UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP CORP.,
et al.,

Defendants.
_____/

DECLARATION OF JENNIFER MICHELLE COLEGATE ON ISSUES OF RECOGNITION OF THE RECEIVER UNDER THE LAWS OF THE CAYMAN ISLANDS

I **JENNIFER MICHELLE COLEGATE** hereby declare:

1. I am over the age of 21 years and am competent to provide this Declaration in connection with the Receiver's Motion for Approval of Distribution Plan and First Interim Distribution filed by the Receiver on 28 February 2022 (**Distribution Application**).

2. I am authorised to swear this affidavit on behalf of the Receiver in reply to an opposition motion from the Joint Official Liquidators to the Distribution Application. Specifically, this Declaration addresses the ability of the Receiver to be recognised by the Grand Court of the Cayman Islands (**Grand Court**) where the Receiver is not appointed pursuant to foreign bankruptcy, insolvency or restructuring proceedings.

3. I am an Attorney-at-law and partner of the dispute resolution department of Collas Crill,(**Collas Crill**), Floor 2, Willow House, Cricket Square, PO Box 709, Grand Cayman, Cayman Islands, KY1-1107.

4. Collas Crill represents Jonathan E. Perlman, Esq., the receiver in these proceedings (the **Receiver**).

5. I was called to the Bar of England & Wales in 2006 and undertook pupillage at South Square Chambers. I subsequently practised with Mayer Brown for over 9 years in both London and Hong Kong specialising in corporate insolvency and restructuring. During this time, in 2011, I was admitted to the Roll of Solicitors of England & Wales and I have been an Attorney-at-Law of the Cayman Islands since 2016.

Jurisdiction of the Cayman Islands

6. The Court is a Court of superior jurisdiction. Decisions of the Court may be appealed to the Cayman Islands Court of Appeal (**CICA**) and thereafter to the Privy Council of the United Kingdom.

7. The Caymans Islands is a common law jurisdiction which adheres to the rule of precedent. The Court is bound by the decisions of the CICA which may be appealed to the Privy Council. Decisions of the Privy Council on cases emanating from the Cayman Islands are binding on the Court. Decisions of the Courts of England & Wales and those decisions of the Privy Council on matters that do not emanate from the Cayman Islands are persuasive before but not binding on the Court. Accordingly, the principles of the laws of the Cayman Islands addressed in this Declaration include decisions of the courts of the Cayman Islands and where appropriate decisions of the Privy Council and of the courts of England & Wales.

Jurisdiction of the Court to recognise foreign receivers

8. The Court has an inherent power at common law to recognize a receiver appointed by a foreign court. This was confirmed by the Cayman Islands' Court of Appeal (**CICA**) in *Kilderkin v Player* [1984-1985] CILR 63. A true and correct copy of *Kilderkin v Player* [1984-1985] CILR 63 is attached as Exhibit A to this Declaration. *Kilderkin* was concerned *inter alia* with the recognition application of a receiver and manager appointed by the Courts of Ontario. The receiver and manager was appointed in the context of litigation being conducted in Ontario for the purpose of locating and identifying assets within the Cayman Islands.

9. The Court had initially granted an order recognising the receiver and manager. However, that order was subsequently rescinded on a separate application to the Court. The receiver and manager appealed against the rescinding of the order of recognition. The CICA reinstated the recognition of the Ontario receiver and in doing so held that:

"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."

10. In considering the requirement that there be a *"sufficient connection"* between the company to which the receiver had been appointed and the foreign appointing court (**Sufficient Connection Test**), the CICA adopted the criteria set out in the decision of the High Court of England & Wales of *Schemmer v Property Resources Ltd* [1975] Ch 273 which provides that the Court should consider whether:

a. Has the company subject to the receivership been made a defendant to the action in the foreign court?

b. Was the company incorporated in the country where the receiver has been appointed?

c. Would the courts of the company of incorporation recognise a foreign appointed receiver?

d. Has the company carried on business in the jurisdiction of the appointment or is the seat of its central management located there?

A true and correct copy of *Schemmer v Property Resources Ltd* [1975] Ch 273 is attached as Exhibit B to this Declaration.

11. In contrast to the *Kilderkin* decision (Exhibit A), in *Schemmer* (Exhibit B) the High Court of England & Wales did not find that the Sufficient Connection Test was satisfied for the reasons that the company to which the receiver had been appointed (i) was not incorporated in the jurisdiction of the appointing court; (ii) had not submitted to the jurisdiction of the

appointing court nor was it a party to the proceedings before that court; (iii) the business of the company was not conducted in the jurisdiction of the appointing court; and (iv) there was no evidence before the court that the receiver's appointment would be recognised in the company's place of incorporation. The receiver in *Schemmer* (Exhibit B) was not a receiver and manager but a receiver appointed following the application of the United States Securities and Exchange Commission, in respect of conduct allegedly in contravention of The American Securities Exchange Act 1934 (**1934 Act**).The significance of this is addressed below see *Public Policy Precluding Recognition.*

12. *In the Matter of Silk Road M3 Ltd* (Unreported, 8 February 2018, Smellie CJ) the Chief Justice of the Cayman Islands' again applied the sufficient connection test as set out in *Kilderkin (Exhibit A)* and *Schemmer (Exhibit B)* and granted recognition to receivers appointed by the Bermuda Supreme Court to a fund that was registered and operating in Bermuda. A true and correct copy of *In the Matter of Silk Road M3 Ltd* (Unreported, 8 February 2018, Smellie CJ) is attached as Exhibit C to this Declaration. In granting the application the Chief Justice opined that the Court:

"has a common law jurisdiction to assist not only liquidation but also receivership proceedings….." and *"the scope of* [the] *Court's jurisdiction is subject to the law and public policy of the Cayman Islands in so far as* [the] *Court can only within the limits of its statutory and common law powers"* [***Re Silk Roads, paras. 65-66***].

13. In further contrast to the decision in *Schemmer (Exhibit B)* and consistent with the decision of *Kilderkin* (Exhibit A) the receivers in *Re Silk Road* (Exhibit C) were appointed on the application of a private litigant and for the purpose of recovering and identifying assets which may satisfy that litigant's claim against the fund.

14. More recently in *Seiden (in his capacity as a temporary receiver of Link Motion Inc) v Link Motion* (Unreported, Cause NO FSD 4 of 2020) Justice Ramsay-Hale opined (**paragraph 10**) that not all of the criteria set own in *Schemmer* need be met in any one case and that the Sufficient Connection Test may simply be satisfied by the company to which the receiver has been appointed (i) being incorporated in the foreign jurisdiction; or (ii) having submitted to the foreign jurisdiction. A true and correct copy of *Seiden (in his capacity as a temporary receiver of Link Motion Inc) v Link Motion* (Unreported, Cause NO FSD 4 of 2020) is attached as

Exhibit D to this Declaration. As in the decisions of *Kilderkin* (Exhibit A) and *Re Silk Road* (Exhibit C) the receiver in *Seiden* (Exhibit D) was appointed by a private litigant.

15. Both the decisions of *Seiden* (Exhibit D) and *Silk Roads* (Exhibit C) illustrate that where the Sufficient Connection Test is satisfied the Court will then go on to consider the factual matrix of the receivership to ascertain what other reasons there may be for granting recognition, such as whether the applicant is seeking to obtain wider powers from the Court than would be available to the receiver in the foreign court; if the appointing court would reciprocate the recognition now sought and, finally whether there are reasons of public policy that would prevent the Court from granting recognition (***Seiden* (Exhibit D), paragraphs 11**).

Public Policy Precluding Recognition

9 As stated above at paragraph 11, in *Schemmer* (Exhibit A) the High Court of England & Wales denied recognition to a receiver appointed on the application of the United States Securities and Exchange Commission pursuant to the 1934 Act. Recognition was primarily denied on the basis that the Sufficient Connection Test was not satisfied. However, the second ground which meant the court was unable to grant recognition to the US receiver was because the 1934 Act was a penal statute in the sense that it enforced the interests of the State and, in the absence of legislation founded on treaty, unenforceable in the United Kingdom.

10. The High Court held that the receiver was in effect a public officer with the remit to prevent the commission or continuation of offences against federal law of the US and could not be recognised by the High Court of England & Wales on the grounds of public policy (***Schemmer (Exhibit B),* page 288C-D, F-G**).

11. This limitation is a long-standing principle of conflict of laws whereby the domestic or public laws of one State may not be given effect to by the courts of another as held in *Huntington v Attrill* [1893] AC 150 (sitting as the Privy Council)) where the Board of the Privy Council opined that:

"The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they

are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country" (***Huntington, (Exhibit E) page 156***). A true and correct copy of *Huntington v Attrill* [1893] AC 150 is attached as Exhibit E to this Declaration.

12. In *Stutts v Premier Benefit Capital Trust* (1992-1993) CILR 605 the Court was asked to recognise a receiver appointed by the US Courts on the application of the SEC pursuant to the 1934 Act and the Securities Act 1933 (**1933 Act**). A true and correct copy of *Stutts v Premier Benefit Capital Trust* (1992-1993) CILR 605 is attached as Exhibit F to this Declaration. The Court noted that the question before it was whether recognising the US receiver *"would be giving effect to penal laws of the United States. It is well established that the English courts will not enforce a foreign penal law, and of course that principle will be followed in these Islands"* (***Stutts, (Exhibit F) page 608***).

12. Having considered the purposes of the relevant Acts and the powers the Court concluded that the means of redress provided by both the 1934 Act and 1933 Act through legal actions resting with the SEC being a body *"which represents that state itself"* (***Stutts, (Exhibit F) page 611***). The Court gave consideration to the purpose of both Acts and held that:

*"Both statutes have as their essential purpose the protection of the investing public and one of their primary purposes is to compensate aggrieved sellers and buyers for the losses they sustain if securities practices are not properly followed. The SEC is an independent regulatory agency created by the Congress of the United States and is charged with the primary responsibility of enforcing the two Acts. It has no authority to bring criminal prosecutions and SEC actions are commenced by civil complaint and proceed according to the Federal Rules of Civil Procedure". (**Stutts, (Exhibit F) page 609**).*

13. Addressing the disgorgement proceedings available under both Acts specifically the Court found those measurers to form part of the public law of the United States such that the SEC appointed receiver could not be granted recognition by the Court:

"In this case, the disgorgement proceedings which have been taken pursuant to the provisions of the two US Acts were in the nature of a suit in favour of the state whose law had been infringed. Notwithstanding the compensatory aspects of the proceedings, the vindication of violations of the two Acts rested with a body (the SEC) which represented the state itself. It must be concluded that the disgorgement provisions in both Acts formed part of the public law of the United States and therefore the court would not be able to recognize the receiver in this jurisdiction" (***Stutts, (Exhibit F) page 606***).

14. *Stutts* (Exhibit F) remains the leading authority in the Cayman Islands on the question of whether a receiver appointed pursuant to either the 1933 or 1934 Act can be recognised by the Court and has subsequently been considered and followed by the Court[i]. True and correct copies of these decisions are attached as Exhibit G, Exhibit H and Exhibit I to this Declaration.

Conclusion

15. The Court has the jurisdiction to recognise receivers appointed by foreign courts. This is a matter of the Court's inherent jurisdiction and common law of the Cayman Islands.

16. The jurisdiction threshold applied to determine whether a foreign receiver is capable of being recognised is whether there is a sufficient connection between the company to which the receiver is appointed, and the appointing court. This may be established by the company submitting to the jurisdiction of the appointing court or being incorporated in that jurisdiction.

17. In the event that the Sufficient Connection Test is satisfied the Court will consider if there are any other reasons which militate against a foreign receiver being recognised or where as a matter of public policy the Court cannot grant recognition.

18. With regard to the public policy of the Cayman Islands, it is an established principle that the Court is unable to recognise a foreign receiver who is appointed for the purposes of upholding the domestic laws of that foreign state, be that through criminal or civil powers. This established principle accounts for the Court's ability to grant recognition to receivers appointed by foreign courts on the application of private litigants (*see* ***Kilderkin (Exhibit A); Seiden (Exhibit D); Re Silk Road (Exhibit C)***), in contrast to receivers who are appointed on the application of state bodies (***Schemmer (Exhibit B); Stutts (Exhibit F)***).

19. In the premises the Receiver is appointed pursuant to the 1933 Act. The 1933 Act has been held by the Court to be a penal in nature with the effect that the Receiver, being appointed to uphold the powers and authority of the SEC being a pubic body of the United States, as enacted in the 1933 Act. It follows that the Court is unable as a matter of public policy to grant recognition to the Receiver.

Sworn by: _____ **JENNIFER MICHELLE COLEGATE**

Tasha Diane Eden
Notary Public in and for the Cayman Islands
My commission expires January 31st, 2023

[i] *Marada Global Corporation v Marada Corporation 1994-95 CILR 546 (considered); TMSF v Merrill Lynch [2008] CILR 267(referred to);Barclays Bank Plc v Kenton Capital Ltd 1994-95 CILR 489 (followed)*

EXHIBIT A

[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.)

14 May 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

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

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

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.

(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 re-borrow 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.

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 management 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

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 professional 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

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 Cayman 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 protagonists 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 officer 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 counter-claim, "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

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

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 B

ICLR: Chancery Division/1975/SCHEMMER AND OTHERS v. PROPERTY RESOURCES LTD. AND OTHERS [1973 S. No. 6773] - [1975] Ch. 273

[CHANCERY DIVISION]

SCHEMMER AND OTHERS v. PROPERTY RESOURCES LTD. AND OTHERS [1973 S. No. 6773]

1974 May 13, 14, 15; 24

Goulding J.

Conflict of Laws - Foreign judgment - Appointment of receiver - United States court appointing receiver of assets of company incorporated in Bahamas and not party to action - Receiver appointed under provisions of penal legislation to prevent violation of federal law - Receiver seeking appointment as receiver over assets located in United Kingdom - Whether receiver's appointment to be recognised

By proceedings brought in a district court of the United States of America under the Securities Exchange Act 1934, the Securities and Exchange Commission alleged that a number of people controlling VCL, a company incorporated in the Bahamas, were involved in fraudulent practices. VCL, although a defendant in the action, took no part in the proceedings. The judge of the district court appointed a receiver to take possession of certain assets, including all the shares and assets of another company, PRL, which was effectively controlled by VCL, and of the assets of PRL's subsidiaries. PRL, which was also incorporated in the Bahamas, was not a defendant in the American proceedings, and there was no evidence that it had carried on business in the United States of America.

The receiver, acting as directed by the district court, issued a writ in England seeking to have himself appointed receiver of the assets of PRL and its subsidiaries, located in the United Kingdom. He also sought injunctions against three banks with branches in London, which held money in the name or on behalf of PRL restraining them from transferring money otherwise than to himself as receiver. Seven shareholders of VCL were joined as plaintiffs to support the receiver in his action. Plowman J., in chambers, granted leave for service of notice of the writ on PRL out of the jurisdiction.

On a motion by PRL to discharge the order: -

Held, setting aside the order, (1) 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 to justify recognition of the foreign court's order as having effect outside the foreign jurisdiction; that on English principles of conflict of laws there was no sufficient connection between PRL and the jurisdiction of the district court (post, pp. **287E - 288A**).

Houlditch v. Marquess of Donegal (1834) 8 Bli.N.S. 301 H.L.(I.); *In re Maudslay, Sons & Field* [1900] 1 Ch.

602 and *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99 considered.

(2) That the American Securities Exchange Act of 1934 was a penal statute and, in the absence of legislation founded on treaty, unenforceable in the United Kingdom; that, whether or not a private individual could obtain a civil judgment under the Act enforceable in the United Kingdom, the receiver was in effect a public officer charged to reduce into possession money in the London branches of the banks in order to prevent the commission or continuation of offences against federal law and, in those circumstances, the receiver had no probable cause of action to support service out of the jurisdiction (post, p. **288C-D**, **F-G**).

Société Générale de Paris v. Dreyfus Brothers (1887) 37 Ch.D. 215, C.A. applied.

(3) That, assuming the seven individual plaintiffs, holding shares in VCL, could bring a minority shareholders' action to protect assets of PRL, there was nothing in the present case to indicate that they were making such a claim and, in those circumstances, it would be wrong to allow service of the writ in order to keep the action alive for any future claim that the plaintiffs might consider bringing in the United Kingdom (post, pp. **288H - 289B**, **E-F**).

The following cases are referred to in the judgment:

Foss v. Harbottle (1843) 2 Hare 461.

Houlditch v. Marquis of Donegal (1834) 8 Bli.N.S. 301, H.L.(I.).

Huntington v. Attrill [1893] A.C. 150, P.C.

Kooperman, In re [1928] W.N. 101.

Macaulay v. Guaranty Trust Co. of New York (1927) 44 T.L.R. 99.

Maudslay, Sons & Field, In re [1900] 1 Ch. 602.

North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd. (1889) 61 L.T. 716.

Société' Générale de Paris v. Dreyfus Brothers (1887) 37 Ch.D. 215, C.A.

Travers v. Holley [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794, C.A.

The following additional cases were cited in argument:

Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks (1904) 90 L.T. 733, H.L.(E.).

Emanuel v. Symon [1908] 1 K.B. 302, C.A.

Fontaine-Besson v. Parr's Banking Co. and Alliance Bank Ltd. (1895) 12 T.L.R. 121, C.A.

Heyting v. Dupont [1964] 1 W.L.R. 843; [1964] 2 All E.R. 273, C.A.

Indyka v. Indyka [1969] 1 A.C. 33; [1967] 3 W.L.R. 510; [1967] 2 All E.R. 689, H.L.(E.).

Rosler v. Hilbery [1925] Ch. 250, C.A.

Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155.

Société Coopérative Sidmetal v. Titan International Ltd. [1966] 1 Q.B. 828; [1965] 3 W.L.R. 847; [1965] 3 All E.R. 494.

Trepca Mines Ltd., In re [1960] 1 W.L.R. 1273; [1960] 3 All E.R. 304, C.A.

Motions

On September 28, 1973, the first plaintiff, John Schemmer, was appointed by the United States District Court for the Southern District of New York as receiver to take possession of a great variety of securities and assets including, inter alia, the assets of Value Capital Ltd. (VCL), a company incorporated in 1971 in the Bahamas, and of Property Resources Ltd. (PRL), a company incorporated in the Bahamas in 1972. VCL held all the common shares and approximately 22 per cent. of the class A shares in PRL, and was able, by virtue of the rights attaching to the common shares, to control the affairs of PRL, although the remaining 78 per cent. of PRL's class A shares, representing a majority of the equity capital, were held by Investment Properties International Ltd. (IPI), a Canadian company, which was in liquidation following the appointment on October 22, 1973, of a liquidator by the Supreme Court of Ontario. By later orders of the district court Mr. Schemmer was authorised to take proceedings in the United Kingdom to have himself appointed receiver of the assets in the United Kingdom of PRL and its subsidiaries, and to sue the defendant banks, David Samuel Trust Ltd., Société Générale Pour Favoriser le Developpement du Commerce et de L'Industrie en France S.A. and National Westminster Bank, in respect of money held by them in the name of or on behalf of PRL.

On December 12, 1973, Mr. Schemmer issued a writ against PRL, VCL, IPI, and the defendant banks, seeking in each case his appointment as receiver and an injunction restraining the relevant bank from transferring or concurring in or assisting in (whether directly or indirectly) the transfer of sums of money in their control otherwise than to himself, and a similar injunction against PRL, VCL and IPI. Seven shareholders in VCL, Isadore Gitterman, Sophie Yacower, Graham Watson, Elsa Murdo, David Warham, Lawrence Wilkov and Doris Topping, were subsequently added as plaintiffs and, by notice of motion dated February 12, 1974, the plaintiffs sought similar relief to that sought in Mr. Schemmer's writ.

On February 14, 1974, Plowman J. gave the plaintiffs leave to serve notice of the writ on the first three defendants, PRL, VCL and IPI, out of the jurisdiction. IPI accepted service through solicitors in England;

VCL did not enter an appearance and PRL entered a conditional appearance only.

By a notice of motion dated March 26, 1974, PRL sought, inter alia, orders (1) that the order of Plowman J., given in chambers, be discharged on the grounds (a) that it did not fall within any of the sub-paragraphs of R.S.C., Ord. 11, r. 1, (b) that the plaintiffs had no locus standi or prima facie cause of action and (c) that in all the circumstances the case was not a proper one for service out of the jurisdiction; and (2) that all further proceedings be stayed.

The facts are stated in the judgment.

Jeremiah Harman Q.C. and **Leonard Hoffmann** for PRL, the first defendants. The plaintiffs have to show that Mr. Schemmer, the receiver appointed by the American court, has a case which is likely to succeed if his averments are taken as true. The defendants say that he has no cause of action in England. The other seven plaintiffs, who are shareholders not of PRL but of VCL, itself a shareholder in PRL, merely support Mr. Schemmer in his claim. In order to sue in their own right the other seven plaintiffs, would in any case, have to show that they had a sufficient interest to have a receiver appointed and there is no reported case in which it has been held that shareholders can, on their own behalf, have a receiver of the company's assets appointed. That is the position even where the company's assets are in jeopardy, and it is a fortiori so when a petition for the winding up of the company is on foot in the Bahamas. Their proper remedy would be the appointment of a provisional liquidator in the appropriate court, which in the present instance, would be a court in the Bahamas. [Reference was made to *Dicey & Morris, Conflict of Laws*, 9th ed. (1973), rule 180, pp. 993, 998.]

The master must have accepted that the basis of Mr. Schemmer's claim was his appointment as receiver by the United States court. That court had no jurisdiction over VCL or PRL according to the English rules for the recognition of foreign judgments. [Reference was made to *Dicey & Morris, Conflict of Laws*, 9th ed., rules 3, 15, 145, at pp. 75, 79, 716 and note 41, p. 717.] Accordingly, Mr. Schemmer has no locus standi or cause of action in this court.

