English law to require their officers and servants to refuse to answer questions that might lead to the disclosure of the contents of the documents or provide evidence that would tend to expose the companies to a penalty. At common law, as declared in section 14 (1) of the Civil Evidence Act 1968, the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook

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old or modern suggests the contrary. It is not for your Lordships to manufacture for the purposes of this instant case a new privilege hitherto unknown to the law.

There remains to be considered what effect the recent events that have occurred in relation to the named persons' claim to privilege under section 3 (1) (*b*) of the Act of 1975 ought to have on the order of Master Creightmore requiring them to give oral evidence. Their right to claim this Fifth Amendment privilege depends on United States federal law, and under the Act of 1975, it was for Judge Merhige to rule on the validity of the claim.

In order to obtain a speedy ruling from him the parties, by mutual consent, departed from the procedure laid down in R.S.C., Ord. 70, r. 6. In view of the imminence of the trial in Virginia they took short cuts. This has led to some degree of procedural confusion as to the capacity in which Judge Merhige was doing the various things he did. This has led to technical disputes about such matters as to whether and if so, at what point the letters rogatory were exhausted and as to the legal nature and effect in England of the orders made by Judge Merhige in Virginia on July 18, 1977, ostensibly under the Organised Crime Control Act of 1970, 18 U.S.C., section 6003. I would not wish to decide this part of the case on mere technical errors of procedure that could be cured by the issue of fresh letters rogatory. In my view the events that happened enable me to base my decision upon principles which transcend any irregularities in procedure.

The essential facts are:

(1) On June 14, 1977, Judge Merhige upheld the claim of the named persons to Fifth Amendment privilege and ruled that they need not answer any questions save as to their names and addresses.

(2) On June 15, 1977, a letter was received by Judge Merhige from the United States Department of Justice stating that the oral evidence of the named persons that was requested in the letters rogatory was required by the department for the purpose of a grand jury investigation into alleged offences against the anti-trust laws of the United States. It contained an assurance that the department would not use the testimony of the named persons as the basis for criminal prosecution of them in the United States.

(3) On July 16, 1977, a representative of the Department of Justice appeared before Judge Merhige and asked him, on the strength of the letter, to rule that the named persons were no longer entitled to claim their Fifth Amendment privilege. The judge declined. He confirmed his previous ruling; but added that if an application were to be made to him under 18 U.S.C., sections 6002 and 6003 for an order requiring the named persons to give evidence on terms that it could not be used against them in any criminal case, he, Judge Merhige, would feel compelled to rule that they were no longer entitled to refuse to answer the questions.

(4) On July 18, 1977, applications were made to Judge Merhige, with the written approval of the United States Attorney-General, for orders under sections 6002 and 6003 in respect of each of the named persons;

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and on the same day the judge issued orders which ordered each of them to "give testimony or provide other information in response to questions pronounced pursuant to letters rogatory issued by this court."

Whatever their procedural defects I am prepared to treat these orders as a ruling by the United States court under section 3 (2) of the Act of 1975, that the Fifth Amendment privilege claimed by the named persons is no longer available to them.

My Lords, it is clear from Judge Merhige's rulings of June 14 and 16, 1977, that so long as the evidence in respect of which Fifth Amendment privilege was claimed was to be used for the purposes of civil proceedings only, it could not in the events that happened be obtained under an order made under sections 1 and 2 of the Act of 1975. In so far as the evidence was intended to be used for the purposes of criminal proceedings in the United States, which were not yet instituted but were only at the stage of investigation by a grand jury, section 5 (1) (*b*) of the Act of 1975 excludes the jurisdiction of the High Court to make an order requiring the evidence to be given.

The United States is not a party to the civil proceedings in which the letters rogatory have been issued. Those proceedings in the words of the United States Attorney-General are "private litigation." The intervention of the Department of Justice to seek an order under sections 6002 and 6003 in private litigation pending in the United States is, we have been told, unprecedented. It is acknowledged by the United States Attorney-General in his letter to be contrary to the firm policy of the Department "except in the most extraordinary circumstances."

The extraordinary circumstances listed, in addition to the Attorney-General's belief that the testimony sought may well be indispensable to the work of the grand jury, include the following statement:

> "These persons are British subjects and we have determined that it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom."

This is a reference to the long-standing controversy between Her Majesty's Government and the Government of the United States as to the claim of the latter to have jurisdiction to enforce its own anti-trust laws against British companies not carrying on business in the United States in respect of acts done by them outside the territory of the United States. As your Lordships have been informed by Her Majesty's Attorney-General it has long been the policy of Her Majesty's Government to deny this claim. Her Majesty's Government regards as an unacceptable invasion of its own sovereignty the use of the United States courts by the United States Government as a means by which it can investigate activities outside the United States of British companies and individuals which it claims infringe the anti-trust laws of the United States. Section 2 of the Shipping Contracts and Commercial Documents Act 1944 was passed in an attempt to thwart this practice. Past attempts by the United States Government to use the United States courts in this investigatory role have been the subject of diplomatic protests. One such protest was made

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in respect of the intervention of the Department of Justice in the proceedings in the instant case before Judge Merhige on June 16, 1977.

My Lords, what follows from the essential facts I have recounted is: First, that the evidence sought from the named persons could not be obtained by Westinghouse so long as the only purposes for which it was required were civil proceedings. Secondly, that it was only when that evidence was called for by the United States Department of Justice for the purposes of an investigation by a grand jury in the United States with a view to discovering whether there were grounds for instituting criminal proceedings against someone, that under United States law the named persons would become compellable to give it. Thirdly, that the purpose for which the Department of Justice was seeking to obtain the evidence was not one for which it could have been obtained by them under the Act of 1975 since no criminal proceedings had yet been instituted. Fourthly, that the evidence was required for the purpose of investigating the activities outside the United States of British companies and individuals for alleged infringements of anti-trust laws of the United States, a procedure which, as the department knew, Her Majesty's Government regards as an unwarrantable invasion of its sovereignty.

My Lords, I have no hesitation in holding that with the intervention of the Department of Justice and its obtaining of the orders under sections 6002–6003 on July 18, 1977, the continued enforcement of Master Creightmore's order as respects the oral evidence of the named persons would amount to an abuse of the process of the High Court under the Act of 1975. The letters rogatory issued in the civil proceedings in the Virginia court on Westinghouse's application are manifestly being made use of by the Department of Justice for the ulterior purpose of obtaining evidence for a grand jury investigation which it is debarred from obtaining directly by section 5 (1) (*b*) of the Act of 1975. I do not find it necessary to inquire whether the action taken by the department was in connivance with Westinghouse or against its wishes. If the latter, Westinghouse will not be prejudiced by the order of Master Creightmore being now set aside; for in the absence of the department's intervention the oral evidence of the named persons whose claim to Fifth Amendment privilege was upheld by Judge Merhige before July 18, 1977, could not have been obtained by them under that order.

Since the rest of Master Creightmore's order, which relates to the production of documents by the two R.T.Z. companies, is also spent by reason of their claim to privilege being upheld by this House, I would discharge the whole order as from July 18, 1977.

LORD FRASER OF TULLYBELTON. My Lords, on October 21, 1976, Judge Merhige, sitting in the United States District Court for the Eastern District of Virginia at Richmond, Virginia, issued two letters rogatory addressed to the High Court of Justice in England seeking the examination on oath of nine named individuals, and of other persons not named, and the production of documents alleged to be in the possession of Rio Tinto Zinc, in the case of one of the letters, and of R.T.Z. Services Limited in the case of the other letter. Both these companies (" the R.T.Z. companies ") are registered in England and neither of them is a party to the

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proceedings in Virginia. All the persons named as witnesses are British subjects resident in England or, at least, outside the United States of America, and none of them is a party to the proceedings in Virginia. Judge Merhige was dealing with 13 actions which had been initiated in different federal courts in the United States of America and had been consolidated in his court. Each action was at the instance of a different plaintiff, but in all of them the defendants were Westinghouse, who are the respondents in two of the instant appeals and the appellants in three appeals. On October 28, 1976, Master Creightmore upon the ex parte application of Westinghouse, made orders under section 2 of the Evidence (Procedure in Other Jurisdictions) Act 1975 ("the Act of 1975") giving effect to the letters rogatory. He ordered the nine named individuals (but no others) to attend before an American consular officer in the United States Embassy in London, and ordered each of the R.T.Z. companies to produce the documents described in a schedule to the letter rogatory relating to that company. A fundamental objection to the making of the order of October 28, 1976, has been taken by the companies and by the individuals on the ground that, as they maintain, the requests made by the letters rogatory do not fall within the terms of the Act of 1975. There is no difference between the objections taken by the two R.T.Z. companies, but somewhat different considerations apply to the companies' objections to producing documents on the one hand, and to the individuals' objections to giving oral evidence on the other hand.

One of the main purposes of the Act of 1975 was to make new provision for enabling the High Court in England to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions, and it repealed several earlier Acts including the Foreign Tribunals Evidence Act 1856. It gives legal effect in the United Kingdom to the principles of the Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters, though in one respect at least, it goes beyond the convention—see section 5 of the Act dealing with evidence for the purposes of foreign criminal proceedings. Section 1 of the Act of 1975 provides as follows:

> "Where an application is made to the High Court . . . for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—(*a*) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction . . . in a country or territory outside the United Kingdom; and (*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the High Court . . . shall have the powers conferred on it by the following provisions of this Act."

The first question in the instant appeals is whether the court should be satisfied, as required by paragraph (*b*) of section 1, that the requests made in the letters rogatory are for "evidence" in the sense in which that word is used in the paragraph or whether they are truly for a wider discovery.

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Unless the application passes through this filter no order can be made to give effect to it. The distinction between evidence and discovery in this context was explained in *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618. That was a case under the, now repealed, Foreign Tribunals Evidence Act 1856, where the word was "testimony" but I do not consider that there is any difference material to the instant appeal between that word and "evidence" in section 1 of the Act of 1975. Devlin J. said, at p. 646:

> "In [*Burchard* v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241] the distinction is made plain between discovery or 'indirect' material on the one hand and proof or 'direct' material on the other hand, and that is the true distinction with which one must approach the word 'testimony' in this Act. Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called 'testimony,' which consists of mere answers to questions on the discovery proceedings designed to lead to a train of inquiry, is not permissible. Into which category does the present fall? It is perhaps enough to say that it is plain from what I have said of the nature of the proceedings in the court of Illinois that they fall into the latter category; they are pre-trial proceedings, proceedings by way of discovery. But if there be any doubt about that I do not think that one need do more than to look at the reasons which Judge Igoe, in the District Court of Illinois, gave when he granted the letters rogatory in this case. One passage is sufficient for my purpose. He said: 'I can find no authority, and none has been cited, for the proposition that a party must show what relevant and material evidence proposed witnesses have in their possession as a condition precedent to taking of depositions of alleged co-conspirators in an anti-trust case. It seems obvious that examination of the officers and agents of alleged co-conspirators may lead to the discovery of relevant evidence, and that is all that is required.' That shows, I think, plainly enough what the object of this procedure is."

The distinction between evidence and discovery is recognised in article 23 of the Hague Convention, and in section 2 (4) of the Act of 1975, and was fully accepted by counsel for Westinghouse who did not dispute that, if the letters rogatory were *merely* seeking discovery, they ought not to receive effect. This issue was decided in favour of Westinghouse by Master Jacob, by MacKenna J. and by the Court of Appeal, and counsel for Westinghouse argued that their decisions turned on the evidence and that there was no reason of principle that would justify your Lordships' House in coming to a different conclusion. I recognise, of course, that great weight must be given to the judgments in these courts but I have felt entitled and bound to re-examine the issue. In the forefront of the evidence relied on by the Court of Appeal was the statement in the recital at the beginning of the letters rogatory that "justice cannot be done among the said parties without the testimony, *which is intended to be given in evidence at the trial of the actions, of* the following persons." (My emphasis.) But in my opinion it would

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be wrong to place reliance on that recital because it was drafted by the legal advisers of Westinghouse with the object of meeting the requirements of the English courts, and it cannot be regarded as stating the considered opinion of the American court. Judge Merhige's order of May 20, 1977, which was relied on by Lord Denning M.R. and Roskill L.J. (ante, pp. 560F–H, 568H) was also drafted by Westinghouse's advisers and is open to the same comment. No doubt any testimony elicited in response to the letters, so far as it is relevant and admissible, would be used as evidence at the trial, but I think we have to consider whether the letters are not calculated to elicit also a substantial quantity of material that would not be direct evidence. In judging of that the main weight must be given to the substance of the letters rogatory and to the circumstances in which they were issued. They were issued as part of the pre-trial discovery process in the 13 consolidated actions raised by Westinghouse's customers in federal courts. Part of Westinghouse's defence was commercial impracticability based on the allegation that the price of uranium had been forced up by a cartel of producers. It was in support of that defence that they wanted production of the documents and the oral evidence. At the stage of discovery American courts will compel persons within their jurisdiction who are not parties to the proceedings to produce documents and to submit to oral examination if such procedure appears reasonably likely to lead to the discovery of admissible evidence, even though the information disclosed is not itself such evidence. Thus they allow a range of inquiry much wider than would be allowed in England. I think that the Court of Appeal may have underestimated the importance of this factor, because Lord Denning M.R. (ante, p. 561G–H) referred to article 23 of The Hague Convention which provides:

> "A contracting state may at the time of signature, ratification or accession, declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."

He said that the United Kingdom when it ratified the convention did not make any such declaration. But unfortunately he was misinformed. Roskill L.J., at p. 567F, also referred to article 23 and was apparently under the same misapprehension. The instrument of ratification of the United Kingdom contains a declaration that in accordance with article 23 Her Majesty's Government will not execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents," and adding that Her Majesty's Government understand that description as including any letter of request which requires a person to make statements or produce documents that would now be struck at by section 2 (4) of the Act of 1975. Of course the mere fact that letters rogatory have been issued at the pre-trial discovery stage does not necessarily mean that they are not seeking for evidence in the sense of section 1 of the Act of 1975 but it does, so to speak, put one on one's guard. In the present case Judge Merhige when he issued the letters rogatory is reported to have said that he was not sure whether the information would be relevant but that "it may lead to something." I

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think I am entitled to have regard to that statement, just as the court in the *Radio Corporation* case [1956] 1 Q.B. 618 had regard to a statement by the American judge, and it seems to show that Judge Merhige regarded the letter as being for the purpose of discovery.

But the matter which is, in my opinion, of decisive importance is the operative part of the letter rogatory. The requests for production of documents and for taking oral testimony have to be considered separately. The description of the documents sought is in schedule B to each of the letters and it is, I think, conceded on behalf of Westinghouse, and is in any event clear, that the description is at least in part too extensive to pass through the filter of section 1 of the Act of 1975. A typical specimen of the objectionable matter is in paragraph 1 which calls for minutes of certain meetings and then for "any memoranda, correspondence or other documents relating thereto." Wide sweeping-up words in practically the same terms are found at the end of many other paragraphs in the schedule. These words would include any letters or telex messages reserving accommodation, hotel bills and many other trivial documents relating to arrangements for representatives of R.T.Z. to attend the meetings referred to. Such matters cannot be necessary or even useful as evidence in support of Westinghouse's case.

A separate though related objection to the terms of many of the items in the schedule is that they could not, in my opinion, receive effect under an order of the English court without contravening section 2 (4) of the Act of 1975. That subsection provides as follows:

> "(4) An order under this section shall not require a person—(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

The reference to "any" documents in the sweeping-up words in the schedule to the letters rogatory suggests to me that the draftsmen did not know whether such documents were in existence or not. Accordingly the words seem to be an attempt to circumvent paragraph (*a*) of section 2 (4) of the Act of 1975, an attempt which should not be allowed to succeed. Moreover, I think that many of the items in schedule B would be contrary to paragraph (*b*) of section 2 (4) in respect that they call for production not of "particular documents specified" but of classes or descriptions of documents.

The Court of Appeal declined to make an order containing these wide words and they amended the order made by Master Creightmore by deleting them, and by substituting words such as "all other documents referred to therein." No doubt the intention was to narrow the range of documents to be produced, although one cannot be sure whether that would be the effect of the substitution. In any case the amended form is still not limited to particular documents specified. Several paragraphs of the schedule were also deleted. But in judging the nature of

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the letters rogatory as a whole the court must in my opinion look at them in the unamended form in which they were received from the American court. I do not say that, if they were found to include a few relatively minor items which could not qualify under section 1 or under section 2 (4) of the Act of 1975, the whole request in the letters would have to be refused. The court has to look at the substance of the matter: see *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618, 641 *per* Lord Goddard C.J. In this case, having regard to the very wide range of documents that would fall within the description in schedule B, I am not satisfied that, so far as the documents are concerned, the letters are substantially limited to obtaining "evidence" in the sense of section 1 of the Act of 1975. On the contrary I think they call for discovery of information far beyond what is necessary or even relevant to Westinghouse's defence. An order to give effect to them would also be contrary to section 2 (4). I am therefore of opinion that the order of October 28, so far as it orders production of the documents, ought not to have been issued. Further, the whole substance of the letters seems to me so far outside the limits permitted by the Act of 1975, that they ought not to receive effect, even in an amended form. I would therefore set aside the order of October 28 so far as it relates to production of documents.

The position of the witnesses whose oral evidence is sought is different and I regard it as a narrow question whether the part of the order relating to them was rightly made. The letters rogatory clearly go too far in requesting oral evidence from "other persons having knowledge of the facts." But that part was omitted from the order of October 28, and I do not consider that its inclusion in the letters rogatory necessarily shows that their purpose was for discovery. The named witnesses are all described as "being directors and/or employees and/or former directors and/or former employees" of the companies and it seems fairly clear that their evidence is sought either because of the positions they held in the companies or because they are named in one or other of the documents sought to be recovered. It seems reasonable to assume that they will have some knowledge about the existence and terms of the agreements, and I therefore agree with the Court of Appeal that the order, so far as it directs the named witnesses to attend for examination, should stand.

I go on to consider the privilege issues raised in these appeals. The issues concerning the production of documents by the R.T.Z. companies are quite different from those affecting the oral evidence of the named witnesses. So far as the documents are concerned, MacKenna J. held that the companies were not bound to produce the documents because they were entitled to rely on privilege against self-incrimination under English law, and the Court of Appeal dismissed an appeal by Westinghouse against his decision. Westinghouse are now appealing to your Lordships' House in what was referred to as the fifth appeal. It turns upon section 14 (1) of the Civil Evidence Act 1968 which provides as follows:

> "The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any docu-

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ment or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(*a*) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; . . ."