The position would be different if Mr. Schemmer were to get himself appointed liquidator by the Bahamian court. [Reference was made to *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99; *Société Générale de Paris v. Dreyfus Brothers* (1887) 37 Ch.D. 215; *North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd*. (1889) 61 L.T. 716 and *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks* (1904) 90 L.T. 733.]

The grounds upon which leave was granted to serve a writ out of the jurisdiction under R.S.C., Ord. 11 were nominally to restrain threatened acts within the jurisdiction, but in reality the object is to get possession of the London funds. The argument in favour of granting an injunction are specious. Mr. Schemmer says that the funds belong to PRL, and that no order would be made in the absence of PRL: see *Rosler v. Hilbery* [1925] Ch. 250. Assuming that Mr. Schemmer has a cause of action

it is not the action against the banks which is the substance of it, and therefore it is not within R.S.C., Ord. 11, r. 1.

The plaintiffs' claim must be not only within the letter but also within the spirit of R.S.C., Ord. 11: see *Rosler v. Hilbery* [1925] Ch. 250. The court should not allow the defendant banks to be sued in the English courts in

respect of what are essentially foreign claims. The injunctions sought against the banks are a mere colourable excuse for claims by foreigners against foreigners. The injunctions should be sought against the banks' customers and not against the banks: see *Fontaine-Besson v. Parr's Banking Co. and Alliance Bank Ltd*. (1895) 12 T.L.R. 121.

[GOULDING J. If one of two foreigners who had a dispute abroad was a customer of a bank in England, would not that be a reason for giving leave to serve the customer abroad in an action to restrain an act in this country?]

The foreigner would be in contempt of the foreign court. The order should be obtained there. Mr. Schemmer could sue PRL in the Bahamas and obtain an injunction there. If the English banks received an order from PRL, the foreign court could sequestrate the assets of the customer, or the Bahamian judgment could be registered and enforced here. It is wrong to say that the action against PRL is in aid of an action against persons in this country; the persons in this country (the banks) should not have been sued at all.

It is for the plaintiffs to show that they have a probable cause of action. There are two main heads of jurisdiction, namely in personam and in rem. But there are two kinds of res in contemplation, one is the place of incorporation of the company and the other is the property in respect of which the claim arises. Under neither head did the New York court have jurisdiction over the company or its assets. If this claim is the enforcement of action taken by a regulatory body in the United States then plainly the matter comes within the rule which provides that the court has no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign state, or (2) founded upon an act of state: see *Dicey & Morris, Conflict of Laws*, 9th ed., p. 75.

G. B. H. Dillon Q.C. and **J. H. L. Leckie** for the plaintiffs. Subject to certain exceptions a foreign court has jurisdiction to give a judgment in personam which is capable of enforcement or recognition in England: see *Dicey & Morris, Conflict of Laws*, 9th ed., rule 180, p. 993. The cases there discussed are cases where the English court will enforce the foreign monetary judgments directly. There are numerous other forms of judgment where no money judgment is involved which are in a different category. The English courts will often appoint a receiver in respect of assets outside its own jurisdiction leaving it to the foreign court to make it effective by its own order. Similarly an English court will confer recognition on a receiver appointed by a foreign court by appointing the foreign receiver to be receiver within the English court's jurisdiction. Such a jurisdiction should be exercised by going behind the foreign court's order, and examining the facts, not merely by enforcing the foreign court's order. PRL would not be deprived of a chance to be

on a minority, which is provided for here by the position as to the Costa Rican bonds. It is not necessary in a minority shareholders' action to make the directors defendants, even though the fraud is alleged to have been carried out by those directors. There is no reason why a minority shareholders' action cannot be started by the shareholders of a company which is itself a shareholder in another company. In principle if the minority shareholders are entitled to protection, they cannot be deprived of such protection by reason of the fact that all the company's assets are in the hands of a subsidiary. There is no reason why *Foss v. Harbottle* (1843) 2 Hare 461 type proceedings should not be in respect of the assets of a subsidiary. [Reference was made to *Dicey & Morris, Conflict of Laws*, 9th ed., p. 1002.] The plaintiffs are seeking to proceed under the Foreign Judgments (Reciprocal Enforcement) Act 1933.

There are instances which show that the courts will expand the common law in cases outside the purely financial direct payment class, for example a measure of recognition is now accorded to foreign judgments in matrimonial law. There are dicta by Lord Denning M.R. which expand the doctrine of reciprocity. Lord Widgery C.J. had treated the Foreign Judgments (Reciprocal Enforcement) Act 1933 as a codifying Act. But outside the scope of that Act the field is wide open for developments of the common law on the most

satisfactory lines for the production of justice. It would be contrary both to the common law and to equity that it should not be possible to deal with a system of international frauds by nomads using a variety of companies.

There is nothing in the common law in this field to prevent the development of the common law so as to cover the relief the plaintiffs seek. Rule 180 of the Conflict Rules has no bearing, since it relates to the direct enforcement of money judgments. *Macaulay v. Guaranty Trust Co. of New York*, 44 T.L.R. 99 and *In re Kooperman* [1928] W.N. 101 show that if PRL had been a company incorporated in the United States of America, Mr. Schemmer could have sued here in his own name for money owed to PRL. The true position here is otherwise with regard to the appointment of a receiver over property situated outside the territorial jurisdiction of the United States court, but application can be made to the courts of the country where the property is situated.

In re Maudslay, Sons & Field [1900] 1 Ch. 602 shows that the English court will often appoint a receiver of property situated outside its territorial jurisdiction but that the assistance of the foreign court is needed to put the receiver in possession of property within the jurisdiction of the foreign court. On that basis Mr. Schemmer asks for the court's assistance to perfect his appointment by the United States court as receiver quoad PRL's assets within the English court's jurisdiction. The order of the United States court is not limited to assets within the United States. [Reference was made to *Houlditch v. Marquess of Donegal* (1834) 8 Bli.N.S. 301 and *In re Kooperman* [1928] W.N. 101.] *Travers v. Holley* [1953] P. 246 where it was held it would be contrary to principle and inconsistent with comity if the courts of this country refused to recognise a jurisdiction which mutatis mutandis they claimed for themselves,

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was approved in *Indyka v. Indyka* [1969] 1 A.C. 33. Lord Morris of Borth-y-Gest at p. 75, Lord Pearce at p. 84 and Lord Pearson at p. 109, agreed that, on the principle of comity, the courts of this country should recognise a jurisdiction which they themselves claim. Lord Wilberforce, at p. 103, took a more restricted view of the principle established by *Travers v. Holley* [1953] P. 246, making it plain that his remarks approving the principle of comity should be confined in the applications to matrimonial affairs. Lord Reid, at p. 58, expressed the view that "Comity has never been the basis on which we recognise or give effect to foreign judgments."

[GOULDING J. In giving recognition to a receiver appointed by a foreign court, is the test to be applied the existence of a real or substantial interest or connection?]

No rules have been laid down in this field. The plaintiffs contend that such a connection, and the principles of reciprocity and comity, are factors which enable the court to act. Rule 180 of the Conflict Rules does not apply, in all its strictness, to the kind of relief sought here. *Travers v. Holley* [1953] P. 246 and *Indyka v. Indyka* [1969] 1 A.C. 33 demonstrate the plastic nature of the common law and the importance of the comity principle.

Travers v. Holley [1953] P. 246 is referred to in *In re Trepca Mines Ltd*. [1960] 1 W.L.R. 1273, 1280-1282, where the Court of Appeal appear to state that the decision in that case was limited to a judgment in rem in a matter affecting matrimonial status and had not been followed except in a matrimonial case but what was said by Harman and Ormerod L.JJ. in that case was really obiter and not part of the ratio decidendi.

The rules in *Emanuel v. Symon* [1908] 1 K.B. 302, which is also referred to *In re Trepca Mines Ltd*. [1960] 1 W.L.R. 1273, 1280, may indicate a field of law where the law has crystallised, but the present case does not come within that field. *Emanuel v. Symon* is only concerned with the particular form of judgment in that case.

It is not suggested in *Société Coopérative Sidmetal v. Titan International Ltd*. [1966] 1 Q.B. 828 that comity is the basis of judgments in personam. There was no procedure for the direct enforcement of foreign judgments, but the principle of comity was applied in appropriate cases so that judgment could be obtained for an equivalent amount. The broad principle in *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155 that "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce" is limited to money judgments. It only applied where it is sought to set up a judgment as a cause of action or as conclusive proof of it.

Here what is sought is discretionary relief, namely the appointment of a receiver. It is not suggested that the foreign court has already appointed a receiver and that that concludes the matter. The court is to go into the question, and if satisfied that it is proper to do so make the appropriate order appointing Mr. Schemmer receiver in this country. The only difference between a foreign judgment and a foreign order is in the nature of the relief given.

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Société Coopérative Sidmetal v. Titan International Ltd. [1966] 1 Q.B. 828 was concerned not only with the question whether the judgment which it was sought to enforce was one which would not have been enforced here because it did not come within any of the categories in Buckley L.J.'s classification in *Emanuel v. Symon* [1908] 1 K.B. 302 but also with whether the Foreign Judgments (Reciprocal Enforcement) Act 1933 had made a fundamental change in the basis on which foreign judgments are recognised as being enforceable in this country (see *per* Widgery J. at p. 844 et seq.). The Act of 1933 is not a codification of the common law. What Hodson L.J. said in *In re Trepca Mines Ltd*. [1960] 1 W.L.R. 1273 was per incuriam. The matter comes within the Act; reliance is placed on section 4 (2) thereof, but if the Act does not apply, if the judgment is of the same type as that in *Emanuel v. Symon* [1908] 1 K.B. 302 one applies the principle in that case. In so far as *Emanuel v. Symon* depends on whether there is a duty to observe or comply with the terms of a foreign judgment it is not contended here that the judgment should be enforced without further inquiry. It is therefore beside the point to consider whether there is any duty here to comply with the order of the foreign court.

The facts should be considered as they exist today, not as they existed at the date of the writ, when IPI was a defendant and not a plaintiff. Here the appropriate and sensible course is to appoint as the receiver the person appointed by the United States court, namely Mr. Schemmer.

The parts of R.S.C., Ord. 11, which apply are r. 1 (1) (*i*) and (*j*). The purpose of an injunction is to protect the assets until they can be got into the hands of a receiver. It is nonsense to say that they should be left unprotected, and that the plaintiff should go first to the Bahamas and get a court order there, and only then come to this court. There is nothing to show that the question of the appointment of a receiver is within the jurisdiction of the Bahamian court. It would be startling if a foreign company with funds in this country could say that the English court could do nothing and was powerless to protect the assets from dissipation.

There is nothing to prevent a minority shareholders' action at second remove, the only difference is that the assets are held not directly by the company but by a company which it controls, viz. in this case PRL. [Reference was made to *Heyting v. Dupont* [1964] 1 W.L.R. 843.]

Harman Q.C. in reply. It is said that the omission of the seven other plaintiffs to sue on behalf of themselves and all other shareholders is no more than an inadvertent and trifling omission and the absence of any assertion that they are seeking to protect the interests of all right-thinking shareholders is unimportant, but the relief of the appointment of a receiver is not known in the *Foss v. Harbottle*, 2 Hare 461 type of case. What their claim is based on is a wish to support the claim of Mr. Schemmer, not a wish to assert a claim of their own. They are not even minority shareholders of PRL at all, but of VCL, itself a minority shareholder in

PRL. While it is not contended that a minority shareholders' action at second remove would be imposible, it would stretch the exception to the rule in *Foss v. Harbottle* exceptionally far. The proper

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place for such a minority action would, in any case, be in the place where the company is incorporated, i.e., in this case in the Bahamas, or where the individual wrong-doing directors are resident. It is wrong that the proceedings should be in England, which has nothing to do with the company's business, and no connection with it save that there are some bank accounts in London. [Reference was made to R.S.C., Ord. 11, r. 4, note 3.] Mr. Schemmer's claim must be based exclusively on the New York judgment, since he has no other connection with the company. He must therefore show that the judgment gives him a cause of action or locus standi. There are only two ways in which a foreign judgment can give rise to such a cause of action: it can create proprietary rights by vesting the company's property in a receiver (see *Macaulay v. Guaranty Trust Co. of New York*, 44 T.L.R. 99 and *In re Kooperman* [1928] W.N. 101); or by creating personal obligations in favour of a receiver against the company which are enforceable in the United Kingdom. A New York court could only create proprietary rights over property within its own jurisdiction: see *per* Cozens-Hardy J. in *In re Maudslay, Sons & Field* [1900] 1 Ch. 602, 609, 611. It is not suggested here that the New York judgment created any rights over the funds in London. The New York court could only create personal obligations towards Mr. Schemmer, as receiver, if it had jurisdiction over PRL according to the English rules as to the Conflict of Laws. It is disputed that the New York judgment created any such obligations. The Securities Exchange Control Act has no application in this country. What the plaintiffs seek to conjure up is some right which is neither in personam nor in rem. The plaintiffs refer to the judgment as not being conclusive, but if so it cannot create any cause of action at all. In these circumstances it is no use to rely on the principles of comity or reciprocity. [Reference was made to *Travers v. Holley* [1953] P. 246; *Indyka v. Indyka* [1969] 1 A.C. 33; *North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd*., 61 L.T. 716; and *Rosler v. Hilbery* [1925] Ch. 250.]

Cur. adv. vult.

May 24. GOULDING J. read the following judgment. This is a motion by the first-named defendant in an action between eight plaintiffs and six defendants. The action was begun by a writ issued on December 12, 1973, by the first-named plaintiff, John Schemmer, of 2, Wall Street, New York City. He remains the leading and principal plaintiff. About two months later the other seven plaintiffs were added as persons wishing to support Mr. Schemmer's application to this court. Four of them reside at Calgary in Alberta, the other three in Florida. I shall have to consider their interest in the action at a later stage.

The six defendants are all companies. The first two, Property Resources Ltd. (PRL) and Value Capital Ltd. (VCL) were incorporated and are resident in the Bahama Islands. The third, Investment Properties International Ltd. (IPI), now in liquidation, was incorporated and is resident in Ontario. I shall follow counsel in referring to those three companies by initials. The remaining three defendants, whom I will call "the defendant banks," are banking companies with places of business in London.

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It will be convenient to state at once the relationship between the several defendants. The defendant banks hold large sums of money in London in the name, or otherwise on behalf, of PRL. I will call them "the London funds." PRL has only two shareholders, namely, VCL and IPI. It has issued shares of two classes called common shares and class A shares. VCL holds the whole of the common shares and about 22 per cent. of the class A shares that have been issued. IPI holds the remaining 78 per cent. approximately of the class A shares. In nominal amount the common shares represent only a minute fraction of PRL's issued and paid-up capital. The two classes of shares rank pari passu with regard to distributions of income or capital, and generally with regard to voting. The small class of common shares have, however, special voting rights which enable VCL to control PRL. First of all the two classes of shareholders are entitled to appoint separate groups of directors, who together constitute the board of the company, and the holders of the common shares are entitled to appoint the larger group. Secondly, the holders of class A shares have no right to vote

on certain specified questions of importance such as a winding up or a sale of property.

On February 14, 1974, the plaintiffs obtained leave to serve notice of the writ on PRL, VCL and IPI out of the jurisdiction. IPI shortly afterwards accepted service through solicitors in England, VCL has not appeared, PRL has entered a conditional appearance and now moves to set aside the order giving leave to serve out of the jurisdiction. The main, although not the only ground of PRL's argument, is that the plaintiffs have no locus standi or prima facie cause of action, and I shall deal with that submission first.

Mr. Schemmer's claim in the action arises out of proceedings taken in the United States of America under an Act of Congress called the Securities Exchange Act 1934. I shall call it shortly "the Act of 1934." The American law relevant to this motion is not formally in evidence, but there seems to be no dispute about its terms or effect, and counsel on instructions have furnished me with a copy of the Act of 1934 and with other necessary information. The long title of the Act of 1934 is as follows:

> "To provide for the regulation of securities exchanges and over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."

Section 2 of the Act declares its purposes and objects in these terms:

> "For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the federal taxing power, to protect and make more effective the national banking system and federal reserve system, and to insure the maintenance of fair and honest markets in such transactions:…"

The section then enumerates at some length the reasons of Congress for the foregoing proposition. I shall not try to state them in full. They include the volume and importance of stock market transactions in interstate commerce (an expression defined to include commerce with foreign countries as well as that among the several states of the American Union); the effect of stock market prices and of fluctuations therein on the calculation of federal and state taxes, on the volume of commercial credit, and on the valuation of security for bank loans; and likewise the alleged role of the manipulation of security prices and fluctuations therein in producing national emergencies, with widespread unemployment and dislocation of the economy, and resultant great expense to the federal government. Section 4 of the Act of 1934 sets up an agency called the Securities and Exchange Commission, which I shall refer to simply as "the commission," to be appointed by the President of the United States, by and with the advice and consent of the Senate. The Act of 1934 contains very elaborate provisions for the regulation of stock exchanges, of other markets and traders in securities, of bank loans made upon securities, of companies whose securities are publicly dealt in, and of many allied matters. Large powers of investigation and of making rules and regulations are conferred on the commission. Some of the more general provisions of the Act of 1934 are contained in section 10, which I shall read:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - (a) To effect a short sale, or to use or employ any stop-loss order in connection with

> the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

The phrase which comes at the end of both the foregoing subsections is worth noticing, for it recurs at intervals throughout the Act of 1934. I will read it again: "necessary or appropriate in the public interest or for the protection of investors." One of the rules made by the commission under section 10 (b) of the Act of 1934, rule 5 of those rules, includes the following provisions:

> "It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, or in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or

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> would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

The judicial enforcement of the Act of 1934 is provided for by the last two subsections of section 21 thereof as follows:

> "(e) Whenever it shall appear to the commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The commission may transmit such evidence as may be available concerning such acts or practices to the Attorney-General, who may, in his discretion, institute the necessary criminal proceedings under this title.
>
> "(f) Upon application of the commission the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the commission made in pursuance thereof."

Section 27 of the Act of 1934 gives exclusive jurisdiction to the federal courts of the United States over all violations of the Act of 1934, and over all suits in equity and actions at law to enforce any liability or duty there-under. The same section authorises service of civil process wherever the defendant may be found. Section 32 provides for the punishment by fine and imprisonment of persons convicted of violating the provisions of the Act of 1934. I have seen nothing in the Act of 1934 expressly authorising the appointment of a receiver of assets at the suit of the commission, a remedy which I have to consider in the present case.

Counsel have, however, informed me that the federal courts possess a general equitable jurisdiction in fields within their competence, and under that jurisdiction appoint receivers when appropriate. If I understand the matter correctly, such an appointment at the suit of the commission under the Act of 1934 is purely conservative and directed to prevent the dissipation of assets by practices in violation of the Act of 1934. It does not effect any expropriation or involve the court or the commission in any execution of trusts or general administration of assets.

In addition to the public sanctions, civil and criminal, which I have tried to summarise, the Act of 1934 in some cases confers a private right of action for damages or other relief upon injured persons, for example on those suffering from any manipulation of security prices in contravention of section 9 of the Act of 1934, and on companies affected by the insider dealings mentioned in section 16 thereof. Counsel have told me that a like private right of action has been recognised by judicial construction in some cases where it is not expressly enacted, notably for violations of section 10

(b) of the Act of 1934, and there is in evidence a sworn opinion to that effect of Professor Moore of the Yale Law School, the author of *Moore's Federal Practice*.

Late in 1972, the commission began proceedings under the Act of 1934 in the United States District Court for the Southern District of New York against Mr. Robert L. Vesco, Mr. Norman LeBlanc, and a large number of other individual and corporate defendants, charging violations of section 10 (b) of the Act of 1934, and of rule 5 thereunder, both of which I have read. The commission's complaint alleged an elaborate scheme of fraudulent practices by persons controlling (among other companies) VCL. The commission claimed injunctions, the appointment of receivers and other equitable relief which I need not specify, in express reliance on sections 21 (e) and 27 of the Act of 1934. Only one of the defendants to the present English action was named as a defendant in the American proceedings, namely, VCL. VCL, so far as I know, has never appeared in the suit, and a number of default orders have been made against it.

I do not think it necessary to narrate the successive orders of the district court. For present purposes I can go straight to an order of Judge Stewart of that court dated September 28, 1973, and need only recite one paragraph thereof. It appointed Mr. Schemmer as receiver to take possession of a great variety of securities and assets, among them the assets of VCL and its subsidiaries, including (inter alia) all the shares and assets of PRL, with large administrative powers subject to the control of the court. By later orders of the district court, Mr. Schemmer was authorised to take proceedings in the United Kingdom to have himself appointed receiver of the assets of PRL and its subsidiaries, located in the United Kingdom, and also to sue the defendant banks and PRL for the London funds in the district court itself.

Mr. Schemmer accordingly began the present action in order that he may, as he says, comply properly with the directions given to him by the United States district court. By his writ he prays that he or some other fit and proper person may be appointed receiver and manager to get in and receive and administer the London funds; secondly, injunctions restraining the defendant banks from parting with the London funds except to such receiver and, thirdly, injunctions restraining PRL, VCL and IPI from transferring or ordering the transfer of the London funds except to such receiver.

There seems to be little reported authority on the enforcement in this country of foreign decrees appointing a receiver. I must mention four cases cited in argument. *Houlditch v. Marquis of Donegal* (1834) 8 Bli.N.S. 301, was an Irish appeal in the House of Lords. The appellants claimed as beneficiaries under a deed of arrangement whereby Lord Donegal had settled a term of years in Irish lands for the benefit of his creditors. The Court of Chancery in England had appointed a receiver of the rents applicable under the deed of arrangement, whom Lord Donegal persistently obstructed. The appellants therefore took proceedings in Ireland for the appointment of a receiver in that country, to account to the master in the English suit, and for

an injunction against the interference of

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Lord Donegal. It was proved that, although originally an absentee, Lord Donegal had repeatedly appeared in the English proceedings. The Lord Chancellor of Ireland (Lord Plunket L.C.) nevertheless held that he had no jurisdiction to enforce or give effect to the English decree. The House of Lords, whose judgment was expressed by the speech of Lord Brougham L.C. reversed his order, and gave the appellants the relief they sought, except that the receiver was made accountable to the Irish (and not directly to the English) court. Lord Brougham's observations contain much general discussion of the effect of a foreign judgment, some of which might not now be accepted as good law. He certainly held that Lord Plunket could have gone behind the English order and inquired afresh into the merits, but in the end he did not think it necessary to move to remit the case for further consideration. The essential grounds of the decision of the House of Lords, put into more modern language, seem to me to be as follows: the English proceedings against Lord Donegal were proceedings in personam, Lord Donegal had submitted to the jurisdiction of the English court, therefore the English decree was binding on him unless shown to be wrong, and consequently the Irish court should enforce his obligations thereunder.

In re Maudslay, Sons & Field [1900] 1 Ch. 602 relates to a receiver appointed by the English court in a debenture holders' action against an English company. The terms of the appointment comprised all the company's property whatsoever and wheresoever. Subsequently an English creditor of the company sought to attach a debt owing to the company in France. Cozens-Hardy J. held that the creditor committed no contempt of court by taking proceedings in France and was entitled to continue them. He said, at p. 611:

> "It is well settled that the court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the court acts in personam. The court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country**....** In other words, the receiver is not put in possession of foreign property by the mere order of the court. Something else has to be done, and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject."

The third case cited was *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99. The plaintiffs there were receivers appointed by the court in Delaware of all the assets of an insolvent company incorporated in that state. The order of the American court was described by counsel as really a combination of a winding-up order and an administration order,

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and there was evidence that in Delaware the plaintiffs could sue in their own name for assets of the company. Clauson J. gave judgment in favour of the plaintiffs for a balance standing to the company's credit at a bank in London, treating their position as analogous to that of foreign assignees in bankruptcy.

The remaining authority is *In re Kooperman* [1928] W.N. 101, where Astbury J. appointed the curateur in a Belgian bankruptcy to be receiver of the bankrupt's immovable property in Walthamstow, so that it might be sold in obedience to an order of the Belgian court. The bankrupt had been trading in Belgium and had appeared in the bankruptcy proceedings there, though resident in France at the time of the English court's order.

Founding his argument on the foregoing authorities, Mr. Dillon, for the plaintiffs, contends that the court should appoint Mr. Schemmer to be receiver of the London funds in pursuance of the American decree. Because PRL is not incorporated in the United States of America, Mr. Dillon does not assert that Mr. Schemmer is immediately entitled to the London funds by virtue of that decree, and he concedes that the English court has power to go behind it and look into the circumstances. The present case is to be compared, he says, with *Houlditch v. Marquis of Donegal*, 8 Bli.N.S. 301, rather than with *Macaulay's* case, 44 T.L.R. 99. Mr. Dillon also founds himself largely on the *Maudslay case* [1900] 1 Ch. 602. If the English court expects its receivers to be able to perfect their title to foreign assets, he says, it must similarly assist receivers of English assets appointed by foreign courts, and he relies on the principle of reciprocity or comity applied in *Travers v. Holley* [1953] P. 246. I think, however, that in view of well-known later decisions *Travers v. Holley* must be followed only with caution outside its own subject matter of matrimonial status.

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. I express no view, one way or the other, on the materiality of those two circumstances.

The situation relied on by the plaintiffs is that PRL is actively or passively concerned in a violation of the laws of a foreign country, and a court in that country has in consequence appointed a receiver of its assets. Under those circumstances (and in the absence of any other ground of foreign jurisdiction) the English court ought not, in my judgment, to regard the appointment as having any effect on assets outside the foreign court's territorial limits. A little imagination will show that any different rule might produce a multiplicity of claims, and confusing and unnecessary questions of competing priorities.

I am naturally led on to a different and alternative ground for denying Mr. Schemmer's alleged cause of action. The Act of 1934 is, in my judgment, a penal law of the United States of America and, as such, unenforceable in our courts. I have read enough of it to show that it was passed for public ends and that its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful. It was, of course, enacted not merely in the interest of the nation as an abstract or political entity, but to protect a class of the public. In that it resembles the greater part of the criminal law of any country. Like many other penal laws, the Act of 1934 also provides in some cases a private remedy available to the victims of the offences which it forbids, and it may possibly be that a private plaintiff who recovers a judgment in a federal court under the Act of 1934 can enforce it by action here. As Lord Watson said in *Huntington v. Attrill* [1893] A.C. 150, 161:

> "… a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must

regard his action as a suit in favour of the state."

Here, however, I have nothing of that sort. Mr. Schemmer comes before this court, in effect, as a public officer charged to reduce the London funds into possession in order to prevent the commission or continuation of offences against federal law. In my judgment, and in the absence of specific legislation founded on treaties, preventive criminal justice is no more a proper subject of international enforcement than retributive criminal justice. The point would be obvious if the plaintiff here were the plaintiff in the district court, namely, the commission (in effect, the financial police of the American Union) and its character is not altered by the substitution of Mr. Schemmer, the receiver appointed on the commission's application.

I conclude, therefore, that Mr. Schemmer has no probable cause of action to support service out of the jurisdiction within the principle of *Société Générale de Paris v. Dreyfus Brothers* (1887) 37 Ch.D. 215.

Foreseeing that conclusion as a possible outcome of the argument, Mr. Dillon said, in the alternative, that the necessary cause of action is vested in the other seven plaintiffs alone. They appear all to be shareholders in VCL, one of them being also a shareholder in IPI. Mr. Dillon asks me to

[1975] Ch. 273 Page 289

regard them as bringing an action for the protection of the assets of PRL of the sort commonly called a minority shareholders' action. Such a suit is based on the exception to the well-known rule in *Foss v. Harbottle* (1843) 2 Hare 461 which arises where the persons in control of a company have committed, or are about to commit, acts that are fraudulent or that are ultra vires the company. The action postulated by Mr. Dillon's argument is unusual in that Mr. Schemmer's co-plaintiffs are not members of PRL but of VCL, itself a shareholder in PRL, but I will assume (without deciding) that that is no insuperable objection. I find, however, no hint in the writ or in the material evidence that the co-plaintiffs are making such a claim as Mr. Dillon suggests. The written authority which they have given to the plaintiffs' solicitors is to take proceedings in England for the purpose of obtaining the appointment of Mr. Schemmer as a receiver together with such injunctive or further relief as the solicitors may determine to be necessary or appropriate. The affidavit in support of the application to add the seven additional plaintiffs accordingly stated quite correctly that they wished to support Mr. Schemmer's application to be appointed receiver, and were willing to be joined *for that purpose*. Mr. Schemmer says substantially the same thing about them in paragraph 28 of an affidavit sworn on February 20, 1974, with a view to obtaining, if necessary, an interlocutory injunction. There is nothing to suggest any wider claim in the writ, and the indorsement thereon remains (so far as I can see) as it was before the further plaintiffs were added, except for the alteration of the expression "the plaintiff" to "the first plaintiff." The writ does not suggest any representative capacity of the additional plaintiffs, nor are the allegedly culpable officers of VCL or PRL named as defendants. The affidavit in support of the application for leave to serve notice of the writ out of the jurisdiction appears to have been sworn while Mr. Schemmer was the sole plaintiff, and as to the cause of action says only that the basis of his claim is his appointment as receiver by the United States district court and that the London funds are moneys which are affected by the order of that court. In all those circumstances it would, in my judgment, be unjust to PRL to keep the existing service alive as a basis for future proceedings of a different sort.

Thus PRL, in my view, must succeed in its main contention. Mr. Harman also submitted a further argument on PRL's behalf. He said that leave for service out of the jurisdiction ought not, on the facts of this case, to have been given, even if the plaintiffs, or some of them, have a probable cause of action which the court would have to adjudicate upon had PRL an address for service within the jurisdiction. That alternative submission requires me not only to examine the language of R.S.C., Ord. 11, but also to consider the exercise of the court's undoubted discretion thereunder. I always find it difficult to say how I would exercise a discretion if things were not as I believe them to be. Counsel must therefore not think me unappreciative of their industry and advocacy if I say nothing about this branch of the debate and decide the motion on Mr. Harman's main point alone. His motion succeeds. I must set aside the order giving leave to

serve out of the jurisdiction so far as regards PRL, the service effected on PRL, and all subsequent proceedings against PRL.

Order granting leave to serve notice of writ out of jurisdiction on PRL set aside.

PRL to have their costs of conditional appearance and all subsequent proceedings.

Leave to appeal.

No order, on plaintiffs' motion, except costs of third to sixth defendants, who were not respondents to PRL's motion, be defendants' costs in cause.

Solicitors: *Bircham & Co.; Courts & Co.; Lovell, White & King; Slaughter & May; Bischoff & Co.; Wilde, Sapte & Co*.

T. C. C. B.

EXHIBIT C

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 234 of 2017 (ASCJ)

IN THE MATTER OF SILK ROAD FUNDS LTD.

AND IN THE MATTER OF SILK ROAD M3 FUND

AND IN THE MATTER OF A REQUEST FOR RECOGNITION

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 11TH DECEMBER 2017 AND 8TH FEBRUARY 2018

APPEARANCES: **Mr. Tom Wright of Solomon Harris, Attorney-at-Law for the Applicant**

Receivers appointed by Bermuda Supreme Court over segregated account within a segregated account fund company – application by receivers for recognition of their appointment and enforcement of the terms of their order of appointment – jurisdiction of the Grand Court for the grant of recognition – how jurisdiction to be appropriately exercised - distinction between receivership and winding up proceedings – applicability of the principles of "modified universalism".

REASONS FOR JUDGMENT

Introduction

1. The Joint Receivers ("the Receivers") of the Silk Road M3 Fund ("the M3 Fund") by their Ex Parte Originating Summons dated 8 November 2017 ("the Recognition

Summons") seek this Court's recognition of the order made by the Supreme Court of Bermuda ("the Bermuda Court") appointing the Receivers ("the Appointment Order"). The Receivers also seek orders granting the recognition and enforcement of the functions and powers of the Receivers granted by the Bermuda Court. For reasons to be explained below, once recognized, the Receivers will also seek this Court's assistance by way of directions permitting them to bring an action for *Norwich Pharmacal*[1] relief against the Joint Official Liquidators ("the JOLs") of Caledonian Bank Limited ("CBL") and Caledonian Securities Limited ("CSL").

2. The Receivers explain that at this early stage of the Receivership of the M3 Fund, they must obtain orders that the JOLs disclose certain documents in their possession without which the Receivers are being impeded from complying with their duties to investigate the whereabouts of the M3 Fund's assets and to take steps to recover those assets, for the benefit of the M3 Fund's stakeholder. The Receivers have therefore also filed an Ex Parte Originating Summons ("NP Summons") seeking such orders pursuant to the *Norwich Pharmacal* principles. The Recognition Summons was heard on 11 December 2017 and these are the reasons for the grant of recognition.

3. The Receivers also filed an Ex Parte Summons ("Gagging Summons") seeking an order preventing the JOLs from informing anyone of the existence of the NP Summons and the evidence in support thereof, which, if the Recognition Summons and Gagging Summons were successful, would be served on the JOLs immediately after the hearing on 11 December 2017. In the event, having been satisfied that pre-

[1] *Norwich Pharmacal v Customs & Excise Comm. [1974] AC 133.*

mature disclosure of the Receivers' actions to those involved with the M3 Fund could result in prejudice to the Receivers' actions, I also granted the Gagging Orders.

Orders Granted by this Court

4. The orders granted in respect of recognition are as follows:

4.1. that the Appointment Order be recognized by this Court, including recognition of the Receivers as having all the functions and powers of the directors and managers of the Silk Road Fund Ltd ("Silk Road") in respect of the business and assets linked to the M3 Fund, including the powers and functions set out in the Appointment Order;

4.2. that in recognition of the above powers and functions, the Receivers are authorised to bring an application for *Norwich Pharmacal* type orders for disclosure against the JOLs of CBL and CSL; and

4.3. that the Receivers shall have liberty to apply to this Court in respect of any matter concerning the M3 Fund and/or Silk Road and arising during the period of the appointment of the Receivers as Receivers of the M3 Fund and to do all such things as may be necessary to assist the Receivers, in connection with their appointment as the Receivers of the M3 Fund.

The M3 Fund and Silk Road

5. To ground their applications, the affidavit of Matthew Clingerman, one of the Receivers, was relied upon. He explains the following necessary background. John Wasty, a Bermudian attorney also files an affidavit in support and in which he sets out and explains the applicable Bermudian law. His evidence on that subject was

accepted for the purposes of my decision and is reflected in my findings which follow.

6. The M3 Fund is what is known in Bermuda, its place of incorporation, as a "segregated account".

7. Silk Road is a "segregated accounts company" incorporated in Bermuda on 19 October 2011. It is permitted by Bermudian legislation to carry on the business of a mutual fund and to offer shares in one or more classes of one or more segregated accounts. The M3 Fund is a segregated account of Silk Road. In a manner identical to that in which Cayman Islands segregated portfolio companies and their segregated portfolios operate, a Bermudian segregated account such as the M3 Fund is not a separate legal entity to its segregated accounts company. Its establishment and nature is explained in section 17(1) of the Bermuda Segregated Accounts Companies Act 2000 ("SACA") which provides as follows:

> *"Nature of segregated accounts, application of assets and liabilities*
>
> *17. (1) Notwithstanding any other provision of this Act, the establishment of a segregated account does not create a legal person distinct from the segregated account company.*
>
> *(2) Notwithstanding any enactment or rule of law to the contrary, but subject to this Act, any liability linked to a segregated account shall be a liability only of that account and not the liability of any other account and the rights of creditors in respect of such liabilities shall be rights only in respect of the relevant account and not of any other account, and, for the avoidance of doubt, any asset which is linked by a segregated accounts company to a segregated account—*

(a) shall be held by the segregated accounts company as a separate fund which is—

(i) not part of the general account and shall be held exclusively for the benefit of the account owners of the segregated account and any counterparty to a transaction linked to that segregated account, and

(ii) available only to meet liabilities to the account owners and creditors of that segregated account; and

(b) shall not be available or used to meet liabilities to, and shall be absolutely and for all purposes protected from, the general shareholders and from the creditors of the company who are not creditors with claims linked to segregated accounts.

(3) For the purposes of this Act, the Companies Act 1981 and otherwise at law, the assets recorded in the general account shall be the only assets of a segregated accounts company available to meet liabilities of the segregated accounts company that are not linked to a segregated account."

8. The segregated accounts company, Silk Road in the instant scenario, holds assets separately on behalf of the M3 Fund segregated account, with the assets being segregated from those of other segregated accounts within Silk Road, and being available only to meet the liabilities of the M3 Fund segregated account. The question whether this kind of arrangement should be regarded as a kind of statutory trust or simply as giving rise to strict accounting obligations was raised but not determined in Re SPhinX, 2009 CILR 28, (at 36). There the view was expressed obiter, that the latter is, at minimum, the nature of the obligation imposed in the context of a similar Cayman Island segregated portfolio company.

Receivership of the M3 Fund

9. On 20 January 2013, Goodwill PTC Limited (as Trustee of the Prosperity Trust) ("Goodwill") subscribed for 10,000 Participating Class A Shares in the M3 Fund for a consideration of US$10 million. Two years later, on 19 January 2015, Goodwill served a redemption notice in respect of its entire shareholding, which was accepted by the administrator of Silk Road.

10. Notwithstanding, as the Clingerman affidavit avers, that Goodwill explored ways in which its investment might be repaid, including by way of a share purchase agreement with the investment advisor of the M3 Fund; as at 10 April 2017 no redemption monies had been repaid. On that date Goodwill filed an originating summons in the Bermuda Court seeking the appointment of the Receivers. The grounds on which the appointment was sought were that it was just and equitable that the Receivers be appointed and that the appointment of the Receivers was likely to achieve the orderly management, sale, rehabilitation, run-off or termination of the business of or attributable to the M3 Fund, or the distribution of the assets linked to the M3 Fund, to those entitled to them.

11. On 21 April 2017, the Bermuda Court appointed Mr. Clingerman and Mr. Sven Michael Schultz as Receivers. By Court Order dated 6 October 2017, Mr. Christopher Smith replaced Mr. Schulz.

Powers Granted to the Receivers by the Bermuda Court

12. The full range of powers granted to the Receivers is set out in the Appointment Order. For the purpose of the instant application, it is submitted by the Receivers that the following powers are pertinent:

"13.1 That the Receivers may do all such things as may be necessary for the purposes of:

(a) The orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the M3 Fund;

(b) The distribution of the assets linked to the M3 Fund to those entitled thereto.

13.2. That the Receivers shall have all of the functions and powers of the directors and managers of Silk Road in respect of the business and assets linked to the M3 Fund.

13.3. That Receivers shall have the powers:

(a) to ascertain the assets of the M3 Fund and their status and take all steps necessary including Court actions where appropriate to obtain possession of such assets and to bring the same under their control and further, where appropriate, bring the same into the jurisdiction of this Honourable Court [the Bermudian Court] and, for this purpose, to seek the assistance of the courts of the various jurisdictions in which assets of the M3 Fund are located;

(b) ....

(h) to consider and if thought advisable to commence such actions as may be necessary to protect, recover or obtain assets and or monies belonging or due to the M3 Fund and to

commence all other proceedings outside Bermuda as may be necessary to have their appointment recognised and to protect the assets of the M3 Fund, in particular but not limited to applications in the United States of America, Hong Kong, Canada, the Cayman Islands, Uzbekistan or Mongolia;

(i) *That the Receivers may bring or defend in their name or in the name of the M3 Fund any action or other legal proceedings which relate to the property belonging to the M3 Fund or which it is necessary to bring or defend for the purpose of effectually discharging the purposes set out at paragraph 3 hereof; and*

(j) *That the Receivers be authorized to take any such action as may be necessary or desirable to obtain recognition of the appointment of the Receivers in any other relevant jurisdiction and to make applications to the courts of such jurisdictions for that purpose."* [Emphasis added.]

13. I note especially that the Bermuda Court granted the Receivers the authorization to "*commence all other proceedings outside Bermuda as may be necessary to have their appointment recognised*" and that among the jurisdictions named in paragraph 13.3(h) above of the Appointment Order for those purposes, the Cayman Islands is named specifically.

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Reasons for seeking recognition in the Cayman Islands

14. Set out at paragraphs 23 to 33 of the Clingerman Affidavit is a summary of the investigations carried out by the Receivers into the whereabouts of the assets attributable to the M3 Fund. Those investigations are said to have revealed that a significant portion of the funds paid by way of the subscription of Goodwill were transferred to (a) one or more accounts in the name of an entity connected to the sole director and shareholder of the former investment advisor, of the M3 Fund[2], and (b) an account in the name of the investment advisor itself; both accounts being held at CBL.

15. The narrative of one of the remittance advices generated by the transfer of monies to one of these accounts at CBL, suggests that the depositor may have maintained a brokerage account at CSL. Full details of the reasons why the *Norwich Pharmacal* relief has to be sought against the JOLs in connection with these deposits and the depositors brokerage account at CSL are contained in documents filed in support of the application for *Norwich Pharmacal* relief, with that application set to be heard on 18 December 2017.

16. As already mentioned, the purpose of the Recognition Summons was to seek this Court's recognition of the appointment of the Receivers, the powers granted to them by the Bermuda Court and this Court's assistance in permitting the Receivers to bring the proceedings for *Norwich Pharmacal* relief against the JOLs.

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[2] Respectively, Eurasia Capital Ltd. and Silk Road Management Limited.

Basis for recognition and assistance

17. It was submitted on behalf of the Receivers that there is only one available route by which the Receivers may seek recognition and assistance and that is through the common law and the principle of "*modified universalism*". This selection of route was said to be to the exclusion of Part XVII of the Companies Law (2016 Revision) (Companies Law). It was also said that recognition at common law, as confirmed by authorities such as *Stutts v. Premier Benefit Trust (Stutts)*[3] and *Canadian Arab Financial Corporation v Player (Player)*[4] which deal with the recognition by the Courts of the Cayman Islands of receivers of a different nature (as further detailed below), would not be the correct route. Those receiverships involved circumstances which are unlike those here, submits Mr. Wright. He submits that these receiverships are more akin to liquidators (per the judgment of Justice Foster *In the Matter of JP SPC 1* and *In the Matter of JP SPC*[5], (discussed further below). Mr. Wright, on behalf of the Receivers, explained why these paths to recognition – the statutory path and the common law jurisdiction for the appointment of receivers – have not been chosen. I explain below why I agree in relation to Part XVII of the Companies Law but regard the common law on the recognition of receivers as the suitable path, rather than reliance on the principle of modified universalism.

The Path Through Part XVII of The Companies Law

18. Sections 240 and 241 of the Companies Law states that:

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[3] 1992-93 CILR 605.
[4] 1984-85 CILR 63.
[5] *In the Matter of JP SPC 1 and JP SPC 4 [2013 (1) CILR 330]*

"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.

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)."