The R.T.Z. companies rely on that subsection because they say that production of the documents called for in schedule B would tend to expose them to proceedings for recovery of a penalty, namely a fine under General Regulation 17 of the European Economic Community, which was passed in implementation of articles 85 and 86 of the Treaty of Rome. Regulation 17 now forms part of the law of England by virtue of article 189 of the Treaty of Rome, and the European Communities Act 1972 section 2 and therefore the penalty would be a penalty provided for by the law of a part of the United Kingdom. Accordingly, privilege would exist under English law in civil proceedings in England and the same privilege applies to proceedings under the letters rogatory: see section 3 (1) (*a*) of the Act of 1975. In the Court of Appeal, Westinghouse argued that a fine imposed by the Common Market was not a "penalty" in the sense of section 14 of the Act of 1968, but the court rejected that argument and it was not repeated in this House.

Two other arguments were advanced on behalf of Westinghouse to show that the decision of the Court of Appeal was wrong. First it was said that the privilege only exists where a person would tend to be exposed to "proceedings . . . for the recovery of a penalty" and that no "proceedings" were required for the imposition of fines by the European Commission because under article 15 (2) of regulation 17 the Commission have power to impose fines for infringement of article 85 of the Treaty summarily by "decision." I have some doubt whether that part of the argument is well founded, because the European Court of Justice has power under article 17 of regulation 17 to review decisions of the Commission imposing fines and, whatever the position may be while the Commission is considering a "decision," a review by the court would involve a resort to proceedings of some sort. But, even if the argument were right so far, it breaks down at the next stage because a fine imposed by the Commission could only be enforced by legal proceedings in the English courts. It was argued that proceedings for *recovery* of a penalty in terms of section 14 did not include proceedings for its *enforcement* as distinct from imposition, but I cannot see why that should be. I think that the Court of Appeal rightly rejected this argument.

The second argument is more formidable. Mr. Vinelott said that production of the documents would not tend to expose the company to proceedings for recovery of a penalty because they were already fully exposed by reason of the following facts: (1) the European Commission is already aware of the existence and terms of many of the documents —viz. those of which copies have been disclosed by the Friends of the Earth; (2) the Commission has wide power under article 14 of regulation 17 to investigate and to compel the disclosure of documents that might be evidence of infringement of article 85 of the Treaty; (3) the Commission has a duty under article 89 of the Treaty to ensure the application of the principles of article 85 against cartels, to investigate cases of

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suspected infringement and to propose appropriate means to bring it to an end; (4) there is machinery under article 175 of the Treaty for member states and other persons and organisations to bring to the notice of the Court of Justice of the Community any failure by the Commission to act; (5) no "negative clearance" under article 2 of regulation 17 has been given, and (6) notwithstanding all these circumstances, the Commission has made no move to investigate the alleged cartel.

In the light of these facts, the present case is unusual if not unique. The question might I think be stated thus: Whether the production of the documents would tend to increase the risk, to which the companies are already exposed, of proceedings for recovery of penalties.

There is force in Mr. Vinelott's contention that the answer should be in the negative, but I have reached the opinion that the Court of Appeal were right in taking the opposite view. We know that the Commission have the question of investigating the possible infringement of article 85 constantly under review and, although it has not yet taken action to initiate proceedings, or even to investigate, it is not unreasonable to think that it might decide to act if it saw that there was hard evidence of infringement. Moreover, production of the documents might lead to one of the member states of the Community or to some other party taking action under article 175 of the Treaty to force the Commission to act.

Mr. Vinelott suggested that the Court of Appeal had applied the wrong test in judging whether production would tend to expose the companies to proceedings in that they had imposed too low an onus upon them. In my opinion that criticism was not justified. The test was stated in *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395, 403–404, where du Parcq L.J. said:

> "Since the decision of the Court of Appeal in *Ex parte Reynolds* (1882) 20 Ch.D. 294 approving the decision of the Court of Queen's Bench in *Reg.* v. *Boyes*, 1 B. & S. 311, it has not been in doubt that the power of the court to insist on an answer is not limited to a case of mala fides. It extends to any case in which it is not made to appear to the court 'that there is reasonable ground to apprehend danger [of proceedings for a penalty] to the witness from his being compelled to answer': *Reg.* v. *Boyes*, per cur."

Although the members of the Court of Appeal expressed themselves in various words they all purported to follow the decision in *Triplex*. The test is not a rigorous one. All that is necessary is that it should be reasonable to believe that production would "tend to expose" (not "would expose") the possessor of the documents to proceedings. I agree with the Court of Appeal that that test is satisfied in the present case.

The nine individual witnesses claimed privilege under the Fifth Amendment to the United States Constitution and their claim was upheld by Judge Merhige on June 14, 1977. For the purpose of giving this ruling Judge Merhige came to London and sat in the United States Embassy here. After giving the ruling he heard some further evidence and in the course of the argument in this House a careful analysis was made of the capa-

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city in which the learned judge made various rulings and orders whilst sitting in London—whether as a judge of the United States court or as examiner acting under the orders of an English court. Some of the procedure was criticised. There may be room for doubt whether it was all strictly regular but the short-circuiting of the procedure was with the laudable object of expediting the proceedings in England in order not to delay the beginning of the trial in America which was then imminent and I do not consider that it has resulted in prejudice to any of the parties.

On June 16, 1977, two days after Judge Merhige had ruled that the privilege plea was well taken, he sat again in the United States Embassy in London and stated that on the previous day he had received a letter from the Department of Justice of the United States Government the effect of which was to offer an informal undertaking that the United States Government would not utilise the deposition testimony of any of the named witnesses as a basis for criminal prosecution of that witness for the violation of any United States law. The explanation of the letter is that since about March 1976 the Department of Justice had been carrying on an investigation into possible infringements of United States anti-trust laws by members of an alleged cartel of uranium producers, and at some date before June 16, 1977, a federal grand jury had been empanelled to pursue the investigations and to initiate criminal proceedings if they were considered appropriate. The letter is important because it discloses fully the reasons for the offer of immunity from prosecution. It has already been quoted fully by my noble and learned friend, Viscount Dilhorne, and I do not repeat the quotation. On the same occasion counsel for the Department of Justice appeared and explained to Judge Merhige that the reason why the department had made only an informal offer of immunity instead of requesting the court to make a formal order under paragraphs 6002–6003 of the Organised Crime Control Act 1970, 18 U.S.C., was that:

> "There is a firm Department of Justice policy that it will not consider seeking immunity for a witness in a private litigation—in any litigation to which it is not a party."

He also said:

> "We are firmly convinced that we would not have even considered this letter if we had had an opportunity to get further direct information on this alleged cartel, but at present that opportunity seems slim, perhaps not at all."

Later on June 16, Judge Merhige declined to give effect to the letter or to require the witnesses to answer questions which they considered might incriminate them, but he said that if a formal application under paragraphs 6002–6003 were made he would have no option but to make an order and grant immunity. The result was that his ruling of June 14 holding the privilege plea well taken remained unaffected. That was how the matter stood when the instant proceedings were last before the Court of Appeal on July 11, 1977.

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Since that date an event has occurred which has profoundly altered the situation. On July 18 the Department of Justice departed from its firm policy and made a formal application to Judge Merhige for an order to compel the testimony of each of the witnesses under paragraph 6002. The application was made with the authority of the Attorney-General of the United States of America and we have seen copies of two letters relating to it. One was a formal letter dated July 11, 1977, from the Department of Justice bearing the significant heading "Re: Grand Jury Investigation of the Uranium Industry." The other letter was dated July 12, 1977, addressed to the United States District Attorney for the Eastern District of Virginia and signed by the Attorney-General of the United States of America in which he explained the reasons for departing from the firm policy of the Department of Justice against seeking such an order in a private litigation, "except in the most extraordinary circumstances." His letter includes the following passage:

> "In my judgment, the testimony of the individuals for whom orders are to be sought is necessary to the public interest. The extraordinary circumstances which led me to this conclusion include the following: (1) Those persons whose testimony is sought have refused to testify on the basis of their privilege against self-incrimination, and they are outside the personal jurisdiction of the United States courts; (2) These persons are not likely to come within the personal jurisdiction of the United States courts so long as the Department of Justice continues a sitting grand jury investigation of the international uranium industry; (3) These persons are British subjects and we have determined that it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom; (4) The Department of Justice has been largely unable to obtain information from these foreign persons about the subject matter of this investigation; (5) The testimony these persons give may well be indispensable to the work of the grand jury; and (6) The subject matter of this grand jury is of particular importance."

I draw particular attention to numbered paragraph (3) of these reasons.

Judge Merhige on July 18, 1977, made an order that each of the named witnesses should give evidence and granting them immunity. The operative part of each order was in the following terms:

> "Therefore it is hereby ordered that: in accordance with the Organised Crime Control Act of 1970, 18 U.S.C. paragraph 6001 et seq., [the named witness] give testimony or provide other information in response to questions propounded pursuant to letters rogatory issued by this court and that any testimony given by [the named witness] *pursuant to this order* shall be subject to the immunity provisions of that Act as provided in 18 U.S.C. paragraph 6002."

Mr. Rokison submitted that any evidence given by a witness before the consular officer in London would not be given pursuant to the order of July 18 by Judge Merhige as that order could not have extra-territorial

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effect in England on a British subject. Any evidence, he said, would be given pursuant to an order of the English court giving effect to the letter rogatory and therefore the witness would not enjoy immunity from prosecution in the United States in respect of his evidence. If the matter fell to be decided by English law, that submission might have considerable force. But the question of immunity is a question of American law and Judge Merhige has plainly indicated that in his view the witness would have immunity although I do not understand that he has heard argument on the matter nor that he has given a formal decision upon it. It may therefore be that the position in American law is not free from doubt. But as a practical matter, having regard to the indication of opinion given by Judge Merhige, I think we must proceed on the footing that each witness would have immunity from prosecution in the United States of America in respect of any evidence given by him in response to the letters rogatory.

The question therefore which has to be decided, and which owing to the sequence of events that I have mentioned, has unfortunately not been considered by any of the courts below, is whether the witnesses should be ordered to appear again before the American consular official as examiner and to answer questions propounded under the letters rogatory. On this important matter we have had the assistance of the Attorney-General. He explained that Her Majesty's Government consider that in this case, as in some other cases in recent years, the United States courts have claimed a jurisdiction which is excessive and constitutes an infringement of the proper jurisdiction and sovereignty of the United Kingdom. In particular, they have asserted jurisdiction in the enforcement of anti-trust legislation, and also in requiring the giving of information to facilitate investigatory procedure under that legislation, where the activities complained of have been carried out by British subjects and have taken place exclusively outside the territory of the United States, on the ground that those activities have taken effect within that territory. Her Majesty's Government consider these claims to extra-territorial jurisdiction particularly objectionable in the field of anti-trust legislation because, among other reasons, such legislation reflects national economic policy which may not coincide, and may be indirectly in conflict, with that of other states. The Attorney-General also brought to our attention article 12 (*b*) of the Hague Convention which provides:

> "The execution of a letter of request may be refused only to the extent that— . . . (*b*) The state addressed considers that its sovereignty or security would be prejudiced thereby. . . ."

The exception relating to security is given statutory effect by section 3 (3) of the Act of 1975, but there is no statutory exception for cases where the Government of the United Kingdom considers that its sovereignty would be prejudiced as in the present case. Nevertheless I can hardly conceive that if any British court, or your Lordships' House sitting in its judicial capacity, was informed by Her Majesty's Government that they considered the sovereignty of the United Kingdom would be prejudiced by execution of a letter of request in a particular case it would

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not be its duty to act upon the expression of the Government's view and to refuse to give effect to the letter. The principle that ought to guide the court in such a case is that a conflict is not to be contemplated between the courts and the Executive on such a matter: see *The Fagernes* [1927] P. 311, 324 *per* Atkin L.J.

In the present case however I consider that the matter can be disposed of on a narrower ground. The power of the English courts to give effect to the letters rogatory depends upon the Act of 1975 and section 1 (*b*) of that Act provides that the power exists where the court is satisfied inter alia that the evidence is to be obtained for the purpose of civil proceedings before the requesting court. When the letters rogatory were presented in England the "evidence" undoubtedly was to be obtained for the purpose of civil proceedings in the Virginia court. In fact it was, and is (if given) likely to be used also in other proceedings for damages for infringement of anti-trust legislation in a court in Illinois. But although the Illinois proceedings include a claim for treble damages, they are in my opinion civil proceedings, and the fact that the evidence may be used for the purpose of those proceedings seems to me irrelevant so long as it also is bona fide intended to be used in the proceedings in Virginia.

But the use of the evidence for the investigatory procedure before a grand jury is a different matter. The English courts have no power under the Act of 1975, or otherwise, to make orders for giving effect to requests for evidence to be used for such investigatory purposes. They do have power, under section 5 of the Act of 1975, to make orders in relation to obtaining evidence for the purposes of criminal proceedings abroad but only for "proceedings which have been instituted." But the grand jury proceedings are not criminal proceedings and the evidence is not said to be required for any criminal proceedings that have yet been instituted. The submission of counsel for the Department of Justice to Judge Merhige and the letters from the Department and from the Attorney-General of the United States of America already mentioned show that the department is seeking the evidence of these witnesses only for the purposes of the Grand Jury proceedings. Moreover paragraph 3 of the Attorney-General's letter of July 12, shows that their evidence probably could not be obtained for that purpose through the existing machinery. Accordingly what is being attempted is to use the machinery provided by the Act of 1975 for obtaining evidence for civil proceedings for the quite different purpose of investigatory proceedings before a grand jury. That is a purpose altogether outside the Act of 1975 and is one to which the English courts ought not in my opinion to lend assistance, particularly having regard to the objections stated by Her Majesty's Government. No hardship will be caused to Westinghouse if we refuse to compel the witnesses to answer as that was already the position under Judge Merhige's ruling upholding their privilege. In my opinion therefore the order made by the Court of Appeal on May 26, before Judge Merhige's ruling and before the application by the Department of Justice, should be reversed.

An interesting submission was made by Mr. Rokison on a question

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that would have arisen if your Lordships had held that the witnesses have no privilege but that the R.T.Z. companies have privilege. In such an event the privilege of the companies could be rendered useless if its directors and officers could be compelled to give evidence incriminating the company. Mr. Rokison submitted that the privilege of a company, which would allow it to refuse to answer written interrogatories by the hand of its proper officer, should apply also to oral evidence by its directors and officers if such evidence might tend to incriminate the company. The submission is unsupported by authority but it has much logical force and if it had been relevant to do so I would have wished to consider it more carefully.

I would set aside the order of October 28, 1976, made by Master Creightmore so far as it relates to production of documents by the R.T.Z. companies. If that course does not commend itself to your Lordships, I would agree with the order proposed by my noble and learned friend on the Woolsack.

LORD KEITH OF KINKEL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it subject to certain observations which I shall endeavour to express.

I agree that MacKenna J. and the Court of Appeal were right in refusing to set aside completely the order of October 28, 1976, giving effect to the letters rogatory. The Court of Appeal was also right, in my view, in holding that the letters should not receive effect in their entirety as regards the documents, production of which was thereby sought. The terms of schedule B to the letters make it clear that the respondents were originally seeking to enforce against persons not party to the Virginia proceedings a general discovery of documents which might or might not constitute evidence in these proceedings. Such a course is not permitted under English law (*Burchard* v. *Macfarlane, Ex parte Tindall* [1891] 2 Q.B. 241 and *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 Q.B. 618). Thus it was not open to the court, in view of the terms of section 2 (3) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, to make an order allowing this to be done. Further, section 2 (4) provides that a person shall not be required (*a*) to "state what documents relevant to the proceedings" are or have been in his possession, or (*b*) to "produce any documents other than particular documents specified in the order as being documents appearing to the court . . . to be, or to be likely to be, in his possession." The terms of schedule B are such that an unqualified order giving effect to these letters rogatory would necessarily have required both these things to be done. On the other hand there can be no doubt that schedule B does specify a certain number of particular documents which can in the circumstances reasonably be regarded as relevant evidence in the Virginia proceedings, and as likely to be in the possession of the R.T.Z. companies. I refer in particular to the originals of certain documents copies of which are included in the Friends of the Earth collection.

So the question comes to be whether the proper course was to reject

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completely the letters rogatory, so far at least as they sought the recovery of documents, on the ground that in substance the applicants were seeking a licence for a fishing expedition, or to give effect thereto as regards the particular documents specified therein which appeared likely to be in the possession of the R.T.Z. companies.

The answer to this question depends, in my opinion, upon the balance of a number of considerations. On the one hand it may be regarded as undesirable that an applicant for letters rogatory should receive any encouragement to think he may properly include therein a wide-ranging schedule of documents in the expectation that the court of request will carry out a pruning operation and allow him as much as he is properly entitled to demand. On the other hand it is the duty of the court of request to do its best, consistently with the provisions of the statute, to assist the processes of justice in the court from which the request comes, and to do so in such a way as will cause the minimum of delay. If in the present case the letters rogatory were to be entirely rejected, so far as they relate to the recovery of documents, it would presumably be open to applicants to obtain from the Virginia court fresh letters limited to the particular documents specified and come back for an order giving effect to them. This would involve considerable delay, and the end result would be the same as if the court of request had itself cut down the scope of the original letters rogatory. Therefore I am of the opinion that the right course, in circumstances such as those of the present case, is for the court of request to issue an order limited to those documents the production of which, in its judgment, ought properly to be enforced. I have no doubt that on a proper construction of section 2 of the Act of 1975, having regard in particular to subsections (3) and (4), it is within the power of the court, in its discretion, to proceed in that way.