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19. It was submitted quite correctly, that the Receivers are not "*foreign representatives*" as defined in Section 240. A "*foreign representative*" *is a* "*trustee, liquidator or other official appointed* in respect of a debtor *for the purposes of a foreign bankruptcy proceeding*" (emphasis added). A debtor is defined as "*a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established*". Thus the requirement is that a "*debtor*" be a legal entity subject to a foreign bankruptcy proceeding. A Bermuda segregated account (like its Cayman equivalent) is not a legal entity separate from its segregated accounts company. As noted above, section 17(1) of the Bermuda SACA states that:

> "*Notwithstanding any other provision of this Act, the establishment of a segregated account does not create a legal person distinct from the segregated accounts company.*"

20. The issue that this presents is that the entity over which the Receivers have been appointed, the segregated account M3 Fund (not the segregated account company Silk Road itself), is not a legal entity and cannot therefore fall into the definition of "*debtor*" and the Receivers are therefore not "*foreign representatives*", within the meaning of the Companies Law. This is quite apart from the further consideration that the M3 Fund cannot be said to be subject to a "*bankruptcy proceeding*"; as will be explained further below.

21. Mr. Wright referred to the judgment of Justice Foster in the *Matters of JP SPC 1* and *JP SPC 4* where he considered that the Receivers of Cayman Islands segregated portfolios were "*foreign representatives*" within the meaning of the English Cross-Border Insolvency Regulations 2009 ("CBIR"), and that the receivership of the

segregated portfolios involved was a "foreign proceeding" within the meaning of the CBIR.

22. It must however, be recognised that the instant case is readily distinguishable from *JP SPC1* and *JP SPC4*. This is because the definition in Part XVII of the Companies Law of "debtor" (discussed above) operates to preclude the recognition of the Receivers under the Companies Law but such a definition does not appear in the CBIR.

23. In his reference to JP SPC1 and *JP SPC2*, I think that Mr. Wright takes out of context the meaning of Justice Foster's decision in that case.

24. Justice Foster did not equate the appointment of the joint receivers in that case with the appointment of a liquidator over a company. In order to arrive at the conclusion that they should be regarded as "*foreign representatives*", he treated the receivership before him as "analogous" to liquidation, even while recognizing that the Fund companies themselves (as distinct from the segregated portfolios) were not the subject of liquidation proceedings.

25. What he determined was that the terms and incidences of the appointment were such as to enable the receivers before him to act in respect of the assets of their segregated portfolios in a manner akin or analogous to how a liquidator would be allowed to act in relation to the assets of a company in liquidation. That determination then led him to declare that the joint receivers should be deemed "*foreign representatives*" for the purposes of seeking recognition in England pursuant to the CBIR, to allow them to bring legal action in order to recover the assets of their segregated portfolios.

26. That is not the same thing as a finding that for all purposes of the law the receivers should be deemed the same as liquidators of a company in liquidation and so appropriately to be recognised under the principle of modified universalism. I will return to deal with this issue more fully below.

Modified Universalism

27. In his argument based upon modified universalism, Mr. Wright also argued that the principles and guidance most applicable to the instant application are to be found in the line of authorities culminating in the recent decision of Justice Segal of this Court in *China Agrotech Holdings Ltd*[6] ("*China Agrotech*"); applying the principles of the Privy Council decision in the case of *Singularis Holdings Limited v. PricewaterhouseCoopers*[7] ("*Singularis*").

28. It was however, recognised by Mr. Wright that the instant application is not on all fours with *Singularis*. In *Singularis*, the Cayman Court-appointed liquidators were asking for the assistance of the Bermuda Court in exercising a power which would not have been available to them in Cayman, being the power to compel PWC the former auditors of *Singularis,* to provide the documentation requested. But for their appointment over *Singularis,* the company which was in liquidation, the liquidators would have had no standing to seek the Court's assistance.

29. *China Agrotech* is a matter in which Justice Segal recognized liquidators appointed in Hong Kong over an entity incorporated in the Cayman Islands and granted those

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[6] *Unreported, 19 September 2017*

[7] *Singularis Holdings Limited v. PricewaterhouseCoopers [2014] UKPC 36*

liquidators the power to apply to the Cayman Court for approval of a scheme of arrangement pursuant to section 86 of the Companies Law.

30. In *China Agrotech*, the power which the liquidators sought to exercise (the power to promote and apply for approval of a Scheme of Arrangement) was again a power which, on the facts of that case, would not have been available but for the fact that the company itself was in liquidation.

31. While acknowledging that the legal entity here, Silk Road, is itself not in liquidation nor receivership, Mr. Wright submitted that, in the instant case, the Receivers are seeking recognition by this Court in order that it is they through whom the M3 Fund may act in this jurisdiction – and later in terms of the *Norwich Pharmacal* relief – it would be relief which the M3 Fund, through the Receivers, could seek in its own right.

32. It was submitted that the cases leading up to and including *Singularis* and *China Agrotech* provide this Court with authority to recognize the Receivers and the functions and powers which have been bestowed upon them by the Bermuda Court, as well as authorizing the Receivers to seek *Norwich Pharmaca*l relief in this jurisdiction.

33. Primarily for the reason that the principles of universality of insolvency or bankruptcy upon which *Singularis* and *China Agrotech* were decided have no applicability here, I declined to recognise the Receivers by reliance on them. I think the reasons for this become clearer from the following discussion of the cases.

***Singularis* – Bermuda Court of Appeal Decision**[8]

34. PWC appealed orders made at first instance by the Bermuda Court recognizing the Cayman Court-appointed liquidators of Singularis and requiring PWC to hand over documents to the liquidators by way of an analogous use of Bermudian legislation (Section 195 of the Companies Act 1981). Under Cayman legislation (section 106 of the Companies Law), the liquidators were seen as not entitled to the documents sought and so unable to apply to the Cayman Court for their production.

35. The difficulty was that under section 195 of the Bermudian Companies Act 1981, the Court was allowed to grant such assistance only as might be available to a foreign liquidator before his home Court.

36. The Court of Appeal of Bermuda condensed PWC's argument with reference to and in paraphrase of the Privy Council's decision in *Al Sabah v Grupo Torras SA*[9] in this way:

> "*If the Supreme Court had no statutory jurisdiction to act in favour of a foreign liquidator, 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 195 of the 1981 Act in circumstances not falling within the terms of that section.*"

37. Mr. Wright emphasized that the Receivers are not asking this Honourable Court to find that it has a separate route to enforcement of the Appointment Orders, in a manner similar to that in which the Bermuda Court did in the first instance decision in

[8] *PricewaterhouseCoopers v. Saad Investments Company Limited & Singularis Holdings Limited [2013] CA (BDA) 7 CIV*

[9] *Al Sabah and another v. Grupo Torras SA [2005] UKPC 1, cited and paraphrased by the Court of Appeal at p.15.*

Singularis. Nor are the Receivers suggesting that this Court must "shape" or "tailor" Cayman insolvency law so that the order sought may be made.

38. It was, however, submitted that Lord Hoffman's following reference to the doctrine of universalism in paragraph 22 of his judgment in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508[10] ("*Cambridge Gas*") can, by analogy, be "*ratio referable*" to the instant case, given that the order which this Court is being asked to recognize does not conflict with local Cayman insolvency law. It was submitted that this Court is not being asked to use common law to dis-apply, disregard or dispense with Cayman legislation:

> "*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.*"

39. But the premise of Mr. Wright's argument here was different, as will become clearer below.

<u>*Singularis* – Privy Council</u>

40. The Privy Council in *Singularis* upheld the Bermuda Court of Appeal's decision to overturn the first instance decision enforcing the order for PWC to produce the

[10] *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings PLC [2006] UKPC 26*

documents. Lord Sumption confirmed[11] that of the three propositions for which *Cambridge Gas* would be authority, if it were correct, the following proposition survived the criticism leveled in *Singularis* and *Rubin v Eurofinance* SA[12] (**Rubin**) and had not been discredited:

> "*The principle of modified universalism, namely that the Court has a common law power to assist foreign winding up proceedings so far as it possibly can.*"[13]

41. Lord Sumption went on to elaborate:

> *"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 to do so."*

42. The relationship between, on the one hand, relief sought by the liquidators for the production of information for the purpose of the performance of their ordinary functions attaching to their status as officers of the court, and on the other hand, the

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[11] *Supra, para 19*
[12] *Rubin and another v. Eurofinance SA and others [2013] 1 AC 236*
[13] *Supra, para 15*

principle of modified universalism, is helpfully set out at paragraph 23 of Lord Sumption's judgment, as follows:

> *"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 world-wide 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 world-wide 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."[Emphasis added.]*

43. The words in emphasis identify the reasons for my view that the principle of universalism of insolvency are inapposite to a case like the present here: the company Silk Road is itself not the subject of the Appointment, is not in liquidation and so there is no question of assisting a process for the "*orderly winding up of its affairs on a world-wide basis*". Here, the Appointment Order is much more narrowly premised and confined, relating as it does only to the assets of the M3 Fund, a specified segregated portfolio within Silk Road which itself continues to operate entirely outside any winding up process. As Lord Sumption explains, the public interests attendant upon the orderly completion of the liquidation process has no equivalent in other cases of ordinary adversarial litigation. While parallels might certainly be drawn with a court-appointed receivership process, to justify regarding a receiver as the Court would a liquidator for the purposes of gathering information abroad about assets of the estate; in my view, the case law does not justify so complete an analogy as to regard the two offices in the same way for the purposes of recognizing title to assets and so to justify applying by analogy the principle of universalism to a receivership. As Lord Sumption also explained in *Singularis* at [11]:

> *"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..... 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."*

44. Those are the "*distinct legal consequences*" of a winding up order which are regarded as justifying, in the public interest, the application of the principle of universalism to winding up proceedings. They find no complete parallel in receivership so as to justify the application by analogy, of the principle of universalism as settled in the case law discussed above, to receivership proceedings. Certainly, no case law to that effect has been identified by Mr. Wright.

45. As reflected in my decision, that conclusion does not however, preclude the grant of recognition to the Receivers for the purposes of fulfilling their mandate as defined by

the terms of the Appointment Order within the jurisdiction of this Court. For as Lord Hoffman declared in *Cambridge Gas* [14]:

> *"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."*

46. That is what my order granting recognition will allow here. It hardly matters therefore what label is placed upon the manner of the exercise of the jurisdiction. It is the undoubted inherent jurisdiction of the Court at common law to recognise the foreign Court-appointed representative to act, but only in keeping with the terms of the appointment.

Conclusion following *Singularis*

47. Nor, contrary to Mr. Wright's submissions, does the following dictum from Lord Collins from *Singularis* (paragraph 33) take the matter any further:

> *"As the Supreme Court confirmed in Rubin v Eurofinance SA [2012] UKSC 46, [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 and despite Lord Mance'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 that this was not a proper case for exercise of that power."*

[14] [2006] UKPC 16

48. Whatever may be the state of the analogous powers of the Bermudian and Cayman Courts for the purposes of recognizing each other's appointed office holders, that dictum is clearly stated as applying to foreign winding up proceedings.

The Stutts Kilderkin/Player Line of Authorities

49. I take a different view of the applicability of the common law recognition jurisdiction for receivers. Indeed, it is that which I consider to be most apposite here. There is a settled line of authorities whose subject matter is the criteria to be satisfied in order for a foreign receiver to be recognized by the Cayman Islands courts. Those criteria are set out in *Schemmer v. Property Resources Ltd.*[15] ("*Schemmer*") and were applied by the Cayman Islands Court of Appeal in *Kilderkin v Player*[16]. In *Schemmer, Goulding* J. stated at page 287:

> *"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 order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgement, 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."* (emphasis added)

50. In *Kilderkin v Player* the Court of Appeal (per Carey JA at 102-103), described the jurisdiction of the Court to recognize a foreign-appointed receiver in the following terms which I apply here:

[15] *Schemmer and Others v. Property Resources Ltd. [1975 Ch. 273]*
[16] Supra.

> *"The appellants having been previously appointed as receiver and manager by the Ontario Court now receive 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.*

[The learned Justice of Appeal then cited section 13(1) of the Grand Court Law as the basis for the exercise by the Grand Court of the "*like jurisdiction within the Islands which is vested in or capable of being exercised in England*" by Her Majesty's High Court of Justice.]

51. He then continued:

> *"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 recognize 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, in Schemmer v Property Reserves Ltd.... The learned judge [Goulding J] in a considered judgment held ([1975 Ch. At 287), rightly as I think, that before the English courts would recognize 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...."*

52. In *Kilderkin v Player*, the Court of Appeal (per Carey JA at p104) then went on to adopt four tests to establish whether there existed a "*sufficient connection*" between the defendant (viz: the subject of the receivership) and the jurisdiction in which the receiver was appointed. These four tests are summarised as follows:

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?

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?

3. Would the courts of the country of incorporation recognise a foreign appointed receiver?

4. Has the company carried on business in [the jurisdiction of the appointment] or is the seat of its central management and control located there?"

53. It was submitted by Mr. Wright that though helpful, the principles espoused and the tests set out in *Schemmer* and applied in *Kilderkin v Player* are applicable to scenarios in which a receiver has been appointed by a foreign court over a specific asset to which the receiver has title. That those principles and criteria do not apply to a scenario in which the receiver's role is more akin to that of a liquidator (as Justice Foster found in *JP SPC1* and *JP SPC2*), appointed over an entity's entire estate, rather than a specific asset. But that is not how I regard the Receiver's appointment as operating here (or as having operated in *Kilderkin v Player*, for that matter). Rather, in keeping with the primary position that the M3 Fund is not itself a legal entity but a segregated portfolio of Silk Road the segregated account company, I consider that the Receiver has been appointed over all its assets, that is, the segregated account of which the M3 Fund is itself comprised. Indeed, in *Kilderkin v Player* itself, the receivers had been appointed over the affairs of Kilderkin the company, supplanting the board of directors.

54. I am satisfied therefore, that it is entirely appropriate to grant recognition to the Receivers on the basis of the principles established in *Kilderkin v Player*.

55. My analysis, by application of the principles, is as follows.

56. Firstly, there is no question but that the M3 Fund has a "sufficient connection" to Bermuda, the jurisdiction in which the Receivers were appointed. As explained above, the M3 Fund is a segregated portfolio of Silk Road which is itself incorporated in Bermuda and that was the basis upon which the Bermuda Court made the Appointment Order.

57. Secondly, Silk Road and the M3 Fund as one of its segregated portfolios, were the very subject of the proceedings before the Bermuda Court, Silk Road having been joined as a defendant to those proceedings.

58. Thirdly, as the Wasty Affidavit explains, the Bermuda Court would recognise a foreign-appointed receiver.

59. Fourthly, as the Clingerman affidavit explains, Silk Road itself is not in liquidation but carries on business in Bermuda although powers of the directors of Silk Road in relation to the M3 Fund, have been subsumed by the powers of the Receivers.

60. For these reasons, I was satisfied that the inherent jurisdiction to recognise the appointment of the Receivers to act as such within the Cayman Islands, is appropriately to be exercised in this case.

Further comparison with the nature and
extent of the powers granted by the Bermuda Court

61. In granting recognition, pursuant to the *Kilderkin v Player* jurisdiction, I accept the following premises:

(1) The Receivers seek this Court's recognition of all the powers granted to the Receivers by the Bermuda court as set out in the Appointment Order.

(2) The Receivers are not seeking recognition of any powers which would not be capable of being granted under Cayman Islands Law. The Receivers are not seeking to use this Court to do something which they could not do in Bermuda.

(3) Additionally, as per paragraph 7 above and its footnote, the Receivers do not seek this Court's order that the powers and functions granted by the Bermuda Court be recognized as if the Receivers had been appointed in the Cayman Islands. They seek a more specific and confined order of recognition.

(4) As is set out in John Wasty's Affidavit at paragraph 17, the Bermuda SACA provides the legislative blueprint for the appointment of the Receivers and the powers and functions that they have been granted. The relevant provisions of the SACA are as follows:

*"**Receivership orders***

19. (1) Subject to the provisions of this section, if, in relation to a segregated accounts company, the court is satisfied that-

(a) a particular segregated account is not solvent, the general account is not solvent, a liquidation has been commenced in relation to the company, or for other reasons it appears to the court just and equitable that a receiver should be appointed;

(b) the making of a receivership order under this section would achieve the purposes set out in subsection (3),the court may make a receivership order in respect of that segregated account.

(2) A receivership order may be made in respect of one or more segregated accounts.

(3) *A receivership order shall direct that the business and assets linked to a segregated account shall be managed by a receiver specified in the order for the purposes of-*

(a) *the orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the segregated account; or*

(b) *the distribution of the assets linked to the segregated account to those entitled thereto.*

(4) *No resolution for the winding up of a segregated accounts company of which any segregated account is subject to a receivership order shall be effective without leave of the court.*

Functions and powers of receiver

21 (1) *The receiver of a segregated account-*

(a) *may do all such things as may be necessary for the purposes set out in section 19(3); and*

(b) *shall have all the functions and powers of the directors and managers of the segregated accounts company in respect of the business and assets linked to the segregated account.*

(2) *The receiver may at any time apply to the court for-*

(a) *directions as to the extent or exercise of any function or power; or*

(b) *the receivership order to be discharged or varied.*

(3) *In exercising his functions or powers the receiver is deemed to act as the agent of the segregated accounts company in respect of the segregated account, and does not incur personal liability except to the extent that his conduct amounts to misfeasance.*

(4) *Any person dealing with the receiver in good faith is not concerned to enquire whether the receiver is acting within his powers.*

GRAND COURT CAYMAN ISLANDS

(5) During the period of operation of a receivership order the functions and powers of the directors and managers and any liquidator of the segregated accounts company cease in respect of the business and assets linked to the segregated account in respect of which the order was made.

(6) At any time after the appointment of a receiver in respect of a segregated account, the company or any account owner or creditor of that account may, where an action or proceeding against the company in respect of that account is pending, apply to the court for a stay of those proceedings, and, on such an application being made, the court may stay the proceedings accordingly on such terms as it thinks fit.

Comparison with Segregated Portfolio Companies under Part XIV of the Cayman Islands Companies Law

62. Important similarities (not all) between the two sets of statutory provisions are as follows:

Test for Receivership – Companies Law

"224(1) Subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied-

(a) that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and

(b) that the making of an order under this section would achieve the purposes set out in subsection (3),

the Court may make a receivership order under this section in respect of that segregated portfolio.

"224(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of-

(a) the orderly closing down of the business of or attributable to the segregated portfolio; and

(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto."

Test for Receivership – SACA

"19(1) Subject to the provisions of this section, if, in relation to a segregated accounts company, the court is satisfied that-

(a) a particular segregated account is not solvent, the general account is not solvent, a liquidation has been commenced in relation to the company, or for other reasons it appears to the court just and equitable that a receiver should be appointed;

(b) the making of a receivership order under this section would achieve the purposes set out in subsection (3),

the court may make a receivership order in respect of that segregated account.

(3) A receivership order shall direct that the business and assets linked to a segregated account shall be managed by a receiver specified in the order for the purposes of-

(a) the orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the segregated account; or

(b) *the distribution of the assets linked to the segregated account to those entitled thereto.*

Functions and Powers of Receivers

Section 226(1) of the Companies Law

226(1) The receiver of a segregated portfolio-

(a) may do all such things as may be necessary for the purposes set out in section 224(3); and

(b) shall have all the functions and powers of the directors in respect of the business and segregated portfolio assets of or attributable to the segregated portfolio.

Section 21(1) of SACA

21 (1) The receiver of a segregated account-

(a) may do all such things as may be necessary for the purposes set out in section 19(3); and

(b) shall have all the functions and powers of the directors and managers of the segregated accounts company in respect of the business and assets linked to the segregated account.

Position of Receivers as Regards Segregated Portfolio Company/Segregated Accounts Company

Section 226(3) of the Companies Law

In exercising his functions and powers the receiver shall be deemed to act as the agent of the segregated portfolio company, and shall not incur personal liability except to the extent that he is fraudulent, reckless, negligent, or acts in bad faith.

Section 21(3) of SACA

In exercising his functions or powers the receiver is deemed to act as the agent of the segregated accounts company in respect of the segregated account, and does not incur personal liability except to the extent that his conduct amounts to misfeasance.

63. From the above, it is clear that the Bermuda statutory basis under SACA for the appointment of the Receivers, and the purpose for which the Receivers have been appointed, is virtually identical to its Cayman Islands counterpart. It is therefore accepted that the powers and functions of the Receivers, when recognized by this Court, would not offend Cayman Islands public policy nor would they be inconsistent with the substantive law of the Cayman Islands, as they are precisely the types of powers and functions which this Court could grant to a Receiver of a Cayman Islands segregated portfolio.

64. It is clear, however, that absent from the above, or from any other provision either of SACA or the Companies Law, is any provision for the recognition of a foreign receiver; hence the need for recognition by application of the common law principles.

Conclusion

65. This Court has a common law jurisdiction to assist not only liquidation but also receivership proceedings taking place under the supervision of the Bermuda Court.

66. The scope of this Court's jurisdiction is subject to the law and public policy of the Cayman Islands in so far as this Court can only act within the limits of its statutory and common law powers.

67. This Court has statutory power to recognize foreign practitioners or Court-appointed representatives and has done so on a number of occasions. However, for the reasons set out above, Part XVII of the Companies Law does not apply to the Receivers.

68. This Court has a common law power to order a third party to provide information pursuant to a recognized legal principle, such as modified universalism (paragraph

22, 23 of *Singularis*) but that principle is inapposite for application here because the company involved, Silk Road, is not in liquidation.