I consider this conclusion to be in accordance with the policy of the Act of 1975. That policy was to improve the arrangements in each of the United Kingdom jurisdictions for obtaining evidence to be used in certain proceedings before the courts of other jurisdictions. The major purpose of the Act was to give effect to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. It repealed the Foreign Tribunals Evidence Act 1856, as amended, which previously operated in this field. At the same time the opportunity was taken to repeal and replace with the same new provisions the Evidence by Commission Act 1859, which previously regulated matters as between the different jurisdictions of the United Kingdom. The necessity of close collaboration between these jurisdictions is obvious, and exactly the same rules now govern the position as regards jurisdictions abroad. Under the Act of 1859 a somewhat narrow view was taken by the English courts in connection with the enforcement in England of a Scottish commission and diligence for the recovery of documents. (See *Burchard* v. *Macfarlane* [1891] 2 Q.B. 241.) It was held that the production of documents by third parties could only be ordered as ancillary to the examination of the parties concerned as witnesses in the case. The decision was generally regarded by the Scottish legal profession as having the effect

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that no commission and diligence for the recovery of documents could ever be enforced against a third party in England. The essential feature of the commission and diligence procedure is that it enables documents which constitute evidence in the cause to be made available in advance of the trial so that they may receive due consideration and not be sprung on the other party in the course of the trial. It thus offers much convenience and is conducive to the better administration of justice. In the present case the Court of Appeal has taken the view that on a proper construction of the Act of 1975 the production of documents by a third party may be ordered though not ancillary to the oral examination of that party as a witness. That view is not now challenged and is plainly right. I would further observe that, although commission and diligence to recover documents is part of pre-trial procedure, I can see no justification in the terms of the Act of 1975 for refusing effect to it on that ground. Thus there is now greater scope for collaboration among the different jurisdictions of the United Kingdom, and also between these jurisdictions and those of countries abroad. So any letters rogatory should be approached in the spirit that they should receive effect to the fullest extent possible under our law. That was the approach adopted by the Court of Appeal in this case.

The Court of Appeal deleted from schedule B certain categories of documents, and altered the description of certain other categories. In my opinion it was not within the power of the court to take the latter course, and I would, for my part, have carried the blue pencil exercise rather further than did the Court of Appeal, with a view to securing that the provisions of section 2 (4) of the Act of 1975 were properly satisfied. It is unnecessary in the circumstances to particularise the further deletions which, in my view, would have been appropriate.

As regards the oral evidence sought to be obtained under the letters rogatory, I am of opinion that the Court of Appeal acted rightly in sustaining the order for examination of the persons named therein as witnesses. On the material made available I consider that there were reasonable grounds for the view that these persons might be in a position to give evidence relevant to Westinghouse's defence in the Virginia proceedings. In the face of a statement in letters rogatory that a certain person is a necessary witness for the applicant, I am of opinion that the court of request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible. That is essentially a matter for the requesting court. Should it appear necessary to apply some safeguard against an excessively wide-ranging examination, that can be achieved by making the order for examination subject to a suitably worded limitation.

There is nothing which I can usefully add upon the question of privilege against self-incrimination arising under section 3 (1) of the Act of 1975, or upon the appropriateness, in the light of the intervention by the United States Department of Justice, of executing the letters rogatory.

My Lords, I agree that the appeals of the R.T.Z. companies and the

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individual appellants should be allowed, that the order giving effect to the letters rogatory should be discharged, and that the appeals of Westinghouse should be dismissed.

Appeals allowed.
Cross-appeals dismissed.

Solicitors: *Linklaters & Paines; Freshfields; Treasury Solicitor.*

F. C.

[HOUSE OF LORDS]

GRUNWICK PROCESSING LABORATORIES LTD. AND OTHERS . . . . . RESPONDENTS

AND

ADVISORY, CONCILIATION AND ARBITRATION SERVICE AND ANOTHER . . . . . APPELLANTS

1977 July 21, 22, 25, 26, 27, 28, 29; Nov. 7, 8, 9, 10; Dec. 14

Lord Denning M.R., Browne and Geoffrey Lane L.JJ.

Lord Diplock, Lord Salmon, Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel

Industrial Relations—Trade union recognition—Reference to Acas—Strike by one-third of work force—Union request to employers for recognition—Strikers dismissed—Union application to Acas—Acas unable to ascertain opinions of workers still employed—Confidential Acas questionnaire sent to strikers only—Acas recommendation of recognition—Whether Acas required to ascertain opinions of all workers—Whether recommendation invalid—Employment Protection Act 1975 (*c.* 71), *ss.* 11, 12, 14 [1]

Shortly after about a third of the workers at the plaintiffs' factories had gone on strike, the strikers and a few employees

[1] Employment Protection Act 1975, s. 11: "(1) A recognition issue may be referred by an independent trade union to the Service by written application in such form as the Service may require. (2) In this Act 'recognition,' in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining. (3) In this section and sections 12 to 14 below, 'recognition issue' means an issue arising from a request by a trade union for recognition by an employer, or two or more associated employers, including, where recognition is already accorded to some extent, a request for further recognition."

S. 12: "(1) Subject to subsection (2) below, when a recognition issue is referred to the Service under section 11 above the Service shall examine the issue, shall consult all parties who it considers will be affected by the outcome of the reference and shall make such inquiries as it thinks fit."

S. 14: "(1) In the course of its inquiries into a recognition issue under section 12 or 13 above the Service shall ascertain the opinions of workers to whom the issue relates by any means it thinks fit, but if in any case it determines to take a formal ballot of those workers or any description of such workers, the following provisions of this section shall apply."

Exhibit 39

[2012 (1) CILR 424]

IN THE MATTER OF TRIDENT MICROSYSTEMS (FAR EAST) LIMITED

GRAND COURT, FINANCIAL SERVICES DIVISION (Cresswell, J.): April 20th, 2012

Companies—liquidators—powers and duties—sale of company property—primary duty to obtain best price having regard to nature of asset, relevant market, steps taken and urgency of sale—not normally provisional liquidators' function to realize substantially all company's assets, but may be appropriate—if court sanction required, liquidators' views important, but decision ultimately court's—to consider, in particular, financial consequences for stakeholders and creditors' wishes

Trident Microsystems (Far East) Ltd. petitioned to be wound up.

The company was incorporated in the Cayman Islands and its parent company was incorporated in Delaware. In January, both applied to the Delaware Bankruptcy Court for relief seeking, *inter alia*, the court's sanction for the sale of certain assets. In the Grand Court, pending the determination of the company's winding-up petition, joint provisional liquidators ("JPLs") were appointed and it was ordered that any sale of the company's assets be subject to court approval. The Grand Court subsequently adjourned the winding-up petition to allow for a consideration of a potential restructuring of the companies' TV business after the proposed sale of its set-top box business. In accordance with the Grand Court Rules 1995, O.21, r.2(3), the Delaware court and the Grand Court approved a cross-border insolvency protocol stipulation entered into between the parties which provided a framework for the courts' cooperation; in particular, it provided that the liquidators would seek approval of the procedures for the sale of material assets, and authority to sell, first from the Delaware court and thereafter from the Grand Court, and would not complete any sales unless the necessary approvals were received from both courts.

In March, the companies received the approval of the Delaware court and the Grand Court of the proposed sale of the companies' set-top box business; and—despite the earlier proposals for a restructuring—they also sought the courts' approvals of a proposed sale of their TV business. If the TV business were sold, the company would have had only two remaining businesses which could not operate as stand-alone entities and so substantially all of the company's assets would have to be realized.

The companies had been trying hard to sell the TV business since October 2011 and had contacted approximately 22 potential purchasers, of whom 9 had expressed an interest and 2 had submitted offers. In March, the companies accepted Sigma Designs Inc.'s offer, which was considered preferable, and entered into a purchase agreement which allowed them to solicit competing offers for one further week and was subject to the approval of both courts. The courts approved the bid procedures and, during the final week, the directors contacted the two parties that had previously expressed a material interest in purchasing but had not made offers—neither, however, wished to submit a competing bid and accordingly no further bids were received before the deadline. The companies obtained the Delaware court's approval of the sale to Sigma and, in the present proceedings, the JPLs sought the Grand Court's parallel approval.

The JPLs submitted that the sale should be approved as (i) after an extensive marketing process, the Sigma bid was the best offer; (ii) the business was making substantial losses of approximately US$1.25m. per week and there was no realistic prospect of it becoming profitable as part of the Trident Group; (iii) the companies and the JPLs were satisfied that the sale represented a better deal for the companies than a restructuring of the business; and (iv) the creditors' committee appointed in these proceedings had consented to the agreement.

Held, granting the application:

(1) The terms of the cross-border insolvency protocol stipulation would be strictly followed. The principles in the Companies Winding Up Rules 2008, O.21 concerning international protocols applied equally to provisional liquidations such as the present and, as such a protocol had been approved, the court would cooperate with the Delaware court to ensure the fair and efficient management of the insolvency in the interests of all the creditors and other interested persons (para. 3; para. 7).

(2) The court would sanction the proposed sale. When a liquidator sought the court's sanction to sell company assets, the court would apply the following principles: (i) the liquidator's primary duty was to take reasonable care to obtain the best price available in the circumstances—taking account of the nature of the asset, the relevant market, the steps taken to market and sell the asset and the urgency of the sale; (ii) the court should give the liquidator's views considerable weight unless there were substantial reasons for not doing so; but (iii) the decision was ultimately one for the court, which must consider the correctness of the liquidator's decision, having regard to all the evidence—in particular the financial consequences for stakeholders; the creditors' wishes; and

whether the stakeholders' interests were best served by sanctioning the sale. In the light of the urgency created by the substantial weekly losses, the extensive marketing carried out, the court's approval of the bid procedures, and the JPLs' and creditors' committee's agreement to the proposed sale, the court would sanction it. Whilst it was not normally the function of provisional liquidators to realize substantially all of the assets of a company in

provisional liquidation, the court's broad discretion to appoint provisional liquidators was a flexible remedy, not restricted to particular categories of cases (paras. 18–22).

Cases cited:

(1) *Barclays Bank plc* v. *Homan*, [1993] BCLC 680; *sub nom. Maxwell Communications Corp. plc (No. 2)*, *Re*, [1992] BCC 757, considered.

(2) *Edennote Ltd. (No. 2)*, *Re*, [1997] 2 BCLC 89, referred to.

(3) *Greenhaven Motors Ltd.*, *Re*, [1999] 1 BCLC 635; [1999] BCC 463, referred to.

(4) *High Risk Opportunities HUB Fund Ltd.*, *In re*, C.A., Case No. 521/1998, April 30th, 2004, unreported, referred to.

(5) *Lancelot Investors Fund Ltd.*, *In re*, 2009 CILR 7, *dicta* of Quin, J. considered.

(6) *MHMH Ltd.* v. *Carwood Barker Holdings Ltd.*, [2006] 1 BCLC 279; [2005] BCC 536; [2004] EWHC 3174 (Ch), referred to.

(7) *Paradise Manor Ltd.* v. *Bank of Nova Scotia*, 1984–85 CILR 437, considered.

(8) *Philadelphia Alternative Asset Fund Ltd.*, *In re*, Grand Ct., Case No. 440/2005, July 19th, 2007, unreported, considered.

(9) *Universal & Surety Co. Ltd.*, *In re*, 1992–93 CILR 149, referred to.

Legislation construed:

Companies Winding Up Rules 2008, O.21: The relevant terms of this order are set out at para. 3.

Ms. C. Moran and *Ms. V. Lissack* for the JPLs;
R. Bell for Sigma Designs Inc.

1 CRESSWELL, J.: On January 4th, 2012, Trident Microsystems (Far East) Ltd. ("the company" or "TMFE"), a company incorporated in the Cayman Islands and its parent company, Trident Microsystems Inc. ("TMI"), incorporated in Delaware, applied to the US Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court") for relief pursuant to Chapter 11 of Title 11 of the US Code in respect of both the company and TMI (the "Delaware bankruptcy proceedings"). The stated purpose of the Delaware bankruptcy proceedings was to seek to stabilize the operations of TMI and the company, to sanction the sale of certain assets of the company, TMI and their subsidiaries and to explore restructuring options for the company and the Trident Group, including further asset sales or a plan of re-organization, the object of which was to discharge all obligations to the creditors of the company and TMI. No trustee in bankruptcy has been appointed in the Delaware bankruptcy proceedings and instead the company and TMI are operating their businesses on a day-to-day basis as debtors in possession.

2 On January 4th, 2012, the company also filed a winding-up petition in this court and a summons seeking the appointment of joint provisional liquidators ("JPLs"). On January 11th, 2012, Mr. Gordon MacRae and Ms. Eleanor Fisher of Zolfo Cooper (Cayman) Ltd. were appointed as JPLs to the company in order to support the Delaware bankruptcy proceedings and to facilitate the orderly implementation of any plan of re-organization. Since January 11th, 2012, the company has continued to operate its business as a debtor in possession subject to the oversight of the JPLs and the ultimate supervision of the Delaware Bankruptcy Court and this court.

The cross-border insolvency protocol

3 Where a company is in liquidation, CWR, O.21 contains provisions as to international protocols as follows:

"Application and definitions (O.21, r.1)

1. (1) In this Order 'company in liquidation' means a company which is incorporated under the Law and is the subject of an official liquidation under Part V.

(2) This Order has no application to foreign companies which are the subject of an official liquidation under Part V.

(3) This Order applies—

(a) when a company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or
(b) when the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

(4) In this Order—
(a) 'foreign officeholder' means a person appointed by a foreign court or other authority to exercise powers similar to those of an official liquidator in respect of a company or to exercise powers similar to those of a receiver in respect of assets of a company;
(b) 'foreign court or authority' means the foreign court or foreign governmental authority which has appointed and exercises supervisory jurisdiction over a foreign officeholder;
(c) 'international protocol' means an agreement made in respect of a company in liquidation between an official liquidator and a foreign officeholder with the approval of the Court and of the foreign court or authority.

Consideration of international protocols (O.21, r.2)

2. (1) It shall be the duty of the official liquidator of a company in liquidation to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(2) The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder.

(3) An international protocol agreed between the official liquidator and a foreign officeholder of a company in liquidation shall take effect and become binding upon them only if and when it is approved by both the Court and the foreign court or authority.

Scope of international protocols (O.21, r.3)

3. (1) An international protocol may define and allocate responsibilities between the official liquidator and foreign officeholder (by reference to geographical location or otherwise) in respect of—
(a) the formulation and promotion of restructuring proposals, including a scheme of arrangement pursuant to section 86 of the Law;
(b) the preservation of assets located outside the Islands;
(c) the realisation of assets located outside the Islands;
(d) the pursuit of causes of action against debtors or other persons outside the Islands;
(e) procedures for the exchange of information between the official liquidator and foreign officeholder;
(f) procedures for reporting to and communicating with the liquidation committee and with creditors and/or contributories;
(g) procedures for co-ordinating sanction applications made to the Court and to the foreign court or authority;
(h) administrative procedures relating to the adjudication of proofs of debt and consequential appeals or expungement applications;
(i) procedures relating to the payment of claims; and
(j) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

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(2) An international protocol may establish procedures for the review, approval and payment of—
(a) the remuneration of the official liquidator and foreign officeholders;
(b) the fees of counsel to the official liquidator and lawyers engaged by the foreign officeholder; and
(c) other expenses incurred by the official liquidator and/or foreign officeholder.

(3) Any provision contained in international protocol which is contrary to the provisions of the Law or purports to exclude the jurisdiction of the Court in respect of the company in liquidation shall be void and of no effect."

The present case, of course, concerns a provisional liquidation but, in my opinion, similar principles apply.

4 I refer to the paper written by the Chief Justice extrajudicially entitled *A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation.* In that paper the Chief Justice said:

"... [T]he recent global financial crisis and the consequential failure of many transnational entities have challenged the courts of countries—including the OFCs—to respond with unprecedented urgency and efficacy. The nature of the challenge has come to be described in the 'co-operation' and 'co-ordination' principles of the UNCITRAL Model Law on Cross-Border Insolvency, Articles 25, 26, 27, 29 and 30. These provisions place obligations on both courts and insolvency representatives in different States to communicate and co-operate to *the maximum extent possible*, to ensure that a

debtor entity's insolvent estate is administered fairly and efficiently, with a view to maximizing benefits to creditors. Those principles are designed to meet the following public policy objectives:

(1) The need for greater legal certainty for trade and investment;

(2) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor;

(3) Protection and maximization of the value of the debtors' assets for distribution to creditors, whether by reorganization or liquidation;

(4) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple states; and

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(5) The facilitation of the resumption of financially troubled businesses with the aim of protecting investment and preserving employment.

This is a far-reaching and daunting mandate. However, as a basic position from which to respond, it is reassuring that the commercial necessity for international co-operation between courts in matters of crossborder insolvency, has long been recognized and is repeatedly stressed in the case law . . . the seminal Cayman Islands decision [is] *Kilderkin* v. *Player* [1984–85 CILR 63] . . . Judicial international co-operation is a well-established tradition in Cayman Islands' jurisprudence, and the common law conflict-of-law rules applicable in this area are carefully applied."

5 As to protocols between the Grand Court and courts overseas, I refer to *In re Philadelphia Alternative Asset Fund Ltd.* (8), where, in the ruling of the Chief Justice, the following passage appears:

"There is a protocol in place which was agreed at the direction of this court, to govern the working relationships of the JOLs and the United States receiver. The protocol identifies distinct divisions of work; with the United States receiver being primarily responsible for the litigation in that country."

In *In re Lancelot Investors Fund Ltd.* (5), Quin, J. stated (2009 CILR 7, at para. 70 *et seq.*) that the Grand Court embraces the concept of facilitation of cooperation and co-ordination in crossborder insolvency proceedings. (See further the commentary of the Chief Justice on that case in his paper referred to above.)

6 As to England and Wales, by way of example only, I refer to *Barclays Bank plc* v. *Homan* (1) where Hoffmann, J., as he then was, said ([1993] BCLC at 684–685):

"The administrators and the examiner, subject to the respective jurisdictions of the courts here and in New York, have carried on the administration of MCC in cooperation with each other. On 31 December 1991 I authorised the administrators to consent to an order of the United States court in New York which would enable the administrators and examiner to enter into an agreement to harmonise their work and eliminate unnecessary duplication and expense. On 15 January 1992 Judge Brozman made a final supplemental order approving the agreement. By the same order, the administrators were recognised as the corporate governance of MCC, subject to the terms of the order. But the order was expressed not to affect the jurisdictions of this court and the United States court under their respective laws or to preclude a party in interest from seeking an expansion or reduction of the examiner's powers."

See further Glidewell, L.J. in the Court of Appeal (*ibid.*, at 694) under the heading *Proceedings in the United States and England*.

7 On January 25th, I conducted a joint hearing by telephone conference with the Hon. Christopher S. Sontchi of the Delaware Bankruptcy Court, with the assistance of counsel appearing before that court and Mr. Colin McKie appearing for the JPLs in this court. We arrived at a cross-border insolvency protocol stipulation regarding TMI and the company. The protocol sets out, by way of background, the parties and the proceedings and contains detailed provisions to protect the interests of all creditors of TMI and the company and to protect the process by which the Delaware bankruptcy proceedings and the Cayman proceedings are administered. The protocol provides a framework for the co-operation between multiple jurisdictions and seeks to eliminate, wherever possible, duplication of effort and to promote judicial economy and co-operation. To this end, on January 25th, I approved the terms of the protocol and the Hon. Christopher S. Sontchi did the same in the Delaware Bankruptcy Court. A copy of the protocol as approved is appended to this ruling. This court will continue to work in co-operation and co-ordination with courts in other jurisdictions when appropriate to ensure the fair and efficient management of international insolvency proceedings in the interests of all creditors and other interested persons, including the debtor.

8 Prior to the approval of the protocol, on January 19th, 2012, I ordered that the JPLs be authorized and have the power to review and supervise the actions taken by the directors of the company in

carrying out bidding and auction procedures for the sale of the set-top box business of the company and TMI. On February 16th, 2012, Foster, J. adjourned the hearing of the petition until July 3rd, 2012. On March 14th, 2012, acting in parallel with the Delaware Bankruptcy Court, I approved the purchase agreement dated January 18th, 2012, together with the schedules and exhibits thereto, as amended, entered into between the company, TMI and nine of their subsidiaries of the one part and Entropic Communications Inc. ("Entropic") of the other part, for the sale of the set-top box business of the company and TMI.

9 On March 26th, 2012, acting in parallel with the Delaware Bankruptcy Court, I ordered that the JPLs be authorized and have the power to review and supervise the actions taken by the directors in carrying out the bidding and auction procedures in accordance with the terms of Exhibit K to the purchase agreement between the company and TMI and five of their subsidiaries of the one part ("sellers") and Sigma Designs Inc. ("Sigma") of the other part, for the sale of the television business of the company ("TV business") in the form approved by the Delaware Bankruptcy Court ("bid procedures").

10 Today, again acting in parallel with the Delaware Bankruptcy Court, having carefully considered all the materials before the court, I propose to order that the purchase agreement dated March 21st, 2012 in respect of the TV business, together with the schedules and exhibits thereto, as amended (in substantially the same form as exhibited to the fourth affidavit of Mr. Gordon MacRae), entered into between the company, TMI and five of their subsidiaries of the one part and Sigma of the other part, be approved. My reasons for so ordering are as follows.

11 On April 4th, 2012, the hearing to approve the purchase agreement for the sale of the TV business took place before the Delaware Bankruptcy Court. Among others, counsel for the statutory committee of equity security holders of TMI, counsel for the official committee of unsecured creditors of the company ("US committee"), counsel for the US trustee in bankruptcy, counsel for NXP Semiconductors Netherlands B.V. and counsel for Sigma attended this hearing. On that day, the Delaware Bankruptcy Court approved the purchase agreement. The US committee and the committee of creditors appointed in these proceedings ("Cayman committee"), which comprise the same three creditors in each case, have approved and consented to the purchase agreement. By letter dated April 5th, Solomon Harris, counsel for the Cayman committee, wrote:

"We confirm that the Cayman creditors' committee supports the application for the approval of the asset purchase agreement entered into between TMFE (in provisional liquidation), TMI and five other subsidiaries.

Each of ARM Ltd., Wipro Technologies and United Microelectronics Corporation authorises Maples & Calder to undertake to the court on their behalf that they will not vote in favour of any resolution to authorise any official liquidator appointed to the company to pursue any claims against NXP Semiconductors Netherlands BV pursuant to sections 145 or 146 of the Companies Law (2011 Revision).

In these circumstances we do not intend to attend the hearing on 12 April 2012."

The JPLs primarily rely on the fourth affidavit of Mr. Gordon MacRae, sworn on April 5th, 2012, in support of this application.

12 I refer to the following background. On March 21st, 2012, the sellers and Sigma entered into the purchase agreement for the sale of the TV business. The sale of the TV business remained subject to a competitive bidding process by way of auction with other potential bidders (cl. 7.1(c) of the purchase agreement). On March 23rd, 2012, the Delaware Bankruptcy Court approved the final form of bid procedures. This court approved them on March 26th, 2012. The purchase agreement operated to set a floor for the minimum purchase price ("stalking horse bid") for the

TV business. It also operated to allow the companies to continue to market the TV business for sale and solicit offers for the TV business from other parties. The companies, with the assistance of Union Square Advisers LLC ("Union") and Mr. Andrew Hinkelman of FTI Consulting Inc., have been actively and extensively marketing the TV business for sale since October 2011. As a result of these efforts, Sigma was selected as the stalking horse purchaser.

13 Given the extensive marketing efforts from October 2011, the bid procedures provided for a period of one further week only to market the TV business before the bid deadline of 9 a.m. EDT on March 30th, 2012. During the course of this week, the directors of the companies and Union contacted the two interested parties that had previously expressed a material interest in purchasing the TV business to determine whether either of these entities would submit a bid to compete with Sigma. Neither of these parties expressed any interest in submitting a competing bid. Accordingly,

no further bids were received for the TV business before the bid deadline of 9 a.m. EDT on March 30th, 2012. As a result, the companies will proceed with the purchase agreement with Sigma.

14 As to the best interests of the company, the JPLs consider that the purchase agreement is in the best interests of the company's creditors for the following reasons:

(1) the Sigma bid was the best offer available to the sellers after conducting an extensive marketing process directed towards potentially interested third parties;

(2) the TV business is making substantial losses of approximately US$1.25m. per week and there is no realistic prospect of the TV business becoming profitable as part of the Trident Group;

(3) the companies and the JPLs are satisfied that a sale on the terms of the purchase agreement represents a better deal for the companies than the restructuring of the TV business; and

(4) the Cayman committee has consented to the purchase agreement.

15 As to the terms of the purchase agreement, a detailed overview of its terms is set out at paras. 24–57 of Mr. Gordon MacRae's fourth affidavit.

16 As to the relevant legal principles, the JPLs require court sanction of the purchase agreement in the same manner as an official liquidator would require court sanction to exercise the powers set out at Part 1 of Schedule 3 to the Companies Law (2011 Revision) for the following reasons. The JPLs can only carry out such functions as are conferred upon them by this court. The order of January 11th, 2012, appointing the JPLs, expressly provided at para. 4(g) that any sale of the assets of the company would be subject to the approval of this court. The purchase agreement is expressed

to be subject to the court's sanction and will become binding if that sanction is given.

17 Ms. Moran, on behalf of the JPLs, submitted that the court should apply the same principles that it takes into consideration when determining whether to sanction actions to be taken by an official liquidator under Part 1 of Schedule 3. I accept that submission. I am informed by Ms. Moran that there are no reported Cayman cases dealing expressly with the principles to be applied when a liquidator seeks court sanction of the sale of the assets of a company in liquidation. However, *In re Universal & Surety Co. Ltd.* (9) sets out the principles to be considered where an official liquidator seeks sanction of a settlement agreement. In my opinion, similar principles should apply to the exercise of any other powers of liquidators for which court sanction is required including, as in this case, the power to sell the company's assets by private contract. Further guidance in respect of the liquidators' powers of sale can also be obtained from certain relevant English authorities referred to below.

18 The relevant legal principles are as follows:

(a) The primary duty of a liquidator when selling the assets of a company is to take reasonable care to obtain the best price available in the circumstances. Accordingly, the court must be satisfied that the JPLs have fulfilled this duty, taking into account the nature of the business to be sold, the relevant market, the steps taken to market and to sell the assets and the urgency of the sale. In this regard the duty is similar to that of a mortgagee in possession exercising a power of sale over the mortgaged assets. In *Paradise Manor Ltd.* v. *Bank of Nova Scotia* (7), the Court of Appeal was asked to consider whether a bank acting as mortgagee with a power of sale had fulfilled its duty to obtain the best price when selling a mortgaged hotel. The court considered that the bank had fulfilled this duty as a result of the extensive advertising campaign, the efforts made to interest other hotel chains directly in purchasing the asset and the holding of a public action.

(b) The court should give the liquidators' views considerable weight unless there are substantial reasons for not doing so. See *Re Edennote Ltd. (No. 2)* (2), approved in *Re Greenhaven Motors Ltd.* (3). *Re Greenhaven* was approved by the Cayman Court of Appeal in *In re High Risk Opportunities HUB Fund Ltd.* (4).

(c) The decision whether to sanction the power of sale is a decision for the court and the court must consider the correctness or otherwise of the liquidators' decision, having regard to all the evidence and in particular:

(i) the financial consequences of the decision for stakeholders;

(ii) the wishes of the creditors; and

(iii) whether the interests of stakeholders are best served by permitting the company to enter into the particular transaction or by not permitting the company to enter into the particular transaction.

19 Applying these principles to the circumstances of the present case, which concerns a provisional liquidation, the companies, Union and Mr. Hinkelman have been actively and extensively marketing the TV business for sale since October 2011. Approximately 22 potential purchasers were identified and Union proceeded to contact and meet with each of these potential purchasers to ascertain their

interest in the TV business. Approximately 30 face-to-face meetings took place. Of these 22 potential purchasers, 9 expressed an interest in purchasing the TV business and signed non-disclosure agreements. Of these, 2 submitted offers for the TV business. After careful consideration of these offers, it was determined that the Sigma offer was preferable and should be accepted as the stalking horse bid.

20 The bid procedures were approved by this court on March 26th, 2012. Given the extensive marketing efforts that had already been carried out and the high weekly losses of the TV business, the bid procedures allowed for only one further week for the companies to further market the TV business before the bid deadline. During the course of that week, the directors of the companies and Union again contacted the two interested parties that had previously expressed a material interest in purchasing the TV business to determine whether either of these entities would submit a bid to compete with Sigma. However, no competing bids were received. The Sigma bid was the best offer received as a result of this extensive marketing process.

21 The JPLs are satisfied that the Sigma bid should be accepted. The TV business is making substantial losses (it is estimated by Mr. Hinkelman that the TV business is currently losing approximately US$1.25m. per week) and there is no realistic prospect that it can be made profitable as part of the Trident Group. Given the significant losses being incurred by the TV business on a weekly basis, it is essential, in the view of the JPLs, that the companies carry out the sale as soon as possible to minimize the drain on resources. The Cayman committee has, as I have said, consented to the purchase agreement being concluded. For these reasons, I make the order to which I have referred.

22 As to the next steps, if the TV business is sold, the company will only have two remaining ancillary businesses—the audio business and the demodulator business. These business units cannot operate as stand-alone entities. The companies will therefore endeavour to sell the assets relating to these businesses to third parties. In the event that the TV business is sold, the majority of the company's assets will have been realized within

the provisional liquidation. It is accepted by Ms. Moran, in my view correctly, that it is not normally the function of provisional liquidators to realize substantially all of the assets of the company in provisional liquidation. However, the court has a broad discretion in respect of the appointment of provisional liquidators pursuant to s.104(1) of the Companies Law (2011 Revision) and it is generally accepted that the use of the provisional liquidation procedure is a flexible remedy, not restricted to particular categories of cases. See, for example, *MHMH Ltd.* v. *Carwood Barker Holdings Ltd.* (6).

23 Once the sale of the TV business to Sigma and the sale of the set-top box business to Entropic closes, the company will still be required to continue its business in the ordinary course for a transitional period in order to assist Sigma and Entropic with the transfer and stabilization of the respective businesses. It is anticipated that this transitional period will last until the end of July 2012. According to para. 64 of Mr. MacRae's fourth affidavit, in order to facilitate an orderly transition of the businesses during this period, it may be preferable for the provisional liquidation to continue.

24 However, there has clearly been a significant change of circumstances since Foster, J. adjourned the hearing of the winding-up petition until July 3rd, 2012, by his order dated February 16th, 2012. Foster, J. agreed to adjourn the winding-up petition based on the reasons set out in the fifth affidavit of Mr. David Teichmann, which explained that, at that time, the company was still contemplating a potential restructuring of the TV business together with the other business units, after the sale of the set-top box business. Given that the TV business is now to be sold, a restructuring is no longer possible, and, instead, it is proposed that the remaining assets of the company will be sold. Accordingly, Ms. Moran accepted, in my view correctly, that it is appropriate to bring forward the hearing of the winding-up petition to allow the company, the JPLs and stakeholders to advance their views as to whether the provisional liquidation should be permitted to continue for the transitional period or whether it is more appropriate to make an immediate winding-up order.

25 Pursuant to para. 4 of the order of Foster, J., the JPLs are at liberty to apply to restore the petition for hearing at an earlier date and must advertise the new date for the adjourned hearing once in the *Cayman Islands Gazette* and once in the *Wall Street Journal* (International Edition), not later than 14 days prior to the hearing. The new date for the hearing of the petition will be fixed through the usual channels, in the light of Ms. Moran's acceptance that it is appropriate to bring the date forward. For completeness, I add that Mr. Rupert Bell has appeared today on behalf of Sigma. I have made an order upon the application of Sigma that certain materials identified in the order be sealed and kept confidential and not

open to inspection by any party or other person except with the prior leave of the court. I rule accordingly.

SCHEDULE

CROSS-BORDER INSOLVENCY PROTOCOL STIPULATION REGARDING TRIDENT MICROSYSTEMS, INC. AND TRIDENT MICROSYSTEMS (FAR EAST) LTD.

Subject to the authorization from the Grand Court of the Cayman Islands (the "Cayman Court") and the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), Gordon MacRae and Eleanor Fisher of Zolfo Cooper ("ZC"), as joint provisional liquidators of Trident Microsystems (Far East) Ltd. ("TMFE") enter into this Stipulation Regarding Cross-Border Insolvency Protocol along with Trident Microsystems, Inc. ("TMI") and TMFE, as follows:

Preliminary Statement

The purpose of the Stipulation is to ensure the just, efficient and expeditious administration of the pending insolvency proceedings of TMFE in the Cayman Islands (the "Cayman Proceedings") and the chapter 11 proceedings of TMI and TMFE (the "Bankruptcy Proceedings") before the Bankruptcy Court. It is in the interest of all parties, including the joint provisional liquidators of TMFE (the "Cayman Liquidators"), TMI and their respective creditors, and the respective courts, to seek to cooperate in the conduct of the insolvency proceedings and TMFE and TMI's chapter 11 proceedings, with the following objectives:

- Reducing the total costs incurred by the Cayman Liquidators in protecting the interests of creditors by avoiding duplication of efforts;
- Avoiding any potential conflict between the Cayman Proceedings and the Bankruptcy Proceedings;
- Ensuring transparency and accountability in the conduct of the proceedings in the United States and the Cayman Islands; and
- Providing a framework for protecting the interests of, and maximizing returns to, all creditors including by way of exploring a plan of compromise or arrangement with the creditors of TMFE.

Mindful of these goals, the parties enter into this Stipulation.

Background

The Parties

TMI was incorporated in California in 1987 and reincorporated in Delaware in 1992. TMI is the direct parent company of TMFE, which is the direct or indirect parent of subsidiary entities organized under the laws of various foreign countries (the "Foreign Subsidiaries," collectively with TMI and TMFE, the "Group"). TMI's principal executive offices are located in Sunnyvale, California. TMI serves as the corporate head of the Group's entities and provides corporate oversight and administrative services necessary for the operations of the Group.

TMFE has no employees and it holds as its principal assets work in progress, receivables and intellectual property in the form of approximately 1,600 patents, and its interest in the Foreign Subsidiaries. In addition, the TMFE is also responsible for the control and administration of accounts payable for the Group. Through administration services performed at TMFE's Hong Kong subsidiary and TMI, the TMFE is responsible for the control and administration of accounts payable on behalf of the entire Group.

The Proceedings

(1) On January 4, 2012, TMI and TMFE commenced chapter 11 proceedings in the Bankruptcy Court. TMI and TMFE are continuing to serve as a debtors-in-possession pursuant to section 1107 of the United States Bankruptcy Code (the "Bankruptcy Code"), and to operate their businesses pursuant to section 1108 of the Bankruptcy Code.

(2) On January 4, 2012, TMFE filed a Winding Up Petition, Cause No. FSD 1 of 2012 PCJ, in the Cayman Court.

The Stipulation

(3) It is agreed among the Cayman Liquidators, TMFE, TMI and Andrew Hinkleman of FTI Consulting, TMI's proposed chief restructuring officer (the "CRO"), that a framework of general principles is appropriate to address certain issues that are likely to arise in connection with the cross-border insolvency proceedings of TMI and TMFE including, without limitation, (a) the administration of TMI and TMFE during their respective proceedings, (b) the sale of certain material assets of TMI and TMFE, (c) the payment of certain claims of TMI and TMFE necessary for the continued operation of the Group, and (d) the resolution of claims against TMI and TMFE and the payment of creditors.

(4) The purpose of the protocol contemplated by this Stipulation is to protect the interests of all creditors of TMI and TMFE and to protect the

process by which the Bankruptcy Proceedings and Cayman Proceedings are administered. The protocol will provide a framework for cooperation between multiple jurisdictions and to eliminate wherever possible duplication of effort and promote judicial economy.

NOW THEREFORE, the Cayman Liquidators, TMFE and TMI hereby stipulate and agree, subject to the approval by the Bankruptcy Court and the Cayman Court the following:

(1) Approval shall be sought from the Bankruptcy Court for the joint administration of the bankruptcy cases of TMI and TMFE solely for procedural purposes.

(2) An Official Committee of Unsecured Creditors (the "Committee") was formed in the Bankruptcy Proceedings on January 17, 2012 and it is contemplated that a Cayman liquidation committee will be formed in the Cayman Proceedings (the "Cayman Committee," and collectively with the Committee, the "Creditors Committees"). While it is understood that the Committee and the Cayman Committee shall individually have certain statutory obligations, TMI, TMFE, the CRO and the Cayman Liquidators will work with the legal and professional advisors to the Creditors Committees to establish protocols for the efficient administration of the cross-border restructurings. Nothing contained in this Stipulation shall modify or alter the rights of the Creditors Committees in their respective proceedings.