69. It is however accepted, that this Court may recognize and assist the Receivers because the following criteria are met:

(1) The Receivers are duly appointed as such over the assets of the M3 Fund by the Bermuda Court and are officers of the Bermuda Court. The M3 Fund is a segregated portfolio of a company (Silk Road) incorporated in Bermuda. Silk Road carries on business and the seat of its central management is located in Bermuda.

(2) The Receivers are seeking assistance in order to tackle the logistical obstacles presented by the territorial limits of their appointment but in keeping with the terms of the Appointment Order and by application of similar common law powers, the Court of Bermuda could grant reciprocal recognition to a Cayman appointed receiver;

(3) The exercise of this Court's power is necessary for the performance of the Receiver's duties and functions;

(4) The exercise of this Court's power is consistent with the substantive law and public policy of the Cayman Islands;

(5) As will be put into evidence in support of the application for the *Norwich Pharmacal* relief, in the case of the Receivers' request to bring those proceedings, the Receivers are prepared to pay the reasonable costs of the JOLs' compliance with any such order for relief;

(6) The Receivers are not asking this Court for any powers which they could not exercise in Bermuda.

70. It is therefore confirmed that this Court has the jurisdiction to make the orders which it made on 11 December 2017, recognizing the appointment of the Receivers.

Honourable Anthony Smellie
Chief Justice

February 8, 2018

The embargo from publication of this Judgment is hereby released this 30th day of May 2019.

EXHIBIT D

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 4 OF 2020 (MRHJ)

BETWEEN

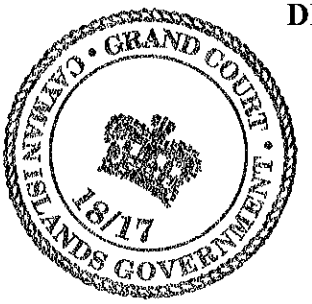
ROBERT SEIDEN,
IN HIS CAPACITY AS TEMPORARY RECEIVER OF LINK MOTION INC.

PLAINTIFF

AND

LINK MOTION INC.

DEFENDANT



Mr. Mark Russell of KSG for the Plaintiff
Defendant not appearing, not represented
Heard on the 3 February 2020

RULING

1. This is an application brought by Robert W. Seiden, in his capacity as temporary receiver ("the **Receiver**") of Link Motion Inc. ("the **Company**"), for recognition of his appointment under an order ("the **Receivership Order**") of the United States District Court for the Southern District of New York ("the **US Court**") in aid of the US Court proceeding in which the Receivership Order was made ("the **US Proceeding**"). The defendant, Link Motion, is a Cayman Islands exempted company headquartered in the People's Republic of China ("**PRC**") carrying on a multinational business in the development, licensing and sale of technology and services in the smart car and smart ride industry. Up until January 2019, the Company was listed on the New York Stock Exchange ("**NYSE**") and had outstanding, to that date, nearly 100 million American Depositary Shares ("**ADS**"), each representing 5 Class A common shares in the capital of the Company. The Company also has commercial offices in the United States and Hong Kong.

The US proceeding

2. In his affidavit sworn on the 18 January 2020 in support of his application for recognition by this Court, the Receiver sets out the relevant background to his appointment in the US Proceeding.

3. A Verified Shareholder Derivative Complaint was filed by a Link Motion shareholder, Wayne Baliga, against three key directors and officers involved in the Company's business and resident in the PRC (the "**Individual Defendants**") in which Mr. Baliga alleged, *inter alia*, that the Individual Defendants were engaged in self-dealing, having transferred valuable Company assets to entities controlled by insiders for no, minimal or unknown consideration. He also alleged that they had mismanaged the Company, allowing the Company's shares to be delisted from the NYSE by failing to file required financial information for publicly-traded companies and precipitating the closure of offices in Dallas, Texas and China as well as a formerly profitable subsidiary in Finland.[1]

4. In response to the Complaint, the US appointed a Receiver over the Company and granted broad injunctive relief against certain individuals. The Receiver states, in his affidavit, that while he has taken steps in Hong Kong and the PRC to fulfil his duties and prevent the dissipation of the Company's assets, the Individual Defendants have ignored, obstructed and frustrated the receivership.[2]

This Application

5. The Receiver states further that the Company has failed to pay its corporate filings fee due in this jurisdiction for at least a year, and that a further failure to pay these fees when they fall due in January 2020 may result in the striking off and dissolution of the Company. Over the same period, the Company's registered office, Maples Corporate Services Limited, has resigned.

[1] Para 8 et seq
[2] Para 27 to 41

6. He seeks the recognition of his appointment by this Court to allow him to protect the interests of the Company pending determination of the serious claims in the US Proceeding.

7. In his submissions on behalf of the Receiver, Mr. Russell submits that the next annual fee will be due by 31 January 2020 and there is no reason to believe that the Individual Defendants will properly attend to the payment. Failure to pay the fees or maintain a registered office raises a significant risk that the Company will be struck-off the register and dissolved, putting its status and title to its assets in jeopardy and that, without recognised legal status in the Cayman Islands, the Receiver will not have the required authority to intervene and prevent the administrative strike-off.

The Law

8. That the Grand Court has an inherent power to recognize a Receiver appointed by a Foreign Court was asserted by the Court of Appeal in the matter of *Kilderkin v Player* (1984-85) CILR 63 which cited the decision of *Schemmer v Property Resources Ltd.* [1975] Ch 273 with approval. The Court held that the jurisdiction falls to be exercised where the Court is satisfied that there is a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed.

9. In *Kilderkin,* Carey JA adopted the four tests set out in *Schemmer* to establish whether such a sufficient connection exists which he summarised as follows:

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?
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?
3. Would the courts of the country of incorporation recognise a foreign appointed receiver?
4. Has the company carried on business in [the jurisdiction of the appointment] or is the seat of its central management and control located there?

10. It is plain from the *Schemmer* judgment that not all four questions need be answered in the affirmative. On my reading of the judgment, incorporation in the jurisdiction of the Court appointing the Receiver or submission by the company to the jurisdiction of the foreign Court appointing the Receiver would suffice to establish a sufficient connection to ground the Court's jurisdiction to recognise a Receiver's appointment.

11. Mr. Russell submits that the recent decision of Smellie CJ *In re Silk Road Funds and Silk Road M3 Fund FSD 234 of 2017 (Unrep.)* suggests that the Court, when considering an application for recognition, should also consider,

    i. the reasons or necessity for seeking recognition,

    ii. whether the receiver is seeking to use the Court to do something it could not do in the appointing jurisdiction,

    iii. whether the receiver is seeking recognition of any powers that could or would not be granted under Cayman law and

    iv. whether recognition would raise any public policy concerns.[3]

DECISION

12. In granting the order for recognition, I considered that the test of *"sufficient connection"* was met as,

    i. the Company was a defendant in the US proceedings, even though a nominal defendant;

    ii. while it did not carry on business there, the Company had commercial offices in the United States and was listed on the NYSE.

    Mr. Russell submits, and I accept, that by listing American depositary shares on the NYSE and opening up its stock for trading by the general public, the Company had, by virtue of its status as a listed company on an American stock exchange, certain

[3] *In re Silk Road* at para 69

filing obligations with the US Securities and Exchange Commission and was subject to certain US securities laws. By listing its shares on the NYSE and subjecting itself to US law, the Company opened itself up to the prospect of being sued for violations of US securities laws, just as Mr. Baliga has done in the US Proceeding. Accordingly, being a listed company on the NYSE creates a strong nexus between the US and the Company that weighs in favour of recognising the US receivership.

iii. That the Company is a Caymanian company would ordinarily weigh against the recognition of a foreign receivership order, but the Company has submitted to the jurisdiction of the US Court and withdrawn its opposition to the appointment of the temporary Receiver which supports, in my view, a finding of a *"sufficient connection"* between the Company and the jurisdiction of the Court appointing the Receiver to justify the recognition of the Receiver's appointment.[4] The fact that the Company does not trade in Cayman, has no assets within the jurisdiction and no creditors here whose interests might be affected are factors that fortify my conclusion that it is appropriate to exercise the Court's jurisdiction in this case.

13. In *Schemmer,* the Court asked the question whether the court of the country where the company was incorporated would recognise the foreign Receiver. In that case, the learned judge was considering an application to recognise a Receiver appointed by a US Court who sought to take control of assets in England which belonged to a company incorporated in the Bahamas, a company that was not a defendant to the US proceedings and had never carried on business there. It was in that context that he suggested that one of the factors the English Court should consider is whether the courts where the company was incorporated would recognise a receiver appointed by US Court.

14. In *In re Silk Road*, the test appears to be framed in terms of reciprocity, with the question being whether the foreign Court which appoints the Receiver would recognise a Receiver

[4] *"Stipulation of non-opposition to preliminary injunction and Consent Order to extend time to....respond to the Complaint":* page 53 of 169 in the exhibit to the Receiver's affidavit.

appointed by this Court. There is no evidence before me that the US Court would do so but, in the absence of any clear evidence that it would *not*, I hold that comity requires that the appointment of a Receiver by a foreign Court of equivalent jurisdiction, on evidence that would have justified the appointment of a Receiver by this Court, be recognized, provided that the other conditions identified by Smellie CJ in *In re Silk Road* were satisfied.

15. One of those conditions is that the powers conferred upon the foreign Receiver be powers capable of being granted under Cayman Islands law. In this case, the powers conferred upon the Receiver are the same as could be granted by this Court, save for the power to appoint Directors which will be excluded from the Recognition Order.

16. With respect to the question of the reason for recognition, which was one of the factors considered by Smellie CJ in *In re Silk Road,* it is in the first instance, to ensure that all fees are paid and that the Company maintains a registered office. The fact is that the Individual Defendants against whom the allegations of misfeasance have been made have abandoned the Company and put it at risk of being struck off administratively and dissolved, a consequence which would, Mr. Russell contends, have a serious adverse impact on the receivership, the US Proceeding and the efforts to vindicate the wrongs alleged in the Complaint. Recognising the Receiver's appointment would, *inter alia*, give him the standing to engage or direct a Cayman registered office provider for the Company, to pay the necessary fees and costs directly and otherwise act on behalf of the Company.

17. Although not one of the additional factors set out in the Chief Justice's decision in *In re Silk Road*, I have considered whether the application for recognition is *ultra vires* as the Receiver is not specifically authorised to seek recognition by the order appointing him, in contrast to the Receiver in *In re Silk Road*. I consider, however, that such authorisation falls to be implied as his Appointment authorises him to do, among other things, any act to protect the status quo of the Company [5] and to appoint agents of the Company. [6] The

[5] At para 2
[6] At para 2 b.

Receiver's appointment would have to be recognised for the Appointment to be given full effect.

18. The final issue for consideration is whether recognising the Receiver would be consistent with public policy. The facts of this case are readily distinguishable from *In re Philadelphia Alternative Asset Fund Limited* (2006) CILR Note 7, where the Court refused to recognise a foreign Receiver in winding up proceedings commenced in the United States on the ground that the petitioner shareholders in Cayman had a legitimate expectation that a company which was domiciled in Cayman would be wound up in Cayman. There are no competing claims in this jurisdiction.

19. As a matter of public policy, this Court will not recognise foreign proceedings undertaken to enforce a foreign penal statute: *Kalley & Ors v Manus & Ors* (1999) CILR 566. While some of the allegations of wrongdoing in Mr. Baliga's Complaint are based on US securities laws, the claims are made by a private citizen on private rights of action and do not, therefore, offend that principle.

20. For these reasons the Order is made recognising the Receiver in terms of the Draft Order which is hereby approved.

DATED 4 FEBRUARY 2020

RAMSAY-HALE J

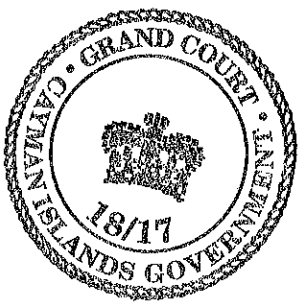


EXHIBIT E

[1893] A.C. 150

[PRIVY COUNCIL.]

HUNTINGTON PLAINTIFF; AND ATTRILL DEFENDANT. ON APPEAL FROM THE SUPREME COURT OF APPEAL FOR ONTARIO.

1891 Nov 18; Dec. 9;

THE LORD CHANCELLOR (LORD HALSBURY), LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, LORD MORRIS, and LORD SHAND.

International Law - Foreign Judgment - Penal Actions - Distinction between Public and Private Penalties.

To an action by the appellant in an Ontario Court upon a judgment of a New York Court against the respondent under sect 21 of New York State laws of 1875, c. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign Court:-

Held, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial, and not penal in the sense pleaded. It was not within the rule of international law which prohibits the Courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the State:

Held, further, that it was the duty of the Ontario Court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction; and that such Court was not bound by the interpretation thereof adopted by the Courts of New York.

APPEAL from a decree of the Court of Appeal (Jan. 13, 1891) affirming a decree of Street, J. (Sept. 15, 1888), and dismissing the appellant's action.

The facts and proceedings are stated in the judgment of their Lordships. The judgment of Street, J., is reported in 17 Ontario Reports, 245, and the judgments in the Appeal Court are reported in 18 Ontario Appeal Reports, 136.

Street, J., held that, according to international law, penalties imposed by statute can only be enforced in the tribunals of the State by the laws of which they are imposed, and that the principle applies to actions upon judgments for such penalties. He further held that the claim this case was an action for a

penalty within the above rule, basing his opinion upon New York decisions to that effect.

In the Appeal Court the judges were equally divided in opinion. Burton and Maclennan, JJ.A., held that the question whether the action in New York was for a penalty or not was concluded by the decisions of the New York Courts. Hagarty, C.J., while agreeing that no action is maintainable on the judgment of a foreign State in respect of a penalty inflicted by the laws of such State, dissented from the decisions of the New York Courts, and held that the liability imposed by the statute in question was not a liability in the nature of a penalty. Osler, J.A., agreeing with the conclusion of Hagarty, C.J., held that the liability in question could not be regarded as a penal liability within the meaning of the principles of international law in question, and consequently that the action was maintainable. He was of opinion, however, that no action would have been maintainable in the Canadian Courts upon the cause of action, in respect of which the judgment was given in the New York Supreme Court.

Sir Horace Davey, Q.C., ***Finlay, Q.C.***, and ***Pollard***, for the appellant, contended that the liability imposed by the New York State Act was not a liability in the nature of a penalty within the meaning of those provisions of international law which prohibit courts of justice from enforcing penalties inflicted by the laws of a foreign State. The action on the judgment obtained by the appellant accordingly was maintainable. The judgment had been obtained in respect of a liability incurred by the respondent for all the debts of a company under sect. 21 of the New York Act. That liability was in reality and under all the circumstances contractual, and not by way of penalty, and the action in which it was enforced was not a penal action, but one by which a private remedy was sought to be enforced. The appellant contracted with the company, on the faith of the liability imposed in his favour as the respondent, by sect. 21. That liability - resulted in debt by the respondent. [LORD BRAMWELL:- What provision as to limitation would have applied to the case?] The ordinary provision with regard to

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debt. The action was a civil remedy to enforce payment of debt, not to enforce a penalty due to the public, nor even for the recovery of damages. By the law of the State of New York the action was not a penal action. Nor was it such by the law of the Ontario Court, which ought to decide by the principles of English law whether an action on such a judgment was maintainable against the respondent. By the law of England such action is maintainable; being brought on a judgment of a Court of competent jurisdiction creating an obligation on the part of the judgment debtor to pay the amount. Reference was made to *Godard v. Gray* (1). With regard to penal laws, Wharton's Law Lexicon defines them as of three kinds: poena pecuniaria, poena corporalis, and poena exilii, all prohibiting an act, and imposing a penalty for the commission of it. Penal actions are those brought by a common informer, or by the public authority, to redress a public wrong; remedial actions are those brought by the party injured to redress a private wrong. See *Bones v. Booth* (2); *Hussey v. More* (3); *Earl Spencer v. Swannell* (4); and for American authorities, *Merchants Bank v. Bliss* (5); *Stokes v. Stickney* (6). Reference was also made to the judgments of the two dissentient judges in *Attrill v. Huntington* (7); *Steam Engine Company v. Hubbard* (8); *Flash v. Conn* (9).

The Attorney General (***Sir R. Webster***), ***Gore*** and ***Ackwith***, for the respondent, contended that, according to principles of international law, the judgment sued on created no obligation on the part of the respondent which a foreign State will recognise. The Courts of the country where the judgment is sued on must judge for themselves as to the nature of the judgment, although in doing so they will pay great regard to any decisions of the Courts of the country where the judgment was passed, and to the reasons on which such decisions proceed. It was contended that this judgment was of a punitive or penal nature, and as such was enforceable only by the Courts of New York. Here,

(1) Law Rep. 6 Q. B. 139.

(2) 2 W. Bl. 1225.

(3) Cro. Jac. 413.

(4) 3 M. & W. 154.

(5) 35 N. Y. 412.

(6) 96 N. Y. 323.

(7) 70 Maryland Rep. 191.

(8) 101 U. S. (11 Otto.) 188.

(9) 109 U. S. (2 Davis) 371.

by universal consent of all the Courts of the country where the Act and the judgment were passed, an action of this kind has been treated as penal. They held that a liability of the kind sought to be enforced in this case is in the nature of a penalty, that it bears no relation to the actual loss or damage sustained by the party to whom the action is given, that it is punitive in its nature and is inflicted upon grounds of public policy. Reference was made to *Merchants Bank v. Bliss* (1); *Wiles v. Suydam* (2); *Easterly v. Barber* (3); *Knox v. Baldwin* (4); *Veeder v. Baker* (5). In those and other cases, causes of action of this nature have been held to be within a New York Statute of Limitation applicable solely to actions for penalties. Reference was also made to *Jones v. Jones* (6); *Hobbs v. Hudson* (7); *Attrill v. Huntington* (8); *First National Bank of Plymouth v. Price* (9); *Steam Engine Company v. Hubbard* (10); *State of Wisconsin v. Pelican Insurance Company* (11); *De Brimont v. Penniman* (12); *Robinson v. Currey* (13); *The Halley* (14).

Finlay, Q.C., replied.

[1892 Feb. 17.] The judgment of their Lordships was delivered by

The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 611 of the State laws of 1875. Sect. 21 of the Act provides that: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the

corporation contracted while they are officers thereof."

(1) 35 N. Y. 412.

(2) 64 N. Y. 173, 177.

(3) 65 N. Y. 252.

(4) 80 N. Y. 610.

(5) 83 N. Y. 156.

(6) 22 Q. B. D. 425.

(7) 25 Q. B. D. 232.

(8) 70 Maryland Rep. 191.

(9) 33 Maryland Rep. 487.

(10) 101 U. S. (11 Otto.) 188.

(11) 127 U. S. (Sup. Ct.) 265.

(12) 10 Blatchford U. S. (Circ.) 436.

(13) Law Rep. 6 Q. B. 21, 28.

(14) Law Rep. 2 P. C. 193.

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The respondent was, in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by sect. 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by sect. 21. The respondent defended the action; but, a verdict having been found against him, the Court, on the 15th of June, 1886, gave final judgment, ordering him to pay to the appellant the sum of $100,240.

Having failed to recover payment, the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal character ought not to be entertained by the Courts of a foreign State.

Mr. Justice Street, who tried the case, being of opinion that the enactments of sect. 21 were strictly punitive and not remedial, dismissed the action with costs. The judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appellant as a creditor of the company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains: "The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed; but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion,

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therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated, Mr. Justice Maclennan expressed his concurrence. But the learned judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was "passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts."

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his "Conflict of Laws," and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a

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foreign country. The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well-known case *(Folliott v. Ogden* (1), and *Ogden v. Folliott* (2)), and also by Chief Justice Marshall, who, in *The Antelope* (3), thus stated the rule with no less brevity than force: "The Courts of no country execute the penal laws of another." Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

(1) 1 H. Bl. 135.

(2) 3 T. R. 734.

(3) 10 Wheaton, 123.

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The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. the Pelican Insurance Company* (1). By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the dictum by Chief Justice Marshall already cited, went on to say: "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary

penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provision are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an

(1) 127 U. S. (20 Davis) 265.

official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (sect. 18) to publish an annual report stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (sect. 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is that every director or officer who vouched its accuracy becomes, under sect. 21, liable personally for all the debts of the corporation contracted during his period of office.

The provisions of sect. 21 are in striking contrast to the enactments of sect. 34, which inflicts a penalty of $100 upon every director or officer of a corporation with limited liability, who authorises or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper

authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both Courts below. With one exception, they do not appear to their Lordships to have a direct or material bearing upon the point raised in this appeal.

In *Steam Engine Company v. Hubbard* (1) the facts were these. The law of Connecticut, in the event of the president and secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and, therefore, to be strictly

(1) 101 U. S. (11 Otto.) 188.

construed; and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their Lordships apprehend that the canon of construction applied in that case would be equally applicable to the case of penalty stipulated by bond, or in a mercantile contract.

Flash v. Conn (1), another decision of the Supreme Federal Court, was relied on by the appellant. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The respondent, in his argument, placed great reliance upon *Merchants' Bank v. Bliss* (2), which was decided in 1866. The statute of 1848, already referred to, required the trustees of the corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this - whether the action was for a "liability created by statute, other than penalty or forfeiture," within the meaning of the Statute of Limitations, or "for a penalty or forfeiture, when action is given to the party aggrieved"? The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, *Wiles v. Suydam* (3), the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships see no reason to question the propriety of these decisions, but

(1) 109 U. S. (2 Davis) 371.

(2) 35 N. Y. (8 Tiffany), 412.

(3) 64 N. Y. 173.

it is hardly necessary to say that a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

Attrill v. Huntington (1) is, however, an authority upon the very point raised in this appeal. During the dependence of the present action, the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The primary judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships are constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the government or people of a state for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concur.

(1) 70 Maryland, 191.

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York, for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.

Solicitors for appellant: *Freshfields & Williams*.

Solicitors for respondent: *Harrison & Powell*.

EXHIBIT F

[1992–93 CILR 605]

STUTTS

v.

PREMIER BENEFIT CAPITAL TRUST

Grand Court

(Schofield, J.)

16 November 1993

Conflict of Laws—companies—foreign-appointed receiver—court may recognize receiver appointed by foreign court if sufficient connection between company and foreign jurisdiction—sufficient connection if company has domicile and primary place of business in foreign jurisdiction and officers already submitted to foreign court

Conflict of Laws—application of foreign law—foreign penal law—court not to enforce foreign penal law—Cayman court to determine whether substantively of penal effect, e.g. if prosecution and sentence for criminal offence or suit, e.g. disgorgement proceedings, brought by or on behalf of state for protection of revenue or municipal laws, involving pecuniary penalties including fines or compensation

Conflict of Laws—companies—foreign-appointed receiver—court will not recognize foreign-appointed receiver if gives effect to foreign civil law with penal effect

The applicant, a receiver appointed in the United States, applied for recognition in the Cayman Islands.

The applicant was appointed receiver of the respondent trust which was organized under the law of the District of Columbia, was registered in the Cayman Islands but conducted its business primarily in Florida. The former trustees and officers of the trust had submitted to the jurisdiction of the US court in proceedings brought by the Securities and Exchange Commission, a US Federal agency charged with the responsibility of enforcing the US securities legislation. The Commission had no authority to bring criminal prosecutions; all proceedings were commenced by civil complaint and proceeded according to the Federal Rules of Civil Procedure.

The complaint in the US proceedings against the respondent was that it had made sales of unregistered securities and had engaged in a scheme to defraud investors. Various equitable remedies were sought, including the appointment of the receiver, an accounting and disgorgement, the latter remedy being the marshalling of the assets of a corporate defendant by the receiver who organized their disposition among investors according to a plan approved by the court. The essential purposes of the Acts under which these proceedings were brought were to protect the investing public and to compensate aggrieved sellers and buyers for their losses. There was also provision for imposing civil fines or penalties, remedies that were also sought against the respondent.

The receiver applied to the Cayman court for an order that he be recognized as the receiver of the trust in the Cayman Islands. He submitted that in recognizing his appointment, the Cayman court would not be giving effect to a foreign penal law since it was clearly and well established in the United States that proceedings under the securities legislation were civil and the remedies provided were remedial.

Held, dismissing the application:

(1) The court had jurisdiction to recognize a receiver appointed by a foreign court if there was a sufficient connection between the company over whose assets the receiver had been appointed and the foreign jurisdiction in which the appointment was made. There was such a connection in this case in the light of the US domicile of the trust, its primary place of business as the United States and the submission to the jurisdiction of the US district court of its former trustees and officers (page 607, line 33 – page 608, line 2).

(2) However, the court's jurisdiction was bound by the principles that it would not execute the laws of a foreign country and would not give effect to foreign penal laws. Despite the existing US authorities which stated that the US Securities Exchange Acts were civil in nature and remedial in effect, the court had to decide for itself the question whether they were in reality penal laws; by determining, first, the substance of the right sought to be enforced and secondly, whether its enforcement would, either directly or indirectly, involve the execution of a law that was penal in effect. For example, the statutory description of a fine or penalty as civil would not necessarily alter its essential penal nature and although it was possible to sever the penal part of a foreign statute from the remedial part so as to enforce rights arising only out of that part, this might not alter the nature of the problem. The general statement of principle applied not only to prosecutions and sentences for crimes and misdemeanours but to all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection ofits revenue and other municipal laws and to all judgments for such penalties. In this case, the disgorgement proceedings which have been taken pursuant to the provisions of the two US Acts were in the nature of a suit in favour of the state whose law had been infringed. Notwithstanding the compensatory aspects of the proceedings, the vindication of violations of the two Acts rested with a body (the SEC) which represented the state itself. It must be concluded that the disgorgement provisions in both Acts formed part of the public law of the United States and therefore the court would not be able to recognize the receiver in this jurisdiction (page 608, lines 3–8; page 608, line 30 – page 609, line 8; page 610, lines 18–20; lines 29–41; page 611, lines 24–30; page 612, lines 11–16).

Cases cited:

(1) *Huntington v. Attrill*, [1893] A.C. 150, *dicta* of Lord Watson applied.

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

(3) *Nanus Asia Co. Inc. v. Standard Chartered Bank*, [1990] 1 HKLR 396, *dicta* of Cruden, Dep. J. applied.

(4) *Raulin v. Fischer*, [1911] 2 K.B. 93.

(5) *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273; [1974] 3 All E.R. 451, considered.

(6) *Wisconsin v. Pelican Ins. Co.* (1887), 127 U.S. 265; 8 S. Ct. 1370.

Ms. C. Bridges for the applicant;

The respondent did not appear and was not represented.

SCHOFIELD, J. This is an application by Charles L. Stutts ("the receiver") for an order that he be recognized in the Cayman Islands as the receiver of a trust known as Premier Benefit Capital Trust ("the Trust"). He was appointed receiver of the trust by an order of the US District Court for the Middle District of Florida, Tampa Division, on July 16th, 1993. The plaintiff in the proceedings in which such order was made is the US Securities and Exchange Commission ("the SEC") and the defendants are the trust and the former officers or trustees thereof, each of whom it has been impossible to serve personally with notice of this application.

The complaint of the SEC in the US proceedings is that the trust made sales of unregistered securities in violation of s.5 of their Securities Act 1933, and engaged in a scheme to defraud investors through the use of misstatements about the trust's securities in violation of s.17(a) of the Securities Act 1933 and s.10(b) of their Securities Exchange Act 1934. This, says the receiver, is a civil complaint and under it the SEC seeks various equitable remedies from the US court. These include the appointment of the receiver, who seeks recognition in this application, an accounting and disgorgement. Civil monetary remedies are also sought.

This court has the same jurisdiction to recognize a receiver appointed by a foreign court as is exercised by the English courts (see *Kilderkin Invs.* v. *Player (2)*). This court has to be satisfied before making such an order that there is a sufficient connection between the company over whose assets the receiver has been appointed and the foreign jurisdiction, the court of which made the appointment. There can be no doubt that such connection exists in this case. The trust was organized under the laws of the District of Columbia and has its domicile there. Its primary place

of business is Florida. The former trustees and officers of the trust have submitted to the jurisdiction of the US District Court.

The issue which concerns me in this application, and which leads me to deliver this order after consideration, is whether if I recognized the receiver in this jurisdiction I would be giving effect to penal laws of the United States. It is well established that the English courts will not enforce a foreign penal law, and of course that principle will be followed in these Islands.

Counsel has referred me to the English decision of Goulding, J. in *Schemmer* v. *Property Resources Ltd.* (5) in which application was made to recognize a receiver appointed in the United States in proceedings taken under the Securities Exchange Act 1934, or for an order setting up an auxiliary receivership. Goulding, J. refused the applications sought primarily on the ground that there was insufficient connection between the defendants and the United States. However, he also denied the applications on the different and alternative ground that the Securities Exchange Act 1934 is a penal law and is therefore unenforceable in the English courts.

Counsel has argued that it is clear that Goulding, J. was not addressed fully on this alternative ground, that he did not have the benefit of being addressed on the US authorities on the points raised and that on this alternative and secondary limb of his decision he came to an erroneous decision. It is argued that actions by the SEC on breaches of the Securities Act 1933 and the Securities Exchange Act 1934 are civil in nature and that the US courts have determined that remedies provided by the Federal securities laws are remedial rather than penal and in particular that it has been held that disgorgement proceedings are remedial and not penal. Despite what the courts of the United States say of the nature of proceedings brought under these two Acts, I must determine for myself whether the Acts are penal in nature. As was stated by Lord Watson in *Huntington* v. *Attrill* (1) ([1893] A.C. at 155):

> "Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either

> directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

I am indebted to the receiver for the following succinct exposition of the nature and intention of the two US statutes under consideration and the remedies granted by the court in applications made under them. I would say at once that although *Schemmer* (5) was decided on consideration only of proceedings under the Act of 1934, it will become apparent that the same considerations apply in relation to proceedings under both the Act of 1934 and the Act of 1933.

The Securities Act 1933 was designed to provide investors with full disclosure of material information concerning public offerings of securities, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing. The Securities Exchange Act 1934 was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, as well as requiring registration and regulation of persons engaged in the securities business.

Both statutes have as their essential purpose the protection of the investing public and one of their primary purposes is to compensate aggrieved sellers and buyers for the losses they sustain if securities practices are not properly followed. The SEC is an independent regulatory agency created by the Congress of the United States and is charged with the primary responsibility of enforcing the two Acts. It has no authority to bring criminal prosecutions and SEC actions are commenced by civil complaint and proceed according to the Federal Rules of Civil Procedure.

The power to order the appointment of a receiver is not specifically contained in the two Acts. It is a power which is exercised by the US courts under their general equitable jurisdiction to preserve defendants' assets and ensure that wrongdoers do not profit from their unlawful conduct. Receivers so appointed marshal the assets of a corporate defendant and

organize their disposition amongst investors according to a plan drawn up by the receiver and approved by the court. These are what are known as "disgorgement proceedings." It is described to me by the receiver as a traditional remedy in equity by which a wrongdoer is ordered by the court to pay or "disgorge" an amount of money equal to the amount by which he profited from his wrongful conduct and is most closely analogous, he says, to the equitable remedy for unjust enrichment. The receiver says that disgorgement demonstrates that the wrongdoer is not allowed to profit from his actions but also serves to compensate investors who were injured by the defendants' breaches of securities laws.

In the US proceedings under consideration in this application, the SEC seeks that the trust account for all proceeds of an alleged fraudulent scheme and disgorge those proceeds. There is a further prayer that the trust pay civil fines and/or penalties pursuant to s.20(d) of the Securities Act 1933 and s.21(d) of the Securities Exchange Act 1934. A description of a fine or penalty as civil does not to my mind avoid the penal nature of such fine or penalty. Acknowledging that this aspect of the US proceedings may be considered by this court as penal in nature, the receiver, through counsel, has offered an undertaking that if his receiver-ship is acknowledged in this jurisdiction such assets as are recovered from the Cayman Islands will not be applied to any fine or penalty and will be applied in the disgorgement proceedings to compensate investors. It is possible to sever the remedial part of a foreign statute from the penal part so as to enforce rights arising out of the part which is remedial (see *Raulin* v. *Fischer* (4)).

Are the disgorgement provisions of the two Acts under consideration and under which the receiver was appointed penal in nature? A reading of the Privy Council decision in *Huntington* v. *Attrill* (1) has convinced me that they are. Lord Watson sets out the following passage from the US Supreme Court decision delivered by Gray, J. in *Wisconsin* v. *Pelican Ins. Co.* (6) ([1893] A.C. at 157):

> " 'The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.' "

Lord Watson went on (*ibid.*, at 157–158):

> "Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

The disgorgement proceedings which have been taken pursuant to the provisions of the two US Acts under consideration are in the nature of a suit in favour of the state whose law has been infringed. Notwithstanding the compensatory aspects of disgorgement proceedings, it cannot be gainsaid that vindication of violations of the two Acts rests with a body, the SEC, which represents the state itself.

I am fortified in my view by reference to the decision of the Supreme Court of Hong Kong, in *Nanus Asia Co. Inc.* v. *Standard Chartered Bank* (3) in which Cruden, Dep. J. considered whether orders made in disgorgement proceedings brought in the US court by the SEC provided the defendant bank with a defence to the proceedings before him. He held that the bank could not invoke the orders because to do so would amount to the enforcement of penal or other public law of the United States. He said ([1990] 1 HKLR at 414):

> "The disgorged offender's funds, it is true, are not paid into the United States treasury. However, the disgorged

> funds are a monetary sum recovered by SEC, in its capacity as a federal agency, in exercise of its statutory powers forming part of the enforcement provisions of the Securities Exchange Act. I am satisfied that the disgorgement proceedings .. amount to 'the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity.' If the disgorgement proceedings are not in the narrow sense the enforcement of a sanction, they are certainly the enforcement of a public power or right at the instance of the United States in its sovereign capacity."

Cruden, Dep. J. considered the issue to be closely balanced but concluded, as do I, that the disgorgement provisions of the Securities Exchange Act 1934 form part of the public law of the United States. The same must apply to the disgorgement provisions of the Securities Act 1933. On these findings I cannot recognize the receiver in this jurisdiction.

The application is dismissed.

Application dismissed.

Attorneys: *Ritch & Conolly* for the applicant.

EXHIBIT G

[2008 CILR 267]

TASARRUF MEVDUATI SIGORTA FONU

v.

MERRILL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED, KAFFEE LIMITED, BARLA FINANCE LIMITED, CUNUR CASH LIMITED, MEDRO LIMITED and YAHYA MURAT DEMIREL

Grand Court

(Smellie, C.J.)

22 May 2008

Conflict of laws—recognition of foreign proceedings—finality of judgment—no jurisdiction to recognize non-final in personam judgment of foreign court—burden on plaintiff to show finality, e.g. recognized and enforceable as such in foreign jurisdiction and appeal procedure exhausted there—irrelevant that defendant may apply to court to set aside civil judgment under foreign law if acquitted of criminal charges based on same facts, as civil judgment final and conclusive until steps taken to set aside

Conflict of laws—recognition of foreign proceedings—public policy—no jurisdiction to recognize in personam judgment of foreign court if contrary to public policy to do so, e.g. involves recognition of foreign sovereign act—whether foreign sovereign act depends on central interest of foreign government—for Cayman court to determine substance of right sought to be enforced, e.g. may enforce action asserting proprietary rights on behalf of private parties as part of regime to compensate victims of fraud

The plaintiff sought summary judgment for the recognition and enforcement of a judgment obtained against the sixth defendant in Turkey.

The plaintiff was a Turkish government agency that insured bank deposits and regulated the Turkish banking sector, which included the restructuring and administration of failed banks. In October 1998, the management and supervision of one such bank was transferred to TMSF, which then became entitled to recover funds (US$30m.) found by the Turkish court to have been misappropriated from the bank by its controller, the sixth defendant. Approximately US$17m. of the misappropriated funds was believed to have been paid to the second to fifth defendants, which were beneficially owned by two Cayman trusts, established by the sixth defendant and of which the first defendant was the trustee. The plaintiff applied, in the present proceedings, for summary judgment recognizing and enforcing the Turkish judgment.

The plaintiff submitted that (a) the Turkish judgment was the final and conclusive judgment of the Turkish court which was recognized as such in Turkey, since the domestic appeal process there had been exhausted—and should therefore be recognized and enforced in the Cayman Islands; and (b) to enforce the Turkish judgment would be within the jurisdiction of the Cayman court, as the action was non-governmental in nature and could be regarded as merely an assertion of the rights of the defrauded depositors of the bank, which could equally be brought by those private individuals themselves.

The defendant submitted in reply that the Turkish judgment was impeachable and could not be enforced in the Cayman Islands, in accordance with settled common law principles governing the recognition and enforcement of foreign judgments, because (a) it was not final and conclusive, as he was charged with criminal offences in Turkey, based on the same facts as the civil judgment, which entitled him to apply to have it set aside, or retried, if he were acquitted; and (b) to do so would be contrary to public policy, as it would involve allowing the sovereign authority of another country (Turkey) to take effect in the Cayman Islands, which the court had no jurisdiction to permit.

Held, granting the application:

(1) The application would be granted and the Turkish judgment would be recognized and enforced without proceeding to trial. Although a non-final foreign judgment could not be recognized in the Cayman Islands and the burden of proving finality rested on the plaintiff, that burden had been discharged. There was no arguable basis on which to conclude that the Turkish judgment was anything other than final and conclusive, as it was recognized and enforceable as such in Turkey itself, the domestic appeal process there having been exhausted. There was no principle in Turkish law that a defendant acquitted of criminal charges based on the same facts as a civil judgment against him, could apply to the civil court to set it aside. Not only would such a principle be contrary to the Turkish Code of Obligations, it would in any case not make the judgment

non-final, as even if a judgment were liable to be set aside, it remained final and conclusive until steps were taken to set it aside, which the sixth defendant had not done. Similarly, the sixth defendant had not attempted to stay the Turkish judgment in the Turkish courts, pending the criminal proceedings, and a stay of the recognition and enforcement of that judgment in the Cayman Islands would therefore be inappropriate and not a proper exercise of the court's discretion (para. 11; paras. 22–23; paras. 29–30; paras. 32–34).

(2) The Turkish judgment was, similarly, not impeachable on the grounds that of its recognition and enforcement in the Cayman Islands would be contrary to public policy. Although a court could not aid an attempt by a foreign state to act in excess of its jurisdiction, by recognizing and enforcing sovereign acts of that state outside its own territory, there was a distinction between such acts and acts of which the central interest was essentially non-governmental in nature. In their true context, the plaintiff's actions, in seeking to enforce the rights of the depositors of the defrauded bank, without the use of any statutory provision during either the prosecution of the claim or in obtaining the judgment, could simply be regarded as assertions of proprietary rights, which could equally be brought by private individuals. It did not matter that the plaintiff could only bring the action because of a statutory assignment of the bank's or its depositors' rights to it by way of a compulsory public acquisition by the state. Nor did it matter that the proceeds were to be paid to the Turkish treasury as, ultimately, the recovered sums would be repaid to the bank's depositors. The plaintiff was merely part of a regulatory regime which, although it served a public interest, could not be classified as governmental, as it was designed purely to compensate victims of fraud. Turkey could not, therefore, be said to have sought to exercise its sovereign authority in the Cayman Islands and accordingly, there was no basis for refusing to exercise jurisdiction and grant recognition and enforcement of the Turkish judgment (paras. 41–47; paras. 50–51).

Cases cited:

(1) *160088 Canada Inc. v. Socoa Intl. Ltd.*, 1997 CILR 409, referred to.

(2) *Att. Gen. (New Zealand) v. Ortiz*, [1984] A.C. 1; [1983] 2 All E.R. 93; [1983] 2 Lloyd's Rep. 265; (1983), 127 Sol. Jo. 307, referred to.

(3) *Att. Gen. (U.K.) v. Heinemann Publishers Australia Pty. Ltd.*, [1989] 2 F.S.R. 631; (1988), 78 ALR 449; 62 ALJR 344, referred to.

(4) *Austria (Emperor) v. Day* (1861), 3 De G.F. & J. 217; 45 E.R. 861, referred to.

(5) *Barclays Bank PLC v. Kenton Capital Ltd.*, 1994–95 CILR 489, referred to.

(6) *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536; (1966), 110 Sol. Jo. 425, referred to.

(7) *Codelco, In re*, 1999 CILR 42, referred to.

(8) *Colt Indus. Inc. v. Sarlie (No. 2)*, [1966] 1 W.L.R. 1287; [1966] 3 All E.R. 85; [1966] 2 Lloyd's Rep. 163; (1966), 11 Sol. Jo. 468, referred to.

(9) *Equatorial Guinea (President) v. Royal Bank of Scotland Intl.*, [2006] UKPC 7, *dicta* of Lord Bingham of Cornhill applied.

(10) *Evans v. European Bank Ltd.*, [2004] NSWCA 82; (2004), 61 NSWLR 75; 1 BFRA 143; [2005] ALMD 6369; [2005] ALMD 6370; [2005] ALMD 6554, considered.

(11) *Iran v. Barakat Galleries Ltd.*, [2008] 3 W.L.R. 486; [2008] 1 All E.R. 1177; [2008] 2 All E.R. (Comm) 225; [2007] 2 C.L.C. 994; [2007] EWCA Civ 1374, applied.

(12) *Kalley v. Manus*, 1999 CILR 566, referred to.

(13) *Marada Global Corp. v. Marada Corp.*, 1994–95 CILR 546, referred to.

(14) *Mbasogo v. Logo Ltd. (No. 1)*, [2007] Q.B. 846; [2007] 2 W.L.R. 1062; [2006] EWCA Civ 1370, applied.

(15) *Norway's Application (Nos. 1 & 2), In re*, [1990] 1 A.C. 723; [1989] 2 W.L.R. 458; [1989] 1 All E.R. 745; (1989), 133 Sol. Jo. 290, referred to.

(16) *Nouvion v. Freeman* (1890), 15 App. Cas. 1, applied.

(17) *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273; [1974] 3 W.L.R. 406; [1974] 3 All E.R. 451; (1974), 118 Sol. Jo. 716, referred to.

(18) *Schnabel v. Yung Lui*, [2002] N.S.W.S.C. 15; 2002 W.L. 169651, *dicta* of Bergin, J. applied.

(19) *Stutts v. Premier Benefit Capital Trust*, 1992–93 CILR 605, referred to.

(20) *TMSF v. Demirel*, [2007] 2 All E.R. 815; [2007] 1 Lloyd's Rep. 223; [2007] I.L. Pr. 8; [2006] EWHC 3354 (Ch), applied.

(21) *Wahr-Hansen v. Compass Trust Co. Ltd.*, 2007 CILR 55, referred to.

(22) *Zuiderent v. Christiansen*, 2004–05 CILR *N* [23], referred to.