(3) With respect to the sales of material assets of the Group, TMI and the Cayman Liquidators will seek approval of the procedures for such sales (including but not limited to the marketing of such assets and subsequent auction of such assets) and for authority to sell the material assets first from the Bankruptcy Court and thereafter seek any necessary approvals from the Cayman Court; provided, however, that TMI and TMFE will not consummate any sales of such material assets unless the necessary approvals are received from the Bankruptcy Court and the Cayman Court.

(4) With respect to the ordinary course sale of non-material assets that do not require approval of the Bankruptcy Court, the Cayman Liquidators may require that any sale of such non-material assets be subject to the approval of the Cayman Court. For the avoidance of doubt, the sales referenced in this paragraph shall not include ordinary course product sales or licensing transactions by the Company.

(5) TMI and the Cayman Liquidators shall use their reasonable best efforts to file a status report and/or operating report with the Bankruptcy Court and the Cayman Court, within four weeks of the commencement of the Bankruptcy Proceedings and the Cayman Proceedings setting forth the status of their efforts for the prior month and thereafter file reports at such

future intervals as the Bankruptcy Court and the Cayman Court may direct. A copy of such reports shall be served on the Office of the United States Trustee, the members of the Creditors Committees and their counsel or other advisors. TMI and the Cayman Liquidators shall use their reasonable best efforts to ensure that a representative (including the CRO) shall also be available for weekly conference calls with the Creditors Committees and their advisors, at which time they or their representatives will apprise and inform the Creditors Committees of the status of their efforts, subject to applicable law. Nothing contained in this paragraph shall alter or modify the obligations of TMI and TMFE to file monthly operating reports as required by the Office of the United States Trustee in the Bankruptcy Proceedings.

(6) TMI and TMFE shall be permitted to operate in the ordinary course of their business operations unless otherwise ordered by the Bankruptcy Court or the Cayman Court including in respect of ordinary course product sales between TMFE and TMHK and the licensing of the intellectual property of TMFE to third parties in the ordinary course. To facilitate these operations, the CRO, and/or the officers and directors (or their authorized representatives) of the Company, TMI, TMHK and their subsidiaries, and the Cayman Liquidators shall meet in person or by telephone or videoconference or by whatever means is most appropriate on a weekly basis to address budgeting, cash expenditures, employee matters, ordinary course transactions and all other matters necessary to fully operate the Group's business operations.

(7) The Cayman Liquidators shall receive and be given notice of all proceedings in the Bankruptcy Court in accordance with the practices of the Bankruptcy Court and have the right to appear in all proceedings in the Bankruptcy Court. TMFE shall give notice to the CRO, the Committee, the Office of the United States Trustee and TMI of all proceedings in the Cayman Court and will not object to their attending and seeking to be heard at any hearings before the Cayman Court. For so long as they have an interest in the estate of TMFE, Entropic Communications, Inc. or any other successful bidder for the assets of TMFE shall receive and be given notice of all proceedings in the Cayman Court in accordance with the practices of the Cayman Court and TMFE will not object to their attending and seeking to be heard at such hearings before the Cayman Court. For the avoidance of doubt, this will not operate to preclude TMFE from seeking orders that confidential information be sealed where TMFE deems necessary and appropriate.

(8) For the avoidance of doubt, the Cayman Liquidators shall be required to act in a manner consistent with the terms of the Cayman Court orders and shall be required to act in a manner consistent with the laws governing the Bankruptcy Proceedings and the Cayman Proceedings. Nothing in this Stipulation requires the Cayman Liquidators to take any

action that violates any provision of Cayman Islands Law or any order of any Cayman Court or any other applicable law.

(9) All creditors of TMFE shall have the opportunity to file a request for service with the Clerk of the Bankruptcy Court, or to participate in the case or proceedings in the Cayman Proceedings. To the extent required, TMI, TMFE and the Cayman Liquidators shall seek to amend this Stipulation pursuant to paragraph 19 hereof, to provide additional protocols governing the filing, administration and adjudication of claims asserted against TMFE.

(10) Notice and requirements for approval and authorization of any transactions regarding disposition, liquidation or distribution of assets shall be in accordance with applicable law.

(11) TMI and TMFE have sought authority from the Bankruptcy Court and the Cayman Liquidators will seek authority from the Cayman Court to maintain the Group's cash management system and bank accounts as described in Exhibit C to the Motion of the Debtors and Debtors in Possession for Entry of Interim and Final Orders (a) Approving the Continued Use of the Debtors' Cash Management System, (b) Approving Continued Transfers Between Debtors and Non-Debtor Subsidiaries, (c) Scheduling a Final Hearing on the Motion, and (d) Granting Related Relief. Thereafter, the TMI and TMFE shall maintain their cash management system and bank accounts in accordance with the Orders of the Bankruptcy Court and the Cayman Court. Any modifications to the cash management system and/or the bank accounts shall be subject to the approval of the Cayman Liquidators and, if required by the applicable law, the Bankruptcy Court and the Cayman Court.

(12) TMI and TMFE have obtained authority from the Bankruptcy Court and the Cayman Liquidators will seek authority from the Cayman Court to pay pre-petition debts of certain critical vendors ("Critical Vendors") as set out at Exhibit B to the Motion of the Debtors for an Order Authorizing the Payment of Certain Prepetition Claims of Critical subject to an aggregate cap of $2 million (USD), and as further modified by the Bankruptcy Court. Subject to such approval, TMFE can take steps to pay the Critical Vendors at its discretion in order to minimize any interruption to the day to day operation of the Group, but subject always to the express consent of the Cayman Liquidators.

(13) The Cayman Court shall have sole jurisdiction and power over the Cayman Liquidators, as to their tenure in office, the conduct of the Cayman Proceedings under Cayman Islands Law, the appointment, role and powers of the Cayman Liquidators and the hearing and determination of matters arising in the Cayman Proceedings under Cayman Islands Law. The Cayman Liquidators shall be compensated for their services in accordance with Cayman principles under Cayman Islands Law.

(14) The Bankruptcy Court shall have sole jurisdiction and power over the conduct of the Bankruptcy Proceedings, the compensation of the professionals rendering services in the Bankruptcy Proceedings, and the hearing and determination of matters arising in the Bankruptcy Proceedings.

(15) The Bankruptcy Court will be requested to hold monthly omnibus hearings during which the status of the Bankruptcy Proceedings and the Cayman Proceedings will be discussed.

(16) The Bankruptcy Court, and the Cayman Court, may, to the extent permitted by practice and procedure, and with the prior consent of each court, conduct joint hearings or conferences with respect to any matter related to the conduct, administration, determination or disposition of any aspect of the Cayman Proceedings, or Bankruptcy Proceedings, where considered by the two Courts to be necessary or advisable and in particular, without limiting the generality of the foregoing, to facilitate or coordinate the proper and efficient conduct of the Bankruptcy Proceedings and Cayman Proceedings. With respect to any such hearings or conferences, unless otherwise ordered, the following may be considered to be appropriate:

(i) A telephone link may be established such that the two Courts may be able to simultaneously hear the matter in the other Court.

(ii) TMFE, TMI and the Cayman Liquidators shall ensure that appropriate materials (including all briefs, memoranda or skeleton arguments) are filed in advance of such hearing consistent with the procedural and evidential rules and requirements of each participating Court, such that each Court has identical or substantially similar materials before it, to enable each Court to properly consider the issues to be determined at the joint hearing.

(17) The Cayman Court and the Bankruptcy Court may, but are not required to, communicate with one another, without advance notice to counsel or counsel being present for any purpose, including, without limitation, to establish guidelines for the orderly making of submissions and rendering of decisions to deal with any other procedural, administrative, or preliminary matters or for the purpose of determining whether consistent rulings can be made by the Cayman Court and/or the Bankruptcy Court and the terms upon which such rulings should be made, and to deal with any other procedural or non-substantive matter in relation to such applications.

(18) This Stipulation shall be binding on and inure to the benefit of the parties hereto and their respective successors, assignees, representatives,

heirs, executors, administrators, trustees (including any trustees under chapters 7 or 11 of the Bankruptcy Code), and receivers, receiver managers, or custodians appointed under United States law, Cayman Islands Law, as the case may be.

(19) This Stipulation may not be waived, amended, or modified orally or in any other way or manner except by a writing signed by the party to be bound, and such approval and authorization of the Bankruptcy Court or Cayman Court as may be necessary and appropriate in the circumstances. Notice of any proposed amendment or modification of the Stipulation shall be provided by the party proposing such amendment to the Bankruptcy Court, Cayman Court, TMI and TMFE and their counsel of record, the Cayman Liquidators, any representative of the Creditors Committees and the CRO (the "Notice Parties"). This Stipulation may be supplemented from time to time by the parties hereto as circumstances require with any supplementing stipulations as approved by the Bankruptcy Court, and Cayman Court.

(20) Any request for the entry of an order which is contrary to the provisions of this Stipulation must be made on notice by the proponent of the order to the Notice Parties.

(21) Each party represents and warrants to the other that its execution, delivery, and performance of this Stipulation are within the power and authority of such party and have been duly authorized by such party, except that, with respect to the Cayman Liquidators and TMI, Cayman Court and Bankruptcy Court, respectively, approval is required.

(22) This Stipulation may be signed in any number of counterparts, each of which shall be deemed an original and all of which together shall be deemed to be one and the same Instrument, and may be signed by facsimile signature, which shall be deemed to constitute an original signature.

(23) The Bankruptcy Court and Cayman Court shall retain jurisdiction over the parties for the purpose of enforcing the terms and provisions of this Stipulation or approving any amendments or modifications thereto.

(24) The parties hereto are hereby authorized to take such actions and execute such documents as may be necessary and appropriate to implement and effectuate this Stipulation.

(25) The Stipulation is not intended to otherwise circumvent, alter, or otherwise affect the rights, obligations, or laws of any jurisdiction and accordingly, if a party to the Stipulation is directed by its Court to act (or not to act) with respect to a particular issue whether on his own application or otherwise, that party's obligation to follow its Court's direction should not be impaired or abridged by the Stipulation. To the extent any party's obligation to follow its Court's order conflicts with its

obligations under the Stipulation, that party shall be relieved from its obligation under the Stipulation, but such party must notify in writing all other parties of the conflict between its Court's direction or order and the Stipulation. In all other material respects, the affected party will remain bound by the terms of the Stipulation.

(26) This Stipulation shall be deemed effective upon its approval of the Bankruptcy Court and the Cayman Court. This Stipulation shall have no binding or enforceable legal effect until approved by the Bankruptcy Court and the Cayman Court.

IN WITNESS WHEREOF the parties hereto have caused this Stipulation to be executed either individually or by their respective attorneys or representatives hereunto authorized.

Application granted.

Attorneys: *Maples & Calder* for the JPLs; *Walkers* for Sigma Designs Inc.

Exhibit 40

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIMS NO. BVIHC (COM) 2009/0136, 2009/0139 and 2009/0074 [Section 273]

IN THE MATTER OF THE INSOLVENCY ACT, 2003
AND IN THE MATTER OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)

BETWEEN:

ABN AMRO FUND SERVICES (ISLE OF MAN) NOMINEES LIMITED
(formerly FORTIS (ISLE OF MAN) NOMINEES LIMITED) and others

UBS AG NEW YORK and others

Applicants

AND

KENNETH KRYS AND CHARLOTTE CAULFIELD
(as Joint Liquidators of Fairfield Sentry Limited)

FAIRFIELD SENTRY LIMITED (in liquidation)

Respondents

AND

IN THE MATTER OF THE INSOLVENCY ACT, 2003
AND IN THE MATTER OF FAIRFIELD SIGMA LIMITED (IN LIQUIDATION)

BETWEEN:

ABN AMRO FUND SERVICES (ISLE OF MAN) NOMINEES LIMITED
(formerly FORTIS (ISLE OF MAN) NOMINEES LIMITED) and others

UBS AG NEW YORK and others

Applicants

and

KENNETH KRYS AND CHARLOTTE CAULFIELD
(as Joint Liquidators of Fairfield Sigma Limited)

FAIRFIELD SIGMA LIMITED (in liquidation)

Respondents

AND

IN THE MATTER OF THE INSOLVENCY ACT, 2003
AND IN THE MATTER OF FAIRFIELD LAMBDA LIMITED (IN LIQUIDATION)

BETWEEN:

ABN AMRO FUND SERVICES (ISLE OF MAN) NOMINEES LIMITED (formerly FORTIS (ISLE OF MAN) NOMINEES LIMITED) and others

UBS AG NEW YORK and others

Applicants

and

KENNETH KRYS AND CHARLOTTE CAULFIELD (as Joint Liquidators of Fairfield Lambda Limited)

FAIRFIELD LAMBDA LIMITED (in liquidation)

Respondents

Appearances:

Mr. Mark Hapgood QC, and Mr. Alan Roxburgh, Mr. Phillip Kite and Ms Colleen Farrington of Harney Westwood & Riegels for Applicants ABN AMRO Fund Services (Isle of Man) Nominees Limited, Bank Julius Baer & Co Limited, SNS Global Custody BV, Deutsche Bank Trust Company Americas and Deutsche Bank (Suisse) SA

Mr. Stephen Rubin QC, and Mr. Piers Plumptre, and Ms. Nadine Whyte of O'Neal Webster for Applicants UBS AG New York, UBS AG Zurich, UBS Jersey Nominees, UBS (Luxembourg) SA, UBS Deutschland AG / Dresdner Lateinamerika AG, UBS Fund Services (Cayman) Limited, UBS Cayman Limited, UBS Fund Services (Ireland) Ltd and UBS Zurich

Mr. Gabriel Moss QC and Mr. William Hare and Ms. Sinead Harris of Forbes Hare for Respondents

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2015: March 23-26
2016: March 11

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JUDGMENT

Applications pursuant to Section 273 of the Insolvency Act, 2003 ("Act") for orders reversing or modifying decisions of liquidators to bring proceedings in United States and directing them to withdraw the proceedings, or alternatively anti-suit injunctions to same effect – Applicants redeemed shares in Funds, now in

liquidation, before fraud (Ponzi scheme) of Bernard Madoff uncovered in 2008 – Liquidators had brought common law restitutionary claims in BVI to recover redemption payments - Claims determined against liquidators on Privy Council appeal of results of preliminary issues trial – Certificates of net asset value ("NAV") were binding – Now liquidators seek to recover the redemption payments in U.S. Bankruptcy Court proceedings based on claims of unjust enrichment, money had and received, mistaken payment and constructive trust which Applicants submit are in essence the same as restitutionary claims determined in BVI – Liquidators assert issue of NAV certificates not being binding (because allegedly not "given in good faith") not determined – Liquidators also bring in U.S. Bankruptcy Court claims based on undervalue transaction provisions of Act, and seek voidable transaction relief under Section 249 of Act.

Applicants submitted that liquidators should not be permitted to pursue U.S. Bankruptcy Court proceedings because of positions taken by them and determinations made in BVI proceedings, and statutory undervalue transaction claims should be brought in BVI, not in U.S.

Section 273 is a limited remedy – If basis for applicant to have standing, or legitimate interest, and for court to have jurisdiction which it may exercise under Section 273, when applicant's true complaint is not as creditor or contributory, it is where act, omission or decision of liquidator involves not an administrative matter but a matter with one or more of the following (sometime overlapping) characteristics (a) a legal issue, such as determination of competing claims and priorities; (b) a matter that it is not for liquidators to decide at their own discretion; and/or (c) the exercise of a power given specifically to liquidators where applicant could have no other recourse, remedy or right to challenge the substantive consequence of the act, omission or decision (which may mean the act, omission or decision itself if that is the final substantive consequence) – Even if persons affected by acts, omissions or decisions with comparable characteristics may come within Section 273, applicant must have legitimate interest in relief sought.

Applicants did not have standing, and in any event did not have a legitimate interest – court did not have jurisdiction which it may exercise to grant Section 273 relief – Even if Applicants had standing and a legitimate interest, applications for Section 273 relief should be dismissed – Test for exercise of Section 273 power not met – Liquidators' "acts, omissions or decisions" in issue not "so utterly unreasonable and absurd that no reasonable man would have done it", "so manifestly absurd or perverse that they fall completely outside the permissible range of options" or "so perverse that no reasonable liquidator could have arrived at [them]" – Alternative claims for anti-suit injunctions to restrain liquidators from pursuing U.S. Proceedings dismissed – More orderly and logical that U.S.

Bankruptcy Court make determinations first on which, if any, restitutionary claims it will entertain, and then whether there are sufficient of same, similar or aligned factual determinations that may need to be made for undervalue transaction claims or leave it to BVI court to deal with those claims in their entirety – Court also questioned whether appropriate means for it to control conduct of officer of the court officers is by way of injunction – Applications dismissed.

[1] **LEON J [Ag]:** The Applicants seek orders in each of the three Applications against each of the three Respondent companies in liquidation, Fairfield Sentry Limited ("**Sentry**"), Fairfield Sigma Limited ('**Sigma**') and Fairfield Lambda Limited ('**Lambda**') (together, "**Funds**"), and their Joint Liquidators, Kenneth Krys and Charlotte Caulfield ("**Liquidators**"), to prevent the Liquidators from continuing with proceedings ("**U.S. Proceedings**") against the Applicants pending (against the Applicants and others) in the United States Bankruptcy Court for the Southern District of New York ("**U.S. Bankruptcy Court**").

[2] The Funds, which were incorporated in this jurisdiction, were "feeder funds" that invested in Bernard L. Madoff Investment Securities LLC ("**BLMIS**"), the entity through which Bernard Madoff conducted his infamous Ponzi scheme. Sentry had invested the majority of its assets directly in BLMIS while Sigma and Lambda had invested in BLMIS indirectly, by investing in Sentry. After the fraud was exposed following Madoff's arrest on 11 December 2008, this Court made orders to wind up the Funds under the Insolvency Act, 2003 ("**Act**") on 'just and equitable' grounds.

[3] The Applicants are former registered shareholders of Sentry, and in some cases also of Sigma and Lambda. Their redeemable shares were redeemed in the period from 2004 to 2008, before the fraud was exposed. Redemption payments were made to them pursuant to the Articles of Association of the Funds.

[4] The Liquidators seek to recover the redemption payments in the U.S. Proceedings.

[5] The U.S. Proceedings are currently stayed. The Liquidators wish to pursue the U.S. Proceedings, if permitted to do so, but have not applied for the stay to be lifted pending determination of these Applications. They state that thereafter they will seek the sanction of this Court (which would be by way of an ex parte application in the usual manner) which, they submit, "is only needed to ensure the liquidators recover their costs" and which is to be "given unless the proposed action is vexatious or oppressive"[1].

[6] In the U.S. Proceedings the first causes of action asserted by the Funds are unjust enrichment, money had and received mistaken payment and constructive trust. The essence of these restitutionary claims is comparable. The Funds assert, in seeking to recover the redemption monies paid to the Applicants based on these causes of action, that:

a) the Funds mistakenly believed that monies withdrawn by Sentry from BLMIS in the redemptions represented the proceeds of sale of investments held by BLMIS for the account of Sentry;
b) the redemption payments were based on a miscalculated Net Asset Value ("**NAV**") of the funds (given the fraudulent Ponzi scheme and the fictitious profits shown by it) and that valuable consideration was not provided for them; and
c) the certificates of NAV, which otherwise would be binding, are not binding because the certificates were not "given in good faith" (and alternatively in some cases the redemption payments were received in bad faith[2]).

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[1] Skeleton Argument of the Respondents – Hearing on 23rd March 2015 ("**Respondents' Skeleton**"), page 2, footnote 1. The Court notes that in addition to the Respondents' Skeleton, it had the benefit of the Applicants' Skeleton Argument; the Applicants' 200 page, 550 paragraph, "Full Written Submissions"; and post-hearing written submissions by way of correspondence to the Court that extended into the second half of May 2015.
[2] The Respondents submitted that for present purposes there is no need to consider the bad faith receipt question (see Respondents' Skeleton, page 5, footnote 4). However the Respondents did submit orally that there is evidence of bad faith by redeemers, including some of the Applicants; that some redeemers had enough information to know that they were receiving the proceeds of fraud; and that there were "lots of red

[7] Second, in the U.S. Proceedings the Liquidators seek declaratory judgments that the redemption payments made during the "vulnerability period", as defined in Section 244 of the Act, constituted voidable transactions – unfair preferences under Section 245 of the Act and/or undervalue transactions under Section 246 of the Act – and they seek orders pursuant to Section 249 of the Act setting aside and avoiding those payments and giving judgment in the amount of those payments ("**BVI Insolvency Act Claims**").

[8] Section 249 of the Act empowers this Court to make orders in respect of unfair preferences and undervalue transactions. The Liquidators have not brought claims under the Act in this jurisdiction.[3]

[9] Specifically, the Applicants seek the following relief on these Applications:

a) orders under Section 273 of the Act reversing or modifying the Liquidators' decisions to bring and pursue, and to cause the Funds to bring and pursue, the U.S. Proceedings, and directing the Liquidators to withdraw or discontinue the U.S. Proceedings;

b) the discharge or variation of any previous orders authorizing the Liquidators to bring the U.S. Proceedings or any proceedings against the Applicants in the United States; and

c) alternatively, injunctions (often referred to as an 'anti-suit injunction') restraining the Liquidators from taking any

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flags about Madoff". Whether the evidence referred to, which was not in issue on these Applications, would meet the test (whatever it is) for relief, would need to be determined under the applicable law. Of course it may be easy to see with much hindsight that there were "lots of red flags" (which of course many people in various positions did not see). Also, the Court raised during the hearing, but did not need to consider for this Judgment, whether redeemers were not just asking for their money back, which they were entitled to do. These are issues for another day, and perhaps another court.

[3] The Applicants submitted in March 2015 that the BVI Insolvency Act claims were not at that date statute-barred in this jurisdiction. The Respondents did not in March 2015 dispute that assertion.

further steps in the U.S. Proceedings against the Applicants other than such steps as may be necessary to withdraw or discontinue the U.S. Proceedings or the claims made therein against the Applicants.

[10] Section 273 of the Act provides as follows:

> A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.

[11] The Respondents submit that these Applications should be dismissed on four grounds.

[12] First, the Respondents submit that the Applicants lack standing under Section 273 of the Act ("**Section 273 Standing and Jurisdiction Issue**") because they are former members of the Funds who are applying as defendants in proceedings brought by the Liquidators, not persons with an ongoing interest in the liquidated company who are entitled to participate in the ultimate distribution – creditors, contributories and members; persons who have a legitimate interest in the relief sought and the efficient management of the liquidation – who may challenge actions of the Liquidators under Section 273 and assert that those actions are manifestly contrary (adverse) to the interests of the liquidated company and those with an interest in it.

[13] The test, say the Respondents, is not whether the Applicants have "an interest in making the application or may be affected by its outcome", but whether the Applicants have "a legitimate interest in the relief sought".[4] The Respondents submit that the Applicants are not merely strangers to the liquidations but in fact adverse to them.

[14] Second, the Respondents submit that even if the Applicants have standing, the Applicants cannot meet the asserted test for the exercise by the Court of its

[4] Deloitte & Touche v Johnson ("**Deloitte**") [1999] BCC 992 at 997, lines C-E (PC).

Section 273 power as the Liquidators' actions are not "so utterly unreasonable and absurd that no reasonable person would have done it" ("**273 Relief Issue**").

[15] The Respondents submit that the U.S. Proceedings were brought pursuant to legal advice and with the support of unconflicted members of the Liquidation Committee and the sanction of this Court, and are for the purpose of recovering assets for the benefit of victims of the Madoff fraud.

[16] Third, the Respondents submit that the Applicants cannot meet the test for an anti-suit injunction in that they cannot show that the Respondents' actions in the U.S. Proceedings are "vexatious or oppressive".

[17] Fourth, the Respondents submit that an anti-suit injunction would not be consistent with judicial comity between this Court and the U.S. Bankruptcy Court, which is the court that should decide whether the actions before it have merit. They point out that these Applications are not trials of the merits of the claims that the Respondents seek to advance in the U.S. Proceedings.

BVI Proceedings and Privy Council Opinion

[18] Relevant background to these Applications is that the Liquidators had brought common law restitutionary claims in this jurisdiction ("**BVI Proceedings**"). Ultimately the fundamental issues in the BVI Proceedings were essentially determined on the results of the trial of preliminary issues that were appealed to the Privy Council[5].

[19] The Privy Council held that the sums paid to the redeeming defendants in the BVI Proceedings were legally due to them because certificates (pursuant to the Funds' Articles of Association) had been issued that established the NAV (unless not "given in good faith")[6].

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[5] Fairfield Sentry Limited v Migani ("**Privy Council Opinion**") [2014] UKPC 9.

[6] Article 11(1)(c) of the Articles of Association provided (as set out in paragraph 13, lines E-F, of the Privy Council Opinion) that "Any certificate as to the Net Asset Value per Share or as to the Subscription Price or Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on all parties."

[20] In the result, the Applicants submit that claims by the Funds based on common law restitutionary claims governed by BVI law cannot be pursued against them, and could not have been pursued against them unless the certificates of NAV used to calculate the redemption prices were not "given in good faith".

[21] The Applicants submit that the "given in good faith" issue, which they say was not raised or preserved when the preliminary issues were formulated, is foreclosed for several reasons including "issue estoppel and/or by the doctrine of *Henderson v Henderson*" (abuse of process)[7] and in any event fails under a proper construction of the Articles of Association (Article 11 would not, it is submitted, enable the Funds to take advantage of their own bad faith or that of their agent which acted under the direction of Sentry's board of directors) and "because the alleged reckless indifference of the administrator to the accuracy of the NAV calculation and to the existence of the assets ostensibly held by BLMIS negates the plea of mistake on which the Restitutionary Claims are founded."[8]

[22] The Respondents submit that after the BVI Proceedings began and the preliminary issues were formulated, the Liquidators "have come into possession of evidence [that as a practical matter "couldn't have been unearthed before"] suggesting that Citco [the entity that issued the certificates] did not issue the documentation [that the Privy Council held to be certificates] in good faith"; that "Citco acted recklessly as to the truth when issuing the certificates, which amounts to bad faith as a

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[7] See Johnson v Gore Wood & Co [2002] 2 AC 1 at 31, lines A-E (HL) (which was quoted in Walbrook Trustees (Jersey) Ltd & Others v William Simon Fattal & Others [2009] EWCA Civ 297, para. 4 (CA)) in which it was stated "But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. ... there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

[8] Applicants' Skeleton Argument, paragraph 41, summarizes this position.

matter of BVI law", and that "such bad faith will not be attributed to the Funds, since they were the victims of the bad faith." The Respondents therefore say that "the certificates will not be binding" and the Funds will be able to pursue the restitutionary claims in the U.S.

[23] The Respondents submitted that the Liquidators:

> ... intend to pursue the common law restitution claims in the US Proceedings on the basis that the documents of [NAV] which the Privy Council held to be certificates, but which are only binding if issued in good faith, were not issued in good faith because Citco acted with reckless indifference in issuing them.[9]

[24] They submit that even if the sums redeemed were contractually due to the redeemers, the allegations of a preference or undervalue transaction are not affected.

[25] The Respondents state, as noted above, that the Liquidators, before resuming the U.S. Proceedings, will seek the sanction of this Court (on an ex parte application, in the usual manner). However, they submit that this Court should give sanction unless the proposed proceedings are vexatious or oppressive[10], and that sanction is only needed to ensure the Liquidators recover their costs.

SECTION 273 STANDING AND JURISDICTION ISSUE

[26] As set out above, the Respondents submit that the Applicants lack standing under Section 273 of the Act.

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[9] Respondents' Skeleton, paragraph 63.

[10] Lloyd-Owen v Bull [1936] 4 DLR 273 (PC) where the Privy Council stated "A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success: where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive." The Privy Council held that the judge's giving of notification to the defendants to the proposed action, and permitting them to file evidence and conduct "what approached as near to a preliminary trial of the proposed action as they could make it", was inappropriate.

[27] The corollary to the question of standing under Section 273 is when this Court has jurisdiction to intervene to review "an act, omission or decision of an office holder" and to consider whether to "confirm, reverse or modify" it. The section permits (gives standing to) a "person aggrieved" to raise with the Court the matter about which the person is aggrieved and then empowers this Court with a discretion to "confirm, reverse or modify the act, omission or decision of the office holder." The office holder is, after all, an officer of this Court.

[28] While much of the jurisprudence cited by the parties focused on who is an aggrieved person[11], key court decisions imply that situations in which the Court can intervene inform when a person has standing and may be considered a person aggrieved.

A. Broader Context for Assessing Section 273 Standing and Jurisdiction.

[29] Before turning to the authorities, and the specifics of Section 273, it may be helpful to put the Section 273 standing and jurisdiction question in the broader context.

[30] Generally speaking, the scheme of the Act, as interpreted in the jurisprudence, sets out the role of the court in at least three categories. The Act mandates what a court must do in certain circumstances, it gives a broad discretion in a second category of circumstances, and it gives the court a limited role in a third category of circumstances. (If there are other categories, they are not material for the purposes of this contextual analysis of Section 273.)

[31] There are some fundamental illustrations of these categories.

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[11] While the Applicants cited authorities on the meaning given to "aggrieved person" in other contexts, and while the Court accepts the value of a broad reading of words conferring standing in remedial provisions, the words must be considered in the context of the statute in question, which is a basic principle of statutory construction. In that regard, the words in the judgment in Sevenoaks Urban District Council v Twynam [1929] 2 K.B. 440 (Divisional Court) are enlightening and applicable: "Is it true to say that in these circumstances and with the meaning of this part of this statute this respondent was a 'person ... aggrieved'? Now undoubtedly those words, 'a person aggrieved,' have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decision of contradictory import. But as been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

[32] Before an office holder is appointed the court must set aside a statutory demand in certain circumstances and may set it aside in other circumstances (Section 157). There are broad Court discretions when interim relief is sought (Section 170), on the hearing of an application for the appointment of a liquidator (Section 167), with respect to the appointment of a liquidator (Section 162), and in relation to the termination of a liquidation (Section 233).

[33] However, when it comes to granting sanction (ex parte) to an office holder or to reviewing remuneration applications by an office holder, the court's role is limited.

[34] The court's role also is limited in reviewing a liquidator's business/commercial (practical) decisions on valuing, realizing and disposing of assets, which have been termed "administrative" powers.[12]

[35] The latter point was expressed as follows by the English Court of Appeal in Mitchell and another v Buckingham International plc (in liq) and others, Re Buckingham International plc (No 2) ("**Buckingham 2**")[13], a judgment (along with a prior judgment of the Court of Appeal in the same matter, Mitchell & Anor v Carter and Anor ("**Buckingham 1**")[14]), upon which considerable weight was placed by the Applicants:

> When liquidators are exercising their administrative powers to realize assets, the court will be very slow to substitute its judgment for the liquidators' on what is essentially a businessman's decision (see Re Edennote Ltd, Tottenham Hotspur plc v Ryman [1996] 2 BCLC 389 at 394).[15]

[36] This is so even though the responsibility of the liquidator for collecting assets and implementing the statutory scheme for distribution among creditors and members of the company is subject to the ultimate control of the court, and even though the

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[12] Leon v York-o-Matic Ltd [1966] 1 WLR 1450 (Ch); Re Edennote Ltd ("**Edennote**") [1995] BCC 389 (Ch) and [1996] BCC 718 (CA).
[13] [1998] 2 BCLC 369 (Ch. Div. and CA) at 391 lines f-g (CA per Lord Bingham CJ, Judge and Robert Walker LLJ, affirming judgment of Harman J, leave to appeal to House of Lords refused).
[14] [1997] BCC 907 (CA per Leggatt, Millett and Aldous L.JJ.), reversing Re Buckingham International plc. [1997] BCC 71 (Ch (Companies Court) per Blackburne J).
[15] Buckingham 2, page 391, lines f-g.

court has powers to enable (assist) the liquidator, as an officer of the court, to get in and realize for the benefit of all creditors all assets of the company.[16]

[37] The authorities cited on these Applications make clear, and the Applicants and Respondents accepted, that the court does not have the power to intervene in administrative matters for which an office holder is responsible.

[38] The Applicants assert that there are authorities that take a more liberal approach to standing under Section 273 (or its equivalent in other jurisdictions) than other authorities cited, focusing on the person needing to have a "genuine grievance".[17] They say that the authorities' real focus is precluding officious interference in the conduct of a liquidation and denying an audience to "mere busybodies" and they are not "mere busybodies".

[39] The difficult question is when a court has jurisdiction to and may intervene, and when an applicant has standing and a legitimate interest to seek relief under Section 273.

B. When Court Has Jurisdiction to and may Intervene, and Applicant Has Standing and a Legitimate Interest, under Section 273.

[40] Consideration of when a court has jurisdiction to and may intervene, and when an applicant has standing and a legitimate interest to seek relief, under Section 273 could begin with Deloitte[18].

[41] Deloitte involved an application by defendants to proceedings being brought by liquidators in the Cayman Islands to remove the liquidators or to preclude them from bringing proceedings against the defendant due to an alleged conflict.

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[16] Buckingham 1, page 912, lines d-f.
[17] Attorney-General of the Gambia v N'Jie [1961] AC 617 at 634; Cook v Southend-on-Sea Borough Council [1990] 2 QB 1 (CA).
[18] See footnote 4.

[42] The relevant statutory provision, unlike in the case of Section 273 of the Act, did not specify who may apply.[19] The Privy Council concluded that accordingly the defendants-applicants "do not lack a statutory qualification to invoke the section."[20]

[43] The Privy Council held that questions of standing can arise in two different kinds of case. When a court is asked to exercise a power conferred by statute, the applicant must be qualified by the statute to make the application (as it held was the situation in the case before it). However when a court is asked to exercise a statutory power or its inherent jurisdiction, "it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint." The Privy Council continued:

> It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.
>
> Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellants submit, that he 'has an interest in making the application or may be affected by its outcome'. It means that he has a legitimate interest *in the relief sought*.
>
> ...
>
> The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. [emphasis in the judgment][21]

[44] The Privy Council held that the appellants did not lack a statutory qualification to invoke the section of the legislation but the question remained whether they had a legitimate interest in the relief sought. They did not have a legitimate interest in

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[19] The Cayman Islands Companies Law (1995 Revision), Section 106(1), provided: "Any official liquidator may resign or be removed by the court on due cause shown; ...", as quoted in Deloitte, page 995, lines C-D.
[20] Deloitte, page 997, lines E-F.
[21] Deloitte, page 997, lines C-E.

having the liquidators removed. The appellants were not merely strangers to the liquidation; their interests were adverse to the liquidation and the interests of the creditors. While the court has inherent jurisdiction to control the conduct of its own officers, it did not follow that the appellants were proper persons to invoke that jurisdiction.

[45] In Buckingham 1 and Buckingham 2, the issue was one of competing creditor claims and priorities[22]. The English Court of Appeal in Buckingham drew a distinction as follows:

> In this case, by contrast, when the provisional liquidators launched their s. 304 petition [in the U.S., aimed at bringing certain assets into the estate rather than allowing those assets to go to a particular creditor], they did so for the same purpose as they might (in times when there was a lower level of comity in cross-border insolvency) have sought an anti-suit (or anti-execution) injunction from the English court [that is, to bring the assets into the estate rather than have them go to one creditor]... That is eminently a matter for the Companies Court, or for liquidators acting under the control of the Companies Court. It is not a matter for the liquidators to decide at their own discretion in the way in which they might take decisions as to the disposal of their company's assets.[23]

[46] In other words, what the court was doing was assisting the liquidators to realize assets for the body of creditors of the estate but reserving to itself the determination of competing claims and priorities.

[47] It also was made clear by Aldous LJ in Buckingham 1 that the court has jurisdiction over a liquidator and the power to act to prevent "an act which would not be lawful"[24]. By "not be lawful", he appears to have meant that it would not accord with the law's scheme of priorities and competing claims in a liquidation, as opposed to being, for example, criminal.

[48] In that regard, Aldous LJ stated as follows:

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[22] Buckingham 1, page 912, lines c-d; Buckingham 2, page 391, lines d-f.
[23] Buckingham 2, page 391, lines h-i.
[24] page 911, lines g-h (per Aldous LJ).