S. Moverly Smith, Q.C. and *M. Loberg* for the plaintiff;

C.D. McKie and *M. Livingston* for the first to fifth defendants;

K. Farrow, *H. Robinson* and *S. Dickson* for the sixth defendant.

1. **SMELLIE, C.J.:** This is an application by the plaintiff, Tasarruf Mevduati Sigorta Fonu ("TMSF"), for summary judgment against the sixth defendant, Mr. Demirel, for the amount of US$30m., plus related amounts of interest, costs and attorneys' fees, the amount awarded to TMSF, against the sixth defendant, in Turkey. This is an *in personam* judgment, arising from allegations of fraud against Mr. Demirel himself, as distinct from other claims, which exist against various banking and other corporate entities, which he owned, or controlled, in Turkey, among which was Bank Ekspres S.A. ("Ekspres"), a Turkish bank.

2. Thus, TMSF's application for summary judgment seeks this court's

recognition and enforcement, at common law (in the prevailing absence here of a global statutory scheme), of the judgment that it obtained from the Turkish court. The application is brought pursuant to the Grand Court Rules 1995, O.14, r.1(1), on the ground that the defendant has no proper defence to the claim—the basis upon which this court might grant summary judgment, without the need for a trial.

3. The test to be applied for determining whether the application should succeed is stated as being in two stages: (i) Is what the defendant says, by way of defence, credible? and (ii) Has the defendant shown that there is a fair and reasonable probability that he has a real *bona fide* defence? (see *Zuiderent v. Christiansen (22)*). These are questions which can be answered only against the background of an understanding of the pleadings.

Background

4. TMSF is Turkey's insurer of banks, and has legal responsibility for the supervision and regulation of the Turkish banking sector. This includes the restructuring and administration of failed banks, whose licences have been revoked; Ekspres and Egebank A.S. ("Egebank") are two such banks. TMSF is also entitled to bring actions in its own name, and to receive the proceeds of all proceedings issued to recover losses of property sustained by banks for which it is responsible. More specifically, these are banks whose shareholding rights, and/or management and supervision, have been transferred to TMSF, pursuant to certain provisions of the (Turkish) Banking Act 2003.

5. On October 25th, 1998, the Turkish Treasury (pursuant to other statutory powers vested in it) transferred the management and supervision of Ekspres to TMSF. Accordingly, it is averred by TMSF in its pleadings (and not disputed by Mr. Demirel) that TMSF is the appropriate plaintiff to recover property found to have been misappropriated from Ekspres. This misappropriation is particularized by TMSF's pleadings as having been committed in the same manner as the fraud which was found to have been proven by the Turkish court in giving the judgment upon which TMSF now sues.

6. The misappropriations are alleged to have occurred in the following manner, which I summarize as necessary only for the present purposes, given that I should proceed on the basis that the Turkish judgment already subsumes proof of the allegations. Egebank, whose controller was Mr. Demirel, collapsed in 1999, with liabilities of US$1.2bn. owed to depositors. Part of the loss resulted from some US$490m., said to have gone directly to the benefit of Mr. Demirel, his family and associates. There are ongoing proceedings in Turkey to recover the Egebank losses.

7. Mr. Demirel is alleged to also have been the recipient of some

TL8.3bn. (equivalent to the principal sum of US$30m.) from Ekspres, pursuant to a fraudulent conspiracy between himself and the controller of that bank, Mr. Korkmaz Yigit. The theft is said to have been effected by the making of sham loans, with no intention of repayment, to various companies controlled by Mr. Demirel. These companies immediately paid the money into the account of yet another Demirel company, at Ekspres, which was then withdrawn, in cash, and paid into Mr. Demirel's account. It is averred that he then entered into a "back to back arrangement" with Mr. Yigit of Ekspres, by which he caused Egebank to make matching fraudulent payments for Mr. Yigit's benefit.

8. The Egebank and Ekspres "loans" were each made on the same date (September 22nd, 1998) and for the same overall amount of US$30m. each. It is this "loan" from Ekspres that is the subject of the Turkish judgment, on which TMSF sues in these proceedings. Prior to the alleged fraud, Mr. Demirel, in 1997, had created a Cayman trust. In 1999, after the alleged fraud, he created two further trusts (the Dolphin and Mana trusts), to one of which (the Dolphin trust) the assets of the 1997 trust were transferred. The first defendant, Merrill Lynch Bank & Trust Co. (Cayman) Ltd., is the trustee of both trusts. The second to fifth defendants are Cayman companies, incorporated with the intention that they be owned beneficially by the trusts. Mr. Demirel and his wife are primary beneficiaries of both the Dolphin and Mana trusts.

9. It is acknowledged that after the alleged fraud took place, Mr. Demirel, between June 2nd, 1999, and April 28th, 2000, caused approximately US$17m. to be paid to some of the trusts' companies. This litigation, and related litigation in England (where it was thought that Mr. Demirel also had assets), represents ongoing attempts by TMSF to recover the proceeds of the alleged fraud.

Objection to the grant of summary judgment

10. On behalf of Mr. Demirel, Mr. Farrow raises two points of objection, by way of the defence to the claims. They are presented as based upon the settled common law principles of private international law, which governs the recognition and enforcement of foreign judgments. These will be discussed in their full legal contexts, as set against the classical statement of the common law rules for the enforcement of foreign judgments, as explained in Rule 35(1) in Dicey, Morris & Collins, 1 *The Conflict of Laws*, 14th ed., para. 14R–018, at 574 (2006):

". . . [A] foreign judgment *in personam* given by the court of a foreign country . . . which is not impeachable under any of Rules 42 to 45 [*i.e.* due to lack of jurisdiction of the foreign court (*ibid.*, para. 14R–118, at 619); fraud (*ibid.*, para. 14R–127, at 622); contravention of public policy (*ibid.*, para. 14R–141, at 629); or opposition to

natural justice (*ibid.*, para. 14R–150, at 633)], may be enforced by a claim or counterclaim for the amount due under it if the judgment is

(a) for a debt or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and

(b) final and conclusive."

The objections on behalf Mr. Demirel are based on Rule 44 (*op. cit.*, para. 14R–141, at 629), "the public policy point," and Rule 35(1)(b) (*ibid.*), "the finality point."

The finality point

11. As Rule 35(1)(c) shows, a foreign judgment will not be recognized in the Cayman Islands at common law, unless it is a final and conclusive judgment. Prior to the proposed amendment of Mr. Demirel's defence to this action, it had been common ground that this judgment for US$30m. had been finalized in Turkey, by way of its service upon Mr. Demirel and by the exhaustion there of the domestic appeal process. It was also common ground that the judgment was enforceable in Turkey.

12. Mr. Demirel's objection is based on rather different reasons. By his proposed amended defence, Mr. Demirel avers that—

". . . [TMSF's] judgment is not final or conclusive, by reason of the fact that he [Mr. Demirel] is charged with criminal offences based on the same facts as the judgment, which would entitle him, if acquitted, to apply to the [Turkish] civil court that pronounced the judgment, for it to be set aside, or for retrial."

13. Those criminal proceedings, which remain outstanding against Mr. Demirel, are said to be on all fours with the factual basis of this *in personam* judgment, obtained in the Turkish civil court, and which TMSF seeks to enforce against him. The criminal proceedings are due to commence on March 20th, 2008.

14. As a matter of Turkish law, according to the opinion of experts relied upon by Mr. Demirel (Profs. Atalay and Souz.yer), where the criminal court delivers a judgment of acquittal in criminal proceedings, then, depending on the grounds of acquittal, that judgment will be binding on the civil court, even if the civil court has already given judgment against the defendant. One of such grounds is where both the criminal and civil proceedings are based on the same allegations of fraud. In those circumstances, it is their opinion that the civil court—the same court that pronounced the earlier judgment—can re-open the case. Questions have been raised about the accuracy and reliability of this expert opinion evidence. These will be considered below.

15. Earlier reliance by Mr. Demirel on an appeal against the judgment to the European Court of Human Rights ("ECHR"), as evidencing the lack of finality, is no longer relied upon by him. Among other things, Mr. Moverley Smith, on behalf of TMSF, points to the requirement under the ECHR rules, that the judgment had to have been regarded by Mr. Demirel himself as final, in order for him to have appealed against it to the ECHR.

16. As to the pending criminal proceedings, TMSF points, first, to the fact that the experts have not gone so far as to express the opinion that any such purported right—arising from acquittal in a criminal court—to revisit the civil judgment, renders that judgment a non-final judgment, as a consequence of Turkish law, in Turkey itself. Nor, therefore, should it be taken as their opinion that, as a matter of Turkish law, an acquittal would render the civil judgment, for the present purposes of recognition and enforcement by this court, not final and conclusive.

17. Passages in the joint opinions of the experts themselves are cited to the contrary by TMSF. This is in the context of the experts having been asked to give opinions on the different, but related, question of whether or not TMSF should be obliged to deduct any sums already recovered from other Demirel assets in Turkey, so as to eliminate, or reduce, this outstanding judgment debt of US$30m. They express themselves in the affirmative since, they say, this judgment is the "only finalized judgment according to Turkish law." Their opinion is expressed in the following terms (as translated), at the very end of their joint opinion of March 11th, 2008, and which is filed in these proceedings on behalf of Mr. Demirel:

"It is seen from the 2007 quarterly activity report of TMSF, announced on its internet website . . . that the total amount of collection made from the Demirel Group has reached US$121,967,780, as of December 31st, 2007. This amount exceeds the amount TMSF is seeking to recover in the Cayman proceedings. As conceded by TMSF, the US$30m. judgment is *the only finalized judgment according to Turkish law*. When the plaintiff has claims for judgment, some of which are finalized and some of which not, the plaintiff is required to deduct the amounts collected from the receivables of the finalized judgments, before the receivables of not finalized judgments. In other words, since the US$30m. judgment *is the only finalized and enforceable judgment according to national law*, it is proper to deduct those receivables from the recoveries made to date." [Emphasis supplied.]

18. Given their required independent and impartial role as experts, that is an expression of opinion which can be regarded as based only on their agreement with its stated legal premise. It is curious, therefore, that it does not accord with their other views expressed in their opinions placed before me, going to the effect of a possible acquittal in the criminal proceedings.

19. I am invited, by Mr. Moverley Smith, to be sceptical about the experts' opinions, for the further reason that they are discordant with the actual wording (albeit in the English translation) of the provisions of the Turkish Code of Obligations, on which the opinions are based:

"Article 53—The judge is not bound either with the opinion of the criminal case concerning liability for deciding whether or not the person committing tort has the mental capacity, or has any fault, nor with the judgment of acquittal delivered by the criminal courts. Furthermore the judgment of the criminal court does not restrain the private judge even in determining the fault or the amount of loss."

(This is taken from page 5 of this first joint legal opinion.)

20. A further translation, proffered during the hearing by Mr. Farrow as being more accurate, is worth noting for that reason. It provides a plainer reading to the same effect, for present purposes, as the version set out immediately above:

"Article 53—The judge is neither bound with the provisions of the criminal code concerned with liability nor with the acquittal judgment delivered by the criminal courts when determining whether or not there is negligence or whether or not the person committing the tort has the mental competence. Furthermore the judgment of the criminal court does not restrain the civil court judge even in assessing the negligence or determining the amount of the loss."

21. Notwithstanding the plain terms of these English translations, the opinions of the experts that follow, and which purport to cite other scholarly opinions in support, are surprisingly to the opposite effect; that is:

"If the Istanbul First High Criminal Court delivers a judgment of acquittal, based on the justification that the loan transaction is not fraudulent, in the proceedings pending against Mr. Demirel, determination of the material fact will be binding for the Private Law Court . . . [and] if re-trial is sought in the Private Law Court, based on the acquittal by the Criminal Court, against the finalized Private Law Court judgment, an order for stay of execution can be obtained from the court handling the trial (see Execution and Bankruptcy Law, Article No. 36)."

22. No attempt is made by the experts to explain the contradiction between the wording of the Code of Obligations and their opinions, so as to afford me a basis upon which I can understand their opinions, let alone accept them, flying, as they appear to do, in the face of the statutory provision. And so what is ultimately suggested on behalf of Mr. Demirel, without the benefit of proper elucidation, is that the outcome of the criminal proceedings before a different court could redound, so as to

render the judgment in the civil court no longer final, if Mr. Demirel were acquitted of the criminal charges and entirely subjectively decided to return to the civil court to set aside the judgment.

23. I do not accept that premise, given the concerns identified above about the expert evidence. The upshot is that I am left with only a single reliable premise: this is that the Turkish judgment is one given *in personam*, against Mr. Demirel, which has been the subject of steps taken to enforce it in Turkey, on the basis that it is a finalized judgment there and, moreover, one in respect of which there are no extant challenges in Turkey. In short, it is a judgment in respect of which all the objective *indicia* point to it being a final and conclusive judgment "in the foreign court of competent jurisdiction in which it was be given" (*Dicey, Morris & Collins, op. cit.*, Rule 35(1)).

24. The words of Rule 35(1) are most significant to the present issue. They derive from the venerable decision of the House of Lords in *Nouvion* v. *Freeman* (16), and have subsequently been adopted and applied by this court: see, for example, *160088 Canada Inc. v. Socoa Intl. Ltd. (1)*. Given the way in which it is said that the Turkish judgment is defeasible, and therefore not final and conclusive, I will set out in full the relevant principles. These are principles which have been accepted as settled and binding, notwithstanding the rather peculiar circumstances of the case of *Nouvion* v. *Freeman* itself—a case in which the issue was whether a Spanish *remate* judgment (one obtained in summary executive, or non-judicial, proceedings) could be regarded as final and conclusive, notwithstanding that the subject-matter remained amenable to being tried in ordinary, or "plenary," proceedings, in which all defences, and the whole merits of the matter, were reviewable again, and in which the *remate* judgment could not be pleaded as a *res judicata.* Moreover, a "plenary" judgment rendered the *remate* judgment inoperative, and required restoration of any moneys paid under it.

25. Unsurprisingly, in those circumstances, the House of Lords upheld the Court of Appeal's conclusion that since a *remate* judgment did not finally and conclusively establish the existence of a debt, no action could be brought upon it in England. In coming to that conclusion, the general principles were laid down by Lord Herschell (15 App. Cas. at 9):

"The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher

tribunal. In such a case, it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation."

26. And Lord Watson said (*ibid.*, at 13):

"In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable, the English Court will enforce it, subject to conditions which will save the interests of those who have the right to appeal."

27. This reference to the limited effect of a right of appeal, upon the recognition and enforceability of a foreign judgment under English Law, has been reaffirmed by the courts, over the generations since *Nouvion* v. *Freeman* (16), most notably perhaps by the English Court of Appeal, in *Colt Indus. Inc.* v. *Sarlie (No. 2)* (8). The latter was a case in which it was held that a judgment of the Supreme Court of the State of New York, being a judgment of a court of competent jurisdiction in the territory in which it was pronounced, was final and conclusive, for the purpose of enforcing it in the English courts, and for that purpose its status as a judgment pending appeal was irrelevant.

28. In the matter before me, Mr. Farrow did not submit that I could treat the effect of the pendency of the criminal proceedings in Turkey, by analogy, as meaning that the Turkish judgment is pending appeal. Rather, he emphasized what he termed "the crucial distinction" (by reliance on his expert opinions), by which the judgment could be liable to be set aside, not by the criminal court itself, in any sense in an appellate capacity, but by the same civil court in which it was pronounced, once that court is moved to do so by Mr. Demirel, if and when he is acquitted by the criminal court.

29. None of the many case precedents examined provided even a close parallel for that scenario in English law. It is one that describes a state of affairs which is virtually indeterminable by reference to any established procedure, because it would depend upon the contingency, not only of the outcome of the criminal proceedings, but also upon the entirely subjective determination of Mr. Demirel, if he is acquitted, whether or not to invite the civil court to re-visit its judgment.

30. Even while I acknowledge that the defence's is the only expert evidence before me upon the subject of the effect of an acquittal under Turkish law, and while I also acknowledge that the burden of proving the finality of the Turkish judgment rests upon TMSF—see *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)* (6)—I remain unpersuaded that

there is a *bona fide* arguable case to the contrary, in light of the judgment as it stands now being plainly regarded, and treated by all, as final and conclusive, for all purposes in Turkey itself.

31. The very thorough judgment of the Supreme Court of New South Wales in *Schnabel* v. *Yung Lui* (18) is also helpfully on point. There, after a careful examination of the leading cases on this question of finality, Bergin, J. said ([2002] N.S.W.S.C. 15, at para. 77:)

"In this case, on this issue, the Court is primarily concerned to determine the status of the US judgment under the US law and that will depend upon the construction and the effect of the applicable US Rules. The test of finality is the treatment of the judgment by the foreign tribunal as res judicata. A default judgment may be enforceable as a final and conclusive judgment even though it is liable to be set aside in the very court that rendered it. The approach that has been adopted is that until the steps are taken to set the judgment aside the judgment is enforceable as a final and conclusive judgment."

32. That "adopted approach," by the common law courts, is all the more advisable here, where the judgment has clearly been rendered by the Turkish court as a *res judicata*, and where, moreover in Mr. Demirel's case, it has been conclusively upheld on appeal, remains enforceable and no steps have been taken before the same Turkish court that rendered it, even to have it stayed pending the criminal proceedings.

33. In all the circumstances, I see no arguable basis for me now to conclude that this is other than a final and conclusive judgment, within the meaning of Rule 35(1). In anticipation of this conclusion, Mr. Farrow also submitted that, were I to grant the order sought by TMSF recognizing the judgment, I should stay execution of the judgment here, pending the outcome of the criminal proceedings in Turkey.

34. I do not see that that could be a proper exercise of discretion, having regard to the indeterminable contingencies identified above. Nor would a stay appear to me appropriate, where it appears that no steps have been taken to approach the Turkish court whose judgment is involved, to impose a stay upon its execution in Turkey, for what would surely have to be even more pressing and compelling reasons there, of the pending criminal proceedings.

Public policy—the exercise of Turkish sovereign authority in Cayman

35. Here, it is argued on behalf of Mr. Demirel (citing Rule 35(1)(a)) that the TMSF judgment is impeachable, as a judgment for public receivables whose recognition and enforcement by this court would be contrary to public policy, as it would involve allowing the sovereign authority of

another country (Turkey) to take effect in this jurisdiction. And further, that as affording recognition, or enforcement, to such a judgment would be contrary to public policy, this court has no jurisdiction to do so. This is Rule 3 in Dicey, Morris & Collins, 1 *The Conflict of Laws*, 14th ed., para. 5R–019, at 100 (2006), and states as follows:

"English Courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal, revenue or public law of a foreign State; or

(2) founded upon an act of state."

36. In their quest to develop the rationale behind this Rule, the courts, going back at least as far as *Emperor of Austria* v. *Day* (4), have recognized that there is a fundamental distinction between a foreign action which amounts to the exercise of sovereign authority in the territory of another state, and an action brought, albeit by an agency of a foreign state, simply to protect property rights, such as might be brought by an individual.

37. This is the fundamental distinction upon which TMSF seeks to rely, for the recognition and enforcement of its Turkish judgment by this court, in response to Mr. Demirel's invocation of the public policy objection. It is also a fundamental distinction which received the close examination of the English Court of Appeal in two recent cases, in which comprehensive and revisionary judgments were delivered.

38. *Mbasogo* v. *Logo Ltd. (No. 1)* (14) was a case in which, at the risk of over-simplification, rather unique claims were brought for an injunction to restrain persons from doing acts for the purpose of promoting revolution and disorder in the Republic of Equatorial Guinea, and for damages said to be due to stress and feelings of insecurity, suffered by the ruler of the Republic, upon his learning of a planned *coup* which had failed. There were objections, by the defendants, to the claims, on grounds of non-justiciability. Among them was the public policy objection, based on Rule 3(1), and for the purposes of its analysis, the Court of Appeal identified this approach ([2007] Q.B. 846, at para. 50):

"The critical question is whether in bringing a claim, a claimant is doing an act which is of sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. As we see it, that was the broad

distinction of principle which the court was seeking to draw in the Emperor of Austria case . . . In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances: see, for example, *Huntington* v. *Attrill* [1893] A.C. 150.

We put the distinction in that broad way because it seems to us to express the rationale behind rule 3(1) in *Dicey, Morris and Collins, The Conflict of Laws.* We have reached the conclusion that rule 3(1) does accurately reflect the law in stating that the English courts have no jurisdiction to entertain an action for the enforcement of "a penal, revenue or other public law of a foreign state" . . . It is true that most of the cases concern actions for the enforcement of penal or revenue laws. But as we have pointed out, these are merely examples of a wider principle . . . Like Lord Denning, M.R. in the *Ortiz* case . . . we have found the analysis by Dr. Mann illuminating. As we understand Dr. Mann, his criticism of the *Emperor of Austria* case . . . was not of the principles stated but of the application of those principles to the facts."

39. This reference to Lord Denning's reliance, in the *Att. Gen. (New Zealand)* v. *Ortiz* (2), on the Dr. Mann article, is worthy of interpolation for present purposes. I take the quotation in the *Mbasogo* v. *Logo Ltd.* case itself ([2007] Q.B. 846, at para. 42):

"As Lord Denning, M.R. made clear in the *Ortiz* case, his judgment was influenced by the article by Dr. F. A. Mann, '*Prerogative Rights of Foreign States and the Conflict of Laws*' 40 *Tr. Gro. Soc.* 25, to which we have referred: Dr. Mann said, at p.34:

'Where the foreign state pursues a right that by its nature could equally belong to the individual, no question of a prerogative claim arises and the state's access to the courts is unrestricted. Thus a state whose property is in the defendant's possession can recover it in an action in detinue. A state which has a contractual claim against the defendant is at liberty to recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign state cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle.'

We agree.

In a later article on '*The International Enforcement of Public Rights*' (1987) 19 *New York University of International Law and Politics* 603, 629–630 Dr. Mann said that the decisive question is whether the

plaintiff asserts a claim that, by its nature, involves the assertion of a sovereign right. Quoting Grotius, he suggested that claims are capable of international enforcement if they arise from acts that may be done not only by the King, but also by anyone else: 'actus qui a rege sed ut a quovis alio fiant'. Again, we agree."