Thus, if the court should decide that the liquidators were not entitled to any sum which would be awarded by the US court, the court could prevent the liquidators from pursuing the proceedings and seeking to recover that sum.[25]

[49] The Applicants rely on the door having been left somewhat open to standing and ascertaining who is a "person aggrieved" by the judgment of Peter Gibson LJ in Mahomed v Morris ("**Mahomed**") where he stated as follows:

> In general I respectfully agree with the sentence which I have cited from *Edennote* ["In the latter capacity alone [applicants were both unsecured creditors and persons denied an opportunity to purchase an asset of the company], like any other outsider to the liquidation, they would not have had the locus standi to apply under s. 168(5)."]. It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of s. 168(5). However, I would accept that someone, like the landlord in *Hans Place Ltd*, who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power, can utilize s. 168(5). It may be that other persons can properly bring themselves within the subsection. But the mere fact that the act or decision is that of a liquidator in respect of an asset of the company the proceeds of which would be available for unsecured creditors is not enough, as can be seen from the example of the persons denied an opportunity to buy an asset of the company from the liquidators in *Edennote*.[26]

[50] Peter Gibson LJ also referred to a decision of Laddie J in Hamilton v Official Receiver[27] in which a contributory sought the assignment to him, for value, of a claim which the liquidator did not intend to pursue and the liquidator was ordered to assign it. He continued:

> The judgment is silent as to the capacity in which the applicant was allowed relief under s. 168(5) and it does not appear that his attention was drawn to *Re Edennote Ltd.* In my judgment the decision can be supported on the same basis that *Edennote* was decided.

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[25] Buckingham 1, page 911, lines g-h (per Aldous LJ) [which Mr. Moss drew to this Court's attention, having had his submission of "no jurisdiction" rejected by the Court of Appeal in Buckingham 1].
[26] [2001] BCC 233 (CA per Peter Gibson and Schiemann L.JJ and Wilson J), at page 240 paragraph 26.
[27] [1998] BPIR 602.

[51] In summary, if there is an established basis for an applicant to have standing, or a legitimate interest, under Section 273 – and for the Court to have jurisdiction which it may exercise – when the applicant's true complaint is not in the usual capacity of a creditor or contributory (even if the applicant is a creditor or contributory and can use that capacity as a basis of asserting standing – to get a 'foot in the door', so to speak), that basis appears to be where the act, omission or decision of the liquidator involves not an administrative (business/commercial) matter but a matter that has one or more of the following characteristics (which may sometimes be overlapping characteristics):

a) a legal issue, such as the determination of competing claims and priorities (as in Buckingham 1 and Buckingham 2);

b) a matter that it is not for the liquidators to decide at their own discretion; and/or

c) the exercise of a power given specifically to liquidators where the applicant could have no other recourse, remedy or right to challenge the substantive consequence of the act, omission or decision (which may mean the act, omission or decision itself if that is the final substantive consequence).

[52] Moreover, as Mahomed indicates, it may be that persons affected by other acts, omissions or decisions with generally speaking comparable characteristics can properly bring themselves within Section 273.

[53] However, in any event and importantly, the applicant must have a legitimate interest in the relief sought. It is not sufficient that the applicant has an interest in making the application or may be affected by the outcome.

C. Do Applicants Have Standing and a Legitimate Interest, and Does Court have Jurisdiction which it may Exercise in this Case?

[54] The Applicants submit that they are not "mere busybodies" but "aggrieved persons"[28] with a genuine grievance, and persons "directly affected by the exercise of a power given specifically to liquidators"[29].

[55] In that regard, while they point to their situation as defendants in the U.S. Proceedings, they say that they have standing to bring, and a legitimate interest in bringing, their Section 273 applications; and that this Court has jurisdiction which it may exercise in regard to their Section 273 applications.

[56] The Applicants submit that in this case the decision of the Liquidators to pursue the U.S. Proceedings is dependent on legal considerations, and as such the Court has a greater role.

[57] The Applicants submit that the following four legal considerations (which in some cases are inter-related) exist and are relevant to their standing and legitimate interest:

- first, whether it is permissible for the Respondents, having argued that their claims for restitution are governed by BVI laws and having pursued their claims in this jurisdiction and lost, to continue to assert what they say are the same causes of action in the U.S. [The substance of this consideration is discussed below in the part "Section 273 Relief Issue" under "*First Consideration: Restitutionary Claims Should Not Be Pursued in U.S.*"];
- second, whether as a matter of public policy claims by the Liquidators raising issues involving the Act, and hence BVI law, should be brought in this jurisdiction [The substance of this consideration is discussed below in the part "Section 273 Relief Issue" under "*Second Consideration: BVI Insolvency Act Claims Should Be Brought in this Jurisdiction*"];

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[28] Edennote, pages 721-722.
[29] Mahomed & Anor v Morris & Ors. ("**Mahomed**") [2001] BCC 233 (CA).

- third, whether any court other than the BVI court can grant relief under Section 249 of the Act setting aside and avoiding the payments [The substance of this consideration is discussed below in the part "Section 273 Relief Issue" under "*Third Consideration: U.S. Bankruptcy Court Cannot Grant Section 249 Relief*"]; and
- fourth, whether the BVI Insolvency Act Claims are bound to fail [The substance of this consideration is discussed below in the part "Section 273 Relief Issue" under "*Fourth Consideration: BVI Insolvency Act Claims Bound to Fail*"].

[58] However, these types of legal considerations are not legal issues such as the determination by the liquidators of competing claims and priorities. These are legal issues that arise in the U.S. Proceedings themselves, not in the decision of the Liquidators to bring the U.S. Proceedings, and initially can be determined by the U.S. Bankruptcy Court if it determines to do so.

[59] Further, the Applicants do not submit that they have no other recourse, remedy or right to challenge on a preliminary basis the substantive consequence of the act, omission or decision (that is, to challenge on a preliminary basis the Liquidators' claims brought in the U.S. Proceedings, whether on inconvenient forum grounds; on issue estoppel, res judicata, abuse of process and/or other comparable doctrines to prevent abuse; or otherwise).

[60] Rather, they submit that they have no other means of obtaining a review in this jurisdiction, under BVI law, of the exercise by the Liquidators of their powers to bring the U.S. Proceedings (being the "act, omission or decision" on which they are focused). But that is different than having no other remedy at all for the substantive concern of the person claiming to be "aggrieved by the act, omission or decision".

[61] The Respondents accept that there may be situations where a person would have no other remedy and there could be a "denial of natural justice"[30]. However, they are quick to submit that the Applicants are not in that situation as they have remedies in the U.S. Proceedings (to dispute jurisdiction; to seek an early dismissal of unmeritorious claims). Presumably the Applicants also may raise in the U.S. Proceedings issue estoppel, res judicata, abuse of process and/or other comparable doctrines to prevent abuse if the Liquidators seek to litigate claims or facts that have been or appropriately could have been determined elsewhere in other proceedings.

[62] The U.S. Bankruptcy Court may determine that there is nothing left of any form of restitutionary claims or that whatever is left is for the determination of this Court given the fact and history of, and judicial admissions and determinations in, the BVI Proceedings, the governing law of the Articles of Association, and other factors it deems legally and factually relevant under its mandate to make preliminary determinations.

[63] And with respect to the BVI Insolvency Act Claims, the U.S. Bankruptcy Court may determine, based on considerations elsewhere in this Judgment, and other factors it considers legally and factually relevant under its mandate to make preliminary determinations, that they should be determined in this jurisdiction and any remedy granted by this Court.

[64] The Applicants counter that the remedies in the U.S. Proceedings are not a review by this Court of the exercise of the Liquidators' powers to bring the U.S. Proceedings in the first place. However, that does not seem to be the relevant point: they have remedies in the U.S. Proceedings in respect of the substance of what the Liquidators are doing.

[65] The Applicants also point out that in the U.S. Proceedings they will have substantial irrecoverable expenditures on legal costs, even if successful,

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[30] Re Hans Place Ltd ("**Hans Place**") [1992] BCC 737; PriceWaterhouseCoopers v Saad Investment Company Limited [2014] UKPC 35

presumably on the basis that the U.S. Proceedings are not subject to "loser pay" rules as would be the case in the Virgin Islands.

[66] Accepting that is the case, it does not mean that the Applicants do not have remedies but rather that there are differences in the remedies available and the remedies sought on these Applications. Those differences are not sufficient to be able to say that the Applicants lack remedies.

[67] The Respondents submit that the Applicants' interest can be only as former members of the Funds who are defendants in proceedings brought by the Liquidators and are seeking to prevent claims from being pursued against them as debtors of the Funds. This, they submit, is not a legitimate interest in terms of standing to seek relief pursuant to Section 273.

[68] While it does appear to be the case that the Applicants are motivated by a desire to cut off the Liquidators' claims against them in the U.S. Proceedings, they would appear to have some contingent interest in the ultimate distributions as they would have some entitlement in the ultimate distribution if there are successful claims against them for recovery of their redemption proceeds in the U.S. Proceedings or otherwise.

[69] However, that is not the basis upon which they apply – none of their submissions focus on a detriment to the estates or their positions as contingent interested persons – rather their submissions are focused on them not being subjected to the U.S. Proceedings.

[70] In any event it is questionable whether their contingent interests are not so remote and overwhelmed economically by their contradictory interests as defendants in the U.S. Proceedings as to leave them, as a matter of realism, largely (if not entirely) in the litigation defendant category.

[71] The Applicants' interest as former members of the Funds who are defendants in proceedings brought by the Liquidators does not give them a legitimate interest upon which this Court may act to grant relief.

[72] Accordingly, the Applications for Section 273 relief should be dismissed on the basis that Applicants do not have standing, and in any event do not have a legitimate interest, and as a result this Court does not have jurisdiction which it may exercise to grant Section 273 relief.

SECTION 273 RELIEF ISSUE

[73] As set out above, the Respondents submit that even if the Applicants have standing under Section 273 of the Act (and assuming they have a legitimate interest), they cannot meet the test for the exercise by the Court of its Section 273 power as the Liquidators' actions are not "so utterly unreasonable and absurd that no reasonable man would have done it".[31]

[74] In the event this Court is wrong in its conclusion that Applicants do not have standing, and in any event do not have a legitimate interest, and as a result this Court does [32]have jurisdiction which it may exercise to grant Section 273 relief, the question of whether Section 273 relief should be granted will be considered.

[75] The Respondents point out that the U.S. Proceedings were brought pursuant to legal advice and with the support of unconflicted members of the Liquidation Committee[33] and the sanction of this Court, and are for the purpose of recovering assets for the benefit of victims of the Madoff fraud.

[76] The essence of the Respondents' submissions is that the Court's role is not to second-guess a liquidator's decisions taken to bring in assets for an insolvent estate. Section 273 is not for a court to question whether a liquidator has chosen the best approach but rather it is to prevent a liquidator from taking steps that are "so manifestly absurd or perverse that they fall completely outside the permissible range of options". The authorities cited in support of this position yield other articulations of the test such as "affected by mala fides" or "so perverse that no reasonable

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[31] Edennote, page 722, lines B-D.

[32]

[33] A relevant factor: Mahomed (CA).

liquidator could have arrived at it"[34]; "so utterly unreasonable and absurd that no reasonable man would have done it".[35]

[77] The Respondents accepted that it would be mala fides and would meet the test for this Court's intervention if a liquidator were bringing unmeritorious (hopeless) court proceedings as a hardball tactic just to pressure the defendant into a settlement. However, that was not really the Applicants' contention despite the Applicants submitting, as set out in this Judgment, that the Respondents' claims are bound to fail.

[78] In a situation where a liquidator states (without waiving privilege) that he or she has an accepted legal opinion of there being sufficient merit to justify the bringing of a claim, it seems that it would be virtually impossible, in the absence of highly compelling contradictory factual evidence, for a court on a preliminary review of the merits to conclude that such motivation was the sole or primary motive.

[79] The substance of the four legal considerations that the Applicants raised in support of their submission that they have standing and a legitimate interest, and that this Court has jurisdiction which it may exercise, are the focus of the Applicants' submissions that the Liquidators bringing of the U.S. Proceedings meets the test for the exercise by the Court of its Section 273 power to grant relief, as articulated in the above paragraphs. In effect they submit that the Liquidators' decision to bring the U.S. Proceedings is "so manifestly absurd or perverse that [it falls] completely outside the permissible range of options"; "so perverse that no reasonable liquidator could have arrived at it"; "so utterly unreasonable and absurd that no reasonable man would have done it".

[80] The merits of the following four legal considerations (which considerations were listed earlier in this Judgment and which in some cases are inter-related) are asserted by the Applicants in respect of the Section 273 Relief Issue:

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[34] Re Hans Place Ltd at p. 745H-746A.
[35] Edennote at p.722, lines B-D.

- first, whether it is permissible for the Respondents, having argued that their claims for restitution are governed by BVI laws and having pursued their claims in this jurisdiction and lost, to continue to assert what they say are the same causes of action in the U.S. [This consideration is discussed below under "*First Consideration: Restitutionary Claims Should Not Be Pursued in U.S.*"];
- second, whether as a matter of public policy, claims by the Liquidators raising issues involving the Act, and hence BVI law, should be brought in this jurisdiction [This consideration is discussed below under "*Second Consideration: BVI Insolvency Act Claims Should Be Brought in this Jurisdiction*"];
- third, whether any court other than the BVI court can grant relief under Section 249 of the Act setting aside and avoiding the payments [This consideration is discussed below under "*Third Consideration: U.S. Bankruptcy Court Cannot Grant Section 249 Relief*"]; and
- fourth, whether the BVI Insolvency Act Claims are bound to fail [This consideration is discussed below under *"Fourth Consideration: BVI Insolvency Act Claims Bound to Fail*"].

[81] **First Consideration: Restitutionary Claims Should Not Be Pursued in U.S.** The Applicants raise the following two reasons under this consideration:

a) that the restitutionary claims are subject to BVI law under which they are bound to fail and the Liquidators should not be allowed to pursue equivalent causes of action and seek an opposite and inconsistent result in the U.S.; and

b) that the restitutionary claims ought not to be pursued in the U.S. because the BVI Insolvency Act Claims cannot be pursued there and all claims should be brought in the same proceedings.

[82] Respecting the first of the two reasons, the Applicants submit that the restitutionary claims are subject to BVI law and that the Respondents have

judicially admitted that is the case by bringing and pursuing the BVI Proceedings, asserting to this Court that restitutionary claims are governed by the Articles of Association, which means BVI law. Throughout the BVI Proceedings the parties treated the case as governed entirely by BVI law. The main contractual claim of the Respondents in the U.S. Proceedings, if such claim is available to be pursued, appears necessarily grounded in the meaning of "given in good faith" in the Articles of Association, which are governed by BVI law.

[83] According to the Applicants, an attempt to raise a belatedly discovered New York law provision in subscription agreements that may apply (according to the Respondents, at least in some instances) was rejected by the Privy Council.[36]

[84] The Applicants further submit that the New York jurisdiction clauses in many (but not necessarily all) of the subscription agreements do not apply. By their terms they would only apply to proceedings "with respect to this Agreement and the Fund", and neither the restitutionary claims nor the BVI Insolvency Act Claims are with respect to the subscription agreements (as noted above, and by the Privy Council, the Articles of Association which are governed by BVI law give rise to the redemption payment obligation). However, the Applicants acknowledge that the Respondents contend for a broader meaning of "with respect to", and that is a New York law issue. Also the Applicants submit that the jurisdiction clause provides for submission to the jurisdiction of the New York courts, not the US Bankruptcy Court, which is a Federal Court of the United States.

[85] Similar to their position on governing law, the Applicants submit that Sentry submitted to this Court in the BVI Proceedings, in order to establish this Court's jurisdiction, that the restitutionary claims being brought were not in respect of the subscription agreements. They submit that it would be abusive and vexatious to now assert that jurisdiction can be founded in New York on the basis that the restitutionary claims are made "with respect to" the subscription agreements.

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[36] Privy Council Judgment, paragraphs 17 and 20.

[86] This Court may consider, as may the US Bankruptcy Court, that the Respondents put their stake in the ground on their restitutionary claims, both in respect of governing law and the applicable jurisdiction, and must live with the outcome of their restitutionary claims under BVI law already determined by the Privy Council in the BVI Proceedings, which of course is not the outcome they sought in the BVI Proceedings.

[87] However, as compelling as these submissions are to this Court, in light of the commencement of the U.S. Proceedings, it is for the U.S. Bankruptcy Court to assess whether there is any scope remaining for the Respondents to pursue claims in the U.S. Proceedings that were or could have been brought in the BVI Proceedings, were determined by the outcome of the BVI Proceedings or should more appropriately be brought in the Territory of the Virgin Islands, including but not limited to the fact that they are or may be under BVI law and the judicial admissions of the Respondents on governing law and the applicable jurisdiction.

[88] To the extent issues with respect to the subscription agreements arise in relation to jurisdiction, governing law or the relevance of the subscription agreements at all, if they do, the U.S. Bankruptcy Court appears to be better positioned than this Court to determine them (and for comparable reasons to why this Court considers it may be better positioned to determine issues of BVI law).

[89] Presumably the U.S. Bankruptcy Court will consider and as applicable apply, with considerable diligence and care, all available considerations of issue estoppel, res judicata, abuse of process and/or other comparable doctrines to prevent abuse, if it considers that they may be engaged, and will consider, if and when the issues are presented to it, whether the restitutionary claims in the US Proceedings can be brought and maintained at all, and if so, whether the U.S., and the U.S. Bankruptcy Court, is the appropriate and convenient forum for the determination of such claims (including in light of the second reason discussed below).

[90] The second of the two reasons advanced for the Applicants' submission that the restitutionary claims ought not to be pursued in the U.S. is that the BVI Insolvency

Act Claims cannot be pursued there (which the Applicants raise as in their Second and Third Considerations, discussed below), and all claims should be brought in the same proceedings.

[91] This Court agrees that ideally all claims by the Respondents against the Applicants should be brought in the same jurisdiction, ideally in the same proceedings, unless "fragmentation is imperative", as to do otherwise ordinarily would be "inefficient and impractical".

[92] However, there may be sufficient reason at this stage that the U.S. Proceedings are a better platform for determination of any restitutionary claims, if notwithstanding the considerations above, the U.S. Bankruptcy Court determines that there are restitutionary claims that can be pursued in the U.S. Proceedings and it is determined that the BVI Insolvency Claims should be pursued or must be pursued in the Territory of the Virgin Islands. In other words, it may turn out that fragmentation is imperative.

[93] Is that conclusion changed by the existence of the BVI Insolvency Act Claims, and the compelling submission that this is the jurisdiction for the determination of those statutory claims? If the U.S. Bankruptcy Court is going to determine any restitutionary claims against the Respondents, is it in a better or as good a position to determine the factual and legal issues in the BVI Insolvency Act Claims?

[94] As discussed below, it cannot be that the U.S. Bankruptcy Court is in as good or a better position to determine the legal issues in the BVI Insolvency Act Claims as those are under BVI law, just as it cannot be that this Court is in a better position than the U.S. Bankruptcy Court to determine New York law issues.

[95] The U.S. Bankruptcy Court may or may not be in a better position to determine the factual issues although it is difficult to see, at least on what is available on these Applications, that the BVI Insolvency Act Claims depend sufficiently on the same, similar or aligned factual determinations that may need to be made to determine any restitutionary claims that continue in the U.S. Proceedings.

[96] Also, it is difficult to see (as discussed in the part below "Third Consideration: U.S. Bankruptcy Court Cannot Grant Section 249 Relief") from a Territory of the Virgin Islands perspective that the U.S. Bankruptcy Court could grant the statutory relief that Section 249 of the Act empowers this Court to grant. Whether it could grant comparable or other sufficient and appropriate relief is for it to determine.

[97] For this question to be determined, logically and as a matter of 'good order', it seems that the U.S. Bankruptcy Court, if it can do so and chooses to do so, should (from this Court's perspective) determine:

- first which, if any, restitutionary claims in the U.S. Proceedings it can and is going to entertain (despite all of the submissions of the Applicants which may be made why it cannot and should not, including on inconvenient forum grounds; on issue estoppel, res judicata, abuse of process and/or other comparable doctrines to prevent abuse; on judicial admissions made in the BVI Proceedings; or otherwise), and
- second if it is going to entertain any of the restitutionary claims in the U.S. Proceedings, whether it can and chooses to entertain any of the BVI Insolvency Act Claims, including whether there are sufficient of the same, similar or aligned factual determinations that need to be made in the restitutionary claims that are necessary or desirable for the BVI Insolvency Act Claims, and whether to leave it to this Court to deal with the BVI Insolvency Act Claims in their entirety, or to deal with those claims based on certain factual determinations that will likely need to be made in the U.S. Proceedings.

[98] While of course this Court cannot ask the U.S. Bankruptcy Court to proceed in any particular manner, if indeed the manner suggested is even open to it, it is more orderly and logical that this Court leave it to the U.S. Bankruptcy Court to make such determinations first in that regard as it considers appropriate and just and consistent with applicable conflict of laws principles.

[99] **Second Consideration: BVI Insolvency Act Claims Should Be Brought in this Jurisdiction.** The Applicants submit that as a matter of public policy claims by the Liquidators raising issues involving the Act, namely the BVI Insolvency Act Claims, should be brought in this jurisdiction, and that business people would expect that such claims would be brought in this jurisdiction.

[100] Issues of BVI law would be more easily and appropriately resolved by this Court than by the U.S. Bankruptcy Court relying on expert evidence of BVI law, they say.

[101] They point by way of examples to a number of issues of BVI law that will need to be resolved.

[102] First, there will be an issue of whether a redemption payment is a "transaction" within the meaning of the Act (Sections 245 and 246) or whether it is "merely part of, or a consequence of, a redemption transaction into which the Fund entered at an earlier stage".

[103] Second, if it was a "transaction", there will be an issue whether the transaction was an "insolvency transaction" (Section 244(2)-(3)). The Applicants submit that that issue raises three questions of BVI law.

[104] Third, under Section 244(1), there will be an issue of the date on which the vulnerability period begins, which in turn is based on whether the impugned transaction was with a "connected person" and the Liquidators have pleaded that the transaction were with connected persons, the Applicants being members of the Funds.

[105] Fourth, there will be an issue whether the Applicants were "creditors" of the Funds for the purposes of Section 245(1); the scope and application of Sections 245(2) and 246(2); the identification for the purposes of Section 246(1)(b) of the consideration for which the Funds entered into the redemption transactions; and the correct approach to the valuation of that consideration.

[106] The Applicants submit that it is generally better that questions of law be decided by courts of the jurisdiction of the law in issue.

[107] If the issues of BVI law are determined in the U.S. Proceedings, the Applicants (and indeed the Respondents) will be deprived of appeal rights to the Court of Appeal and ultimately to the Privy Council, and the courts of this jurisdiction will have been deprived of the opportunity to determine those legal issues.

[108] They submit that the BVI Insolvency Act Claims are extensively dependent on issues of BVI law, with which this Court and the courts to which appeals from this Court proceed, will be more familiar than the U.S. Bankruptcy Court and the courts to which appeals from it proceed, and that it is important for the development of the BVI as an international commercial centre that this Court is seen to ensure that BVI law is strictly followed in BVI insolvency matters and if there are to be appeals, it is preferable that they be heard by the appellate courts of this jurisdiction.

[109] In essence the Respondents submit that the Applicants over-state each of the alleged reasons why the U.S. Bankruptcy Court cannot determine the BVI Insolvency Act Claims.

[110] As articulated in dealing with the First Consideration, it cannot be that the U.S. Bankruptcy Court is in as good or a better position to determine the legal issues in the BVI Insolvency Act Claims as those are under BVI law, just as it cannot be that this Court is in a better position than the U.S. Bankruptcy Court to determine New York law issues.

[111] The U.S. Bankruptcy Court may or may not be in a better position to determine the factual issues although it is difficult to see, at least on what is available on these Applications, that the BVI Insolvency Act Claims depend sufficiently on the same, similar or aligned factual determinations that may need to be made to determine any restitutionary claims that continue in the U.S. Proceedings.

[112] Also, it is difficult to see (as discussed in the section below "Third Consideration: U.S. Bankruptcy Court Cannot Grant Section 249 Relief") that the U.S. Bankruptcy Court could grant statutory relief that this Court may grant under Section 249 of the Act.

[113] However, as set out above in dealing with the First Consideration, logically and as a matter of 'good order', it seems that the U.S. Bankruptcy Court, if it can do so and chooses to do so, should (from this Court's perspective) determine:

- first which, if any, restitutionary claims in the U.S. Proceedings it can and is going to entertain (despite all of the submissions of the Applicants which may be made why it cannot and should not, including on inconvenient forum grounds; on issue estoppel, res judicata, abuse of process and/or other comparable doctrines to prevent abuse; on judicial admissions made in the BVI Proceedings; or otherwise), and
- second if it is going to entertain any of the restitutionary claims in U.S. Proceedings, whether it can and chooses to entertain any of the BVI Insolvency Act Claims, including whether there are sufficient of the same, similar or aligned factual determinations that need to be made in the restitutionary claims that are necessary or desirable for the BVI Insolvency Act Claims, and whether to leave it to this Court to deal with the BVI Insolvency Act Claims in their entirety, or to deal with those claims based on certain factual determinations that will likely need to be made in the U.S. Proceedings.

[114] In doing so, the U.S. Bankruptcy Court may choose to have regard to the extent of BVI law involved in the BVI Insolvency Act Claims, whether it considers it is able to grant relief under Section 249 of the Act, or in some other manner, and the other factors advanced by the Applicants (assuming those factors are advanced to the U.S. Bankruptcy Court).

[115] While, as stated above, of course this Court cannot ask the U.S. Bankruptcy Court to proceed in any particular manner, if indeed the manner suggested is even open to it, it is more orderly and logical that this Court leave it to the U.S. Bankruptcy Court to make such determinations first in that regard as it considers appropriate and just and consistent with applicable conflict of laws principles.

[116] It may turn out that some "fragmentation is imperative" or the U.S. Bankruptcy Court may conclude, having regard to the extent and nature of the restitutionary claims it will entertain (if any), that fragmentation can be avoided or its consequences reduced, and the public policy considerations (of a jurisdiction's laws being determined by the courts of that jurisdiction) better served, by requiring the BVI Insolvency Act Claims to be pursued in this jurisdiction if they are going to be pursued at all.

[117] **Third Consideration: U.S. Bankruptcy Court Cannot Grant Section 249 Relief.** The Applicants raise an objection under their First Consideration that only this Court can grant statutory relief under Section 249 of the Act setting aside and avoiding the payments that the Respondents allege are unfair preferences and undervalue transactions, and that the U.S. Bankruptcy Court has no power to make a declaration or grant relief under Part VIII of the Act ("Voidable Transactions").

[118] The Applicants submit that there is no example of any U.S. court applying discretion under foreign statutory provisions. In the case of Section 249 of the Act, the discretion is given to this Court. They submit it is nonsensical to suggest that the U.S. Bankruptcy Court (or any foreign court) can exercise the statutory discretion.

[119] As stated above, it is difficult to see that whatever determinations the U.S. Bankruptcy Court could make in respect of the factual or even legal issues respecting the allegedly voidable transactions that the U.S. Bankruptcy Court could grant the statutory relief under Section 249 of the Act that this Court could grant. As noted below, however, it may consider that it can grant other comparable and effective relief.

[120] Section 249 provides that where this Court (as defined term in the Act) is satisfied that a transaction entered into by a company is a voidable transaction, this Court, on application of the office holder, may make various orders, as specified in Section 249(1)(a)-(c) and 249(2).

[121] If the U.S. Bankruptcy Court were to have jurisdiction, and see fit, to entertain the BVI Insolvency Act Claims, presumably if it has the jurisdiction to do so, it could make declaratory determinations with respect to the allegedly voidable transactions. Whether it could make any other comparable and effective types of orders remains to be determined.

[122] If the U.S. Bankruptcy Court were to make, for example, declaratory determinations, presumably the office holder (the Liquidators) would need to apply to this Court under Section 249 if they wish this Court to make any of the types of discretionary orders available under the section. Upon such an application, this Court would need to be "satisfied" that any transaction subject to such declaratory determination is a "voidable transaction" and then would need to determine the appropriate relief from the options under Section 249. What this Court would need to do to be "satisfied" remains to be determined, including the effect of the U.S. Bankruptcy Court's declaratory determination.

[123] It remains for the U.S. Bankruptcy Court to determine, if asked to do so, whether from its perspective this method of adjudicating the BVI Insolvency Act Claims is logical, practical, efficient or appropriate.

[124] If it determines it is not, then either "fragmentation is imperative", or indeed it may determine that any remaining restitutionary claims should be determined in this jurisdiction (in particular, the alleged availability and applicability of the "given in good faith" issue).

[125] **Fourth Consideration: BVI Insolvency Act Claims Bound to Fail.** The Applicants submit that the unfair preference claims and the undervalue transaction claims are bound to fail for two reasons.

[126] First, the Applicants submit that the redemptions were not "insolvency transactions", as defined in the Act.[37] The Liquidators' pleaded case is that each of the redemption payments made during a period of two years prior to the filing of

[37] Act, Section 244(1) and (2): A transaction is an insolvency transaction if (a) it is entered into at time when the company is insolvent; or (b) it causes the company to become insolvent.

the application for the appointment of a liquidator in respect of the relevant Fund constituted an insolvency transaction entered into by the Fund within the vulnerability period.

[127] The Applicants submit that a redemption payment is not a "transaction" but part of, or a consequence of, a redemption transaction into which the Fund entered at an earlier stage [38] and in any event that the redemption payments were not "insolvency transactions". They say that the Liquidators' case is that as a result of redemption payments made before the Madoff fraud was exposed, the Funds were unable to satisfy liabilities to the BLMIS Trustee arising under consent judgments entered against the Funds on 13 July 2011 pursuant to a settlement agreement made on 9 May 2011 and that although the Funds as a result notionally have substantial liabilities to the BLMIS Trustee, those liabilities either have been discharged or will become payable only if and when Fairfield has received funds with which to discharge them.

[128] In their submissions on why the BVI Insolvency Act Claims involve issues of BVI law (discussed separately in this Judgment), the Applicants say that the issue of whether the redemption payments were insolvency transactions raises three questions of BVI law, namely whether the Funds, even now, are unable to pay their debts as they fall due; assuming the funds are not so able, whether that inability had commenced at the time when the redemption payments were made; and alternatively and on the same assumption, whether the redemption payments caused the Funds now to be unable to pay their debts as they fall due.

[129] Given these submissions of the Applicants on the issues of BVI law that arise in the BVI Insolvency Act Claims, it is rather difficult to accept that this Court can now make a summary determination on these Applications that they are "bound to fail".

[130] Second, the Applicants submit, as a reason that the unfair preference claims are bound to fail, that the Applicants, as redeeming members of a company, were not

[38] Re Taylor-Sinclair (Capital) Ltd, Knights v Seymour Pierce Ellis Ltd. [2001] 2 BCLC 176.

"creditors" for the purposes of Section 245 of the Act[39], relying on Westford Special Situations Fund Ltd v Barfield Nominees Ltd.("**Westford**")[40]

[131] The submission turns on the definition of "creditor" under Section 9 of the Act that "[a] person is a creditor of another person (the debtor) if he has a claim against the debtor ... that is, or would be, an admissible claim in" a liquidation or bankruptcy of the debtor.

[132] The Applicants point out that the Liquidators have pleaded that the Applicants were creditors within that definition. The Applicants submit that based on Section 197 of the Act (which precludes a member and a past member of a company from claiming "in the liquidation of the company for a sum due to him in his character as a member") and Westford (which dealt with the meaning of creditors for the purposes of Section 162 of the Act, being the provision setting out who may apply to the court for the appointment of a liquidator), they are not "creditors".

[133] However, to succeed on that argument the Applicants acknowledge that they must distinguish or otherwise deal with the judgment in Somers Dublin Ltd. v Monarch Pointe Fund Ltd.[41] as the "two judgments are not fully reconcilable. It is therefore necessary to analyze them in order to identify the principle by which this court is bound."[42]

[134] Given the nature of the submissions of the Applicants on this second "bound to fail" reason, it too seems inappropriate for it to be decided in the context of a summary determination on these Applications.

[135] Both reasons, however, lend support to the Applicants' submissions that there are difficult issues of BVI law to be determined such that the U.S. Bankruptcy Court may conclude that the BVI Insolvency Act Claims should be determined in this jurisdiction.

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[39] Act, Section 245(1) "... a transaction entered into by a company is un unfair preference given by the company to a creditor if the transaction ...".
[40] BVIHCVAP 2010/014, 28 March 2011.
[41] BVIHCVAP 2010/040, 11 March 2013.
[42] Applicant's Skeleton Argument, paragraph 77.

[136] Accordingly, even if the Applicants have standing and a legitimate interest under Section 273 of the Act, the Applications for Section 273 relief should be dismissed on the basis that the Applicants do not meet the test for the exercise by the Court of its Section 273 power. This is so because the Liquidators' "acts, omissions or decisions" in issue are not "so utterly unreasonable and absurd that no reasonable man would have done it", "so manifestly absurd or perverse that they fall completely outside the permissible range of options" or "so perverse that no reasonable liquidator could have arrived at [them]".

ANTI-SUIT INJUNCTIONS

[137] The Applicants seek, in the alternative, anti-suit injunctions to restrain the Liquidators from pursuing the U.S. Proceedings.

[138] In support of the alternative applications, the Applicants rely on all the submissions made on their main applications.

[139] The Applicants summarize their submissions on the application of the principles for the granting of an anti-suit injunction, as set out in particular in Société Nationale Industrielle Aérospatiale v Lee Kui Jak[43], to the facts on these Applications, in the following manner.

[140] They submit that it is not in the interests of justice for the U.S. Proceedings to continue. Contrary to the submissions of the Respondents that an anti-suit injunction would not be consistent with judicial comity between this Court and the U.S. Bankruptcy Court, which is the court that should decide whether the actions before it have merit, the Applicants submit that the U.S. Bankruptcy Court has recognized that this Court has the authority to decide if the U.S. Proceedings should be allowed to continue, so there should be no concern that an anti-suit injunction would breach comity.

[141] Further the Applicants submit that if the proceedings are bound to fail, they are vexatious. It is also unjust and vexatious for foreign claims to be pursued that

[43] [1987] 1 AC 871; see also Carlyle Capital Corporation Ltd v Conway [2013] 2 Lloyd's Rep 179.

would interfere with the process of this Court or compromise the integrity of its judgments. Therefore, the Applicants submit that it is vexatious and oppressive for the restitution claims to be pursued in the U.S., and the ends of justice require that the BVI Insolvency Act Claims should be adjudicated only in this jurisdiction. Also it is vexatious for proceedings to be pursued in a foreign jurisdiction where claims based on equivalent causes of action have already been dismissed in this jurisdiction so that the pursuit of the claims is a collateral attack on the Privy Council Opinion. It is not unjust to deprive Fairfield of any advantages of litigation in the United States because the restitutionary claims are bound to fail and the BVI Insolvency Act Claims, which are also bound to fail, could properly be brought only in this jurisdiction. The ends of justice would be served by the grant of an injunction to restrain the Liquidators from continuing the U.S. Proceedings.

[142] As set out in the preceding sections of this Judgment on the main grounds of the Applications, this Court considers that it is more orderly and logical that this Court leave it to the U.S. Bankruptcy Court to make determinations first on which, if any, restitutionary claims it is going to entertain, and then whether there are sufficient of the same, similar or aligned factual determinations that may need to be made for the BVI Insolvency Act Claims, or leave it to this Court to deal with the BVI Insolvency Act Claims in their entirety.

[143] Further, this Court questions whether an appropriate means for it to be controlling the conduct of a liquidator, an officer of the court – one of its own officers – is by way of injunction. The Court has inherent jurisdiction to control the conduct of its own officers, which the Privy Council in Deloitte held "is beyond dispute".[44] Whether the inherent jurisdiction in the context of a person claiming to be "aggrieved by an act, omission or decision of an office holder" has been replaced by Section 273 of the Act need not be determined on these Applications, as even if there is inherent jurisdiction beyond Section 273 of the Act, the Applicants would not be proper persons to invoke the jurisdiction, for the same reason as they would not be proper persons to invoke the Section 273 jurisdiction if they were persons

[44] Deloitte, page 998, lines B-C.

"aggrieved by an act, omission or decision of an office holder" within the meaning of that section.

[144] Accordingly, the alternative claims for anti-suit injunctions to restrain the Liquidators from pursuing the U.S. Proceedings should be dismissed.

ORDER AND DIRECTION

[145] This Court orders that the Applications are dismissed.

[146] This Court directs that the parties shall file and exchange written submissions on costs by 4:00 pm on Wednesday 16 March 2016, following which this Court will make its order regarding the costs of the Applications.

Justice Barry Leon
Commercial Court Judge
11 March 2016