40. Even more recently, in *Iran* v. *Barakat Galleries Ltd.* (11), the English Court of Appeal was called upon to review the principles. This was a case in which the Government of Iran sued, in England, for the recovery of antiquities alleged to form part of Iran's national heritage, and which were held by the Barakat Galleries in London. Barakat, by way of preliminary objection, argued, *inter alia*, that Rule 3(1) was fatal to Iran's claim, because "English courts have no jurisdiction to entertain an action . . . for the enforcement, either directly or indirectly of a penal, revenue or other public law of a foreign state . . ." ([2008] 3 W.L.R. 486, at para. 96).

41. In its masterly analysis of the preceding case law, the Court of Appeal began by re-affirming that, in the application of Rule 3(1), the starting point for determining justiciability was not the lack of jurisdiction of the courts of the forum, but of the foreign state, which has no international jurisdiction to enforce its law outside its own territory. Thus, the basis of this Rule is that the courts of the forum will not exercise their own jurisdiction in aid of an attempt, by those of the foreign state, to act in excess of their own jurisdiction—a view which the Court of Appeal recognised as also having been substantially earlier adopted by the House of Lords in *In re Norway's Application (Nos. 1 & 2)* (15).

42. The Court of Appeal then proceeded to consider whether there is a distinction, in the operation of the Rule, between penal and public foreign laws (no question of the revenue laws of Iran having arisen for consideration in the case). The court concluded that there was—importantly to the outcome in this case—a distinction between penal and other public laws; such that the former may be regarded as an expression of the sovereign authority of the foreign state, but the latter, depending on the true context, may be regarded simply as an assertion of proprietary rights. Thus, if the claim to be recognized, or enforced, by the English courts was one which derived from the latter category of public laws, it would be justiciable, provided that—adopting the words of the High Court of Australia in *Att. Gen. (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (3), as approved only shortly before by the *Equatorial Guinea (President)* v. *Royal Bank of Scotland Intl.* (9)—"the 'central interest' of the [foreign] state in bringing the action is [not] governmental in nature" ([2006] UKPC 7, at para. 24).

43. Thus, where, in particular, the foreign judgment derives from a proceeding taken pursuant to a public law of the foreign state, the context must be carefully considered. An illustration of the application of that

principle (see *Iran* v. *Barakat Galleries Ltd.* (11)), very apposite to this case, was the approach of the High Court of Australia in *Evans* v. *European Bank Ltd.* (10), in which it was held (distinguishing *Schemmer* v. *Property Resources Ltd.* (17)) that a receiver appointed by the US Federal Trade Commission could sue in New South Wales, to recover the proceeds of a credit card fraud because, according to the headnote to the case ([2004] NSWCA at 82) "in the sphere of consumer protection, regulatory regimes may serve a public interest and be classified as public laws, without constituting a governmental interest of the relevant kind" and "as a matter of substance, this is a proceeding designed to compensate persons who had been defrauded" ([2004] NSWCA 82, at para. 83).

44. The analogy with TMSF's position here is readily apparent. The clear advice coming from the case law (that the court from which recognition and enforcement is sought must examine, with care, the real substance of the claim to be enforced, to discern whether or not it is, in essence, of a sovereign character), has been followed before by this court, in refusing to recognize the appointment of a receiver arising from US "disgorgement proceedings." Those were proceedings taken by the US Securities Exchange Commission, against wrongdoers under federal statutory powers, to require them to "disgorge" an amount of money, equal to the amount by which they had profited from their wrongdoing. The application was refused because those proceedings were found to be, in substance, not compensatory, but plainly sovereign and penal in nature; see *Stutts v. Premier Benefit Capital Trust (19)*. A different conclusion was reached where the claim only partially involved the enforcement of Norwegian tax laws, and where the rest of the claim involved a private proprietary interest: *Wahr-Hansen v. Compass Trust Co. Ltd. (21)*.

45. Here, it is conceded by Mr. Farrow that, in pursuing the case in Turkey against Mr. Demirel, TMSF did not make use of statutory provisions in Turkey, by which it could have claimed by virtue of sovereign authority (referred to as "Law 6183"), but instead used the civil proceedings available to private litigants, based on the Turkish Code of Obligations. It was also accepted—and it followed—that if Ekspres had itself sued, this public policy objection could not have been raised. Ekspres (although itself now also taken over by TMSF) would then have been able to plead that it sued as a private litigant, seeking to enforce proprietary rights.

46. In all the circumstances present here, I do not think, when the entire substance of the matter is examined, that it matters that TMSF could only have brought this action, by virtue of a statutory assignment of Ekspres', or its depositors', rights obtained, as Mr. Farrow puts it, "by way of public compulsory acquisition by an agency of the state." Nor should it matter that the proceeds of the judgment are to be paid to the Turkish treasury,

when it is borne in mind that the treasury itself had to provide funds to TMSF for repaying the depositors.

47. At the core, this claim remains essentially one for the recovery of monies, which have been defrauded from private persons, who were the depositors of the bank, or from the bank itself. The fact that TMSF, as an agency of the Turkish state, is the party pursuing the claim, does not change the essence of the claim, which is one that could have been brought directly by, or on behalf of, those private interests themselves. No act of a peculiarly sovereign character is shown to have been taken in the prosecution of this claim in Turkey, or in the obtaining of the judgment sought to be recognised by this court, such that it could be said that the Turkish state is here seeking to exercise its sovereign authority within the Cayman Islands.

48. In this case, I have the rare benefit of another court having previously decided the very issue before me, on this public policy point. In *TMSF* v. *Demirel* (20), Collins, J. (as he then was, now Collins, L.J. and a member of the court in *Iran* v. *Barakat Galleries Ltd.* (11), as well as the present editor of *Dicey, Morris & Collins*) had to decide whether the same objection should stand in the way of TMSF being granted leave to serve its writ (for enforcement of this same Turkish judgement but upon Mr. Demirel in England), out of the jurisdiction upon Mr. Demirel. Collins, J. undertook a thorough analysis of the substance of TMSF's claim, even though he acknowledged that the public policy objection may still be available to Mr. Demirel, were he to take an active role in defending against the claim in England, after service was effected upon him. In so doing, Collins, J. also had regard to the expert evidence, which comprises much of the expert evidence before me.

49. I found his analysis however, qualified as above, to be compelling, and I respectfully adopt it for the purposes of discerning the essential nature of TMSF's claim ([2007] 1 Lloyd's Rep. at 233):

"The overall effect of the evidence is that the claims were originally private law claims of the banks, and were vested in TMSF. Until TMSF commenced proceedings they could have been transferred to new asset management companies, in which event they would have continued to be private claims. Once TMSF commenced proceedings, it could have made, but did not make, use of the Law 6183 procedures for the collection of debts . . .

. . . Even on the evidence of Turkish law it [TMSF] has a strongly arguable case that the claims remained private law claims. If the principles expressed in *President of the State of Equatorial Guinea* v. *Logo Ltd.* are applied it is highly likely that TMSF would succeed on this issue. The claim was pursued to judgment in Turkey as a private

law claim in the civil courts, and not as a public law claim in the administrative courts.

The only act of a sovereign character which may be involved is the assumption by TMSF of bank assets [and, I would add, of bank liabilities], but that took place in Turkey and there is no question of the Turkish state entity exercising sovereign authority outside Turkey simply because it sues on a claim so transferred to it. There is no assertion of the sovereign authority in England by the Turkish state entity in seeking to enforce a Turkish judgment based on such a claim, which could have been asserted by the bank concerned. This is not the assertion of a sovereign right, and the fact that the claim may be labelled as a public receivable in Turkey (and so equated, according to the evidence of Mr. Demirel, with taxes) does not in English eyes make it a claim comparable to a claim for taxes or penalties."

50. Looked at from the perspective of this court, which also has a significant history of having to consider and resolve objections based on this particular ground of public policy (see, for more recent examples since *Stutts v. Premier Benefit Capital Trust (19)*; *Marada Global Corp. v. Marada Corp. (13)*; *Barclays Bank PLC v. Kenton Capital Ltd. (5)*; *In re Codelco (7)*; and *Kalley v. Manus (12)*), TMSF's claim appears no more so a claim based on assertion of sovereign authority to me, than it did to Collins, J.

51. I therefore find no basis for refusing to exercise the jurisdiction of this court to grant its recognition. There being no other ground of objection than those dealt with herein, and which I find to be without merit, I grant judgment pursuant to the Grand Court Rules, O.14, r.1, on the parts of the claim set out in the statement of claim and the prayer for relief. TMSF will have its costs on the standard basis, to be taxed if not agreed.

Application allowed.

Appleby for the plaintiff; *Maples & Calder* for the first to fifth defendants; *Mourant* for the sixth defendant.

EXHIBIT H

[1994–95 CILR 546]

MARADA GLOBAL CORPORATION

v.

MARADA CORPORATION and OTHERS

Grand Court

(Harre, C.J.)

2 November 1995

Conflict of laws—companies—foreign-appointed receiver—claim by receiver appointed on application of foreign regulatory agency but suing through company not to be struck out by court if seeks distribution of company's assets to investors and creditors, not penal remedy

The first defendant applied to strike out the plaintiff's claim against it for money had and received.

A receiver, appointed by a US court and acting through the plaintiff company, brought the present proceedings against, *inter alia*, the first defendant for money had and received. The receiver had been appointed to manage the plaintiff's assets on an application by the Securities and Exchange Commission, which had alleged that the plaintiff, amongst others, had violated US Federal securities legislation. The US court had ruled that the appointment was necessary to protect investors' funds and had authorized the receiver to intervene in an interpleader summons, between the SEC and the first defendant, relating to funds held in the Cayman Islands. The Grand Court ruled that the issues relating to those funds would be decided on the receiver's claim for money had and received and consequently the SEC abandoned its claim in the interpleader proceedings. The US court subsequently authorized an action by the receiver in the name of the plaintiff, expressly stating that such an action was to be for the benefit of the plaintiff company, its investors and its creditors and that the receiver was not authorized to recover funds to distribute to the SEC. The first defendant then applied to strike out the plaintiff's claim as an abuse of process.

It submitted that the receiver, suing in the plaintiff company's name, had been appointed on the application of the SEC and was seeking indirectly to enforce foreign penal law in the Cayman Islands by recovering funds in order to compensate allegedly defrauded investors in the United States.

The plaintiff, in reply, submitted that its claim should not be struck out because (a) it was asserting the right of a private litigant rather than attempting to enforce foreign penal law; and (b) moreover, the receiver had been expressly authorized by the US court to recover funds for the benefit of the company, its investors and creditors, and not for distribution to the SEC.

Held, refusing to strike out the plaintiff's claim:

The question whether a claim to be enforced in the Cayman Islands involved the assertion of foreign sovereignty was to be determined

according to Cayman law, although the attitude of the courts in the relevant foreign jurisdiction merited serious attention. Such a determination would depend on the context of the case as a whole, and the fact that the right of action was penal in nature would not in itself preclude a personal claim which depended on it. In the present case, although US securities law was penal in nature and the SEC, the government agency charged with enforcing that law, had instituted the proceedings which had led to the appointment of the receiver, the plaintiff's claim was by a corporation in respect of rights available to any private litigant and did not seek to enforce a penal power of the state in its sovereign capacity. Moreover, the receiver was not seeking recognition from the court as he was claiming through the plaintiff company and not in his own name. The US court had expressly authorized him to sue in the name of the plaintiff to recover funds for the benefit of the company and its investors and creditors and not for distribution to the SEC. It followed that the defendant's application would be dismissed (page 551, line 36 – page 552, line 39).

Cases cited:

(1) *Huntington v. Attrill*, [1893] A.C. 150; (1892), 68 L.T. 326.

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

(3) *Raulin v. Fischer*, [1911] 2 K.B. 93; (1911), 80 L.J.K.B. 811.

(4) *Stutts v. Premier Benefit Capital Trust*, 1992–93 CILR 605, considered.

(5) *US v. Inkley*, [1989] Q.B. 255; [1988] 3 All E.R. 144, applied.

A. McN. McLaughlin, Jnr. for the plaintiff;

Mrs. S.M. Corbett for the first defendant.

HARRE, C.J.: This is an application by the first defendant, Marada Corporation, to strike out the claim of the plaintiff, Marada Global, as an abuse of the process of the court and, subject to any counterclaim, to dismiss the action.

On November 16th, 1994 a US District Court ordered the appointment of a receiver to manage the assets of Marada Global and others on the application of the Securities and Exchange Commission ("SEC"). Among the powers of the receiver was the power, on obtaining the permission of the court, to institute any action deemed necessary and appropriate. A further order was made by the US District Judge on December 21st, 1994. It authorized the receiver to intervene in an interpleader summons relating to funds held by a Cayman bank in which the competing parties were Marada Corporation and the SEC and to file an independent action here to obtain an injunction preventing dissipation of those funds. Cayman proceedings were filed on December 21st, 1994. They claim money had and received by Marada Corporation to the use of Marada Global or

alternatively money payable on demand for money lent. These proceedings are attacked on the following grounds:

1. The receiver was not authorized by the US court to commence this action at the time when he did so.

2. The receiver has not made an application in Cayman for recognition and would not have succeeded had he done so, as the proceedings are designed to give extraterritorial effect to the penal law of a foreign jurisdiction.

Evidence has been filed for Marada Global in the form of an affidavit by its American attorney, Mr. Wiggins. He traces the involvement of the SEC in this matter in support of the argument that the receiver is acting at its instigation and for its interest and that the SEC abandoned its claim in the interpleader proceedings before this court because the receiver appointed in Florida at its request was seeking indirectly in the present proceedings what the SEC had originally sought directly, namely "disgorgement" or repatriation of moneys in the Marada Global account.

At this point I can refer to the following principles quite briefly. They are well established here and are not in dispute.

1. This court has the same jurisdiction to recognize the receiver appointed by a foreign court as is exercised by English courts: see *Kilderkin Invs.* v. *Player (2)*.

2. Even if the court is satisfied that there is a sufficient connection between the company over whose assets the receiver has been appointed and the court of the foreign jurisdiction, the receiver will not be recognized if the effect of his recognition would be to give effect to the penal laws of the jurisdiction concerned: see *Stutts* v. *Premier Benefit Capital Trust (4)*.

3. Whether the foreign law concerned regards the law to be enforced as penal is irrelevant; that is a matter for the court which is being asked to enforce the law: see *Huntington* v. *Attrill* (1).

My task is to apply these principles to the facts of this case, and I consider first the nature of the Florida proceedings. They are described in an affidavit by Mr. Wiggins, in his capacity as the attorney for the defendants in those proceedings. Among those defendants is Marada Global, the present plaintiff.

The complaint by the SEC in the Florida proceedings alleges violations of the US Securities Act 1933 and the US Securities Exchange Act 1934 and claims, among other things, disgorgement of the profits of the alleged fraudulent activities of the Florida defendants.

The terms in which relief was requested by the SEC satisfies me that those were proceedings of a kind which would not provide a basis for the recognition of a receiver in the Cayman Islands: see *Stutts* v. *Premier Benefit Capital Trust (4)*. There is a request for a declaration that violations of Federal securities laws were committed, for various restraints against further violations, an accounting and disgorgement "to effect the

remedial purposes of the Federal securities laws," an order for payment of civil fines and penalties and a freezing of assets "except that such freeze of assets not be applicable to any receiver appointed by the court."

However, the receiver was not appointed on those applications. That was done pursuant to a subsequent motion of the SEC on November 16th, 1994. The SEC requested that the court appoint the receiver to manage the defendant's assets and to prevent their dissipation. Contempt of previous orders was alleged and it was submitted that the appointment was needed to act in the investors' best interests, with specific reference to the funds in the Cayman bank account. The court gave its reasons for acceding to the request for a receiver. They were these:

> "It is well settled that the Securities and Exchange Commission can seek the appointment of a receiver in an injunctive action: see *e.g. SEC* v. *First Fin. Group of Texas*, 645 F. 2d 429 (1981) and *SEC* v. *Florida Bank Fund Inc.*. . . . A court has discretion to make such an appointment: see the *First Financial Group* case. Courts have considered various factors in determining when the appointment of a receiver is appropriate. A court may appoint a receiver when the interests of public investors are in substantial jeopardy or when the appointment is necessary to prevent a diversion or waste of assets: see *SEC* v. *R.J. Allen & Assocs. Inc.*, 386 F. Supp. 866 (1974). A court may also appoint a receiver to preserve the *status quo* or to make assessment of various transactions undertaken by the party that will be placed in receivership: see *SEC* v. *Manor Nursing Centers Inc.*, 458 F. 2d 1082 (1972), also *Commodity Futures Trading Commn.* v. *American Metals Exch. Corp.*, 991 F. 2d 71 (3d. Cir. 1993) and *Florida Bank Fund Inc.* . . .
>
> The court hereby adopts and incorporates by reference its findings of fact and conclusions of law set forth in the preliminary injunction order entered herein on October 18th, 1994 (Dkt. No. 75). Based on these findings and upon the representations of the parties at the October 25th, 1994 hearing on the motion for appointment of receiver, it appears that the funds of investors in the Marada entities are in jeopardy. Various principals of the Marada entities have committed numerous securities law violations, and a receiver is necessary to ensure that funds of investors remain protected. It further appears that defendants have made attempts to withdraw investor funds from bank accounts in which the funds are deposited, in violation of the court's temporary restraining order. Additionally, the record herein does not clearly set forth the amount of funds collected from investors and the locations of all the funds. The appointment of a receiver is necessary to assure the securing of an accurate accounting of the funds."

This analysis lends some support to the argument on behalf of Marada Global that notwithstanding the origins of the Florida proceedings with the

SEC the present proceedings are severable and not within the rule prohibiting a court from executing the penal judgments of a foreign court: see *Raulin* v. *Fischer* (3). Moreover, I have already mentioned the position of the SEC in the Cayman interpleader proceedings, Cause No. 353 of 1994. An order by this court in that matter was made on December 22nd, 1994 pursuant to which the issues between Marada Global Corporation and numerous investors who were defendants in Cause No. 353 are to be decided in Cause No. 446 of 1994. On that basis the SEC did not seek to pursue its claim in the interpleader proceedings.

In relation to those matters, the case of Marada Corporation in the present application is succinctly put in the affidavit of Mr. Wiggins. It is this:

> "These events give rise to the clear and inescapable inference that the SEC abandoned its claim to the money in the Marada Cayman account before this court because the receiver appointed in Florida at its request was seeking recovery of the money in the present proceedings, thereby achieving indirectly what the SEC had initially sought directly, namely 'disgorgement' or repatriation of the moneys in the Marada Cayman account to Florida. [The] proceedings are in reality an attempt by the SEC through its receiver to achieve repatriation of the money formerly held in the Marada [Corporation] account. Although brought in the name of Marada Global as a claim for money had and received and/or repayment of a loan, the action has been initiated by the receiver (who was appointed on the application of the SEC) as simply another means of attempting to claim the money formerly held in the Butterfield account of Marada [Corporation] to compensate allegedly defrauded investors in the United States. This, in essence, is an attempt at enforcement of US securities laws in this jurisdiction. I therefore respectfully ask that this action be struck out as an abuse of the process of the court."

It is not asserted that there is, on the face of the pleaded claim, no cause of action. The real issue is whether the action has been brought on the proper authority of the plaintiff company. The assumption has been made that the attorneys for the company are acting on the instructions of the receiver. They have declined to reveal by whom they are instructed but say simply that they are satisfied that they are properly instructed. The receiver has not applied for recognition here. The key to the decision which I shall make lies, in my view in the terms of the further order of the US District Court dated February 16th, 1995 which is exhibited to the affidavit of the receiver dated February 17th. That order authorizes an action in the name of Marada Global in the following terms:

> "A receiver appointed by a court upon request of the SEC serves as an officer of the court and the court sets forth powers which the receiver may exercise: see *SEC* v. *Elliot*, 953 F. 2d 1556 (11th Cir. 1992). Ordinarily, a receiver which is granted the power to manage a

> corporation in receivership stands in the shoes of management and can direct litigation of the corporation: see *SEC* v. *Spence & Green Chemical Co.* 612 F. 2d 896 (1980). In the instant case the court, in its order of November 16th, 1994 appointing the receiver, predicated the receiver's right to pursue litigation upon receipt of the court's permission. Pursuant to the receiver's emergency motion for authorization and for directions (Dkt. No. 112), the court entered its order of December 21st, 1994 granting the receiver permission to maintain its action in the Cayman Islands. The court finds, therefore, that the receiver can maintain the Cayman Islands action against Marada Corporation Ltd., to recover debts which Marada Corporation Ltd. allegedly owes to Marada.
>
> The court further finds it appropriate to provide clarification of its order of December 21st, 1994 in accordance with the receiver's motion for clarification. The receiver, in its emergency motion for authorization, requested that the court allow the receiver to pursue the Cayman Islands action on behalf of Marada, its creditors and its investors, to 'prevent the release or dissipation of the funds to anyone other than the receiver.' The court granted that relief in its order of December 21st, 1994. Accordingly, the court clarifies that pursuant to that order, the receiver is authorized to maintain the Cayman Islands action in the name of Marada to recover debts owed to Marada and that such action is for the protection and benefit of Marada, its investors and its creditors.
>
> The court further notes that the receiver, in its emergency motion for authorization, asked that the court permit it to pursue recovery of funds only for the benefit of Marada and its investors and creditors. Therefore, by granting the receiver's motion, the court provided no authorization for the receiver to recover funds for distribution to the SEC."

The power to stand in the shoes of management and direct litigation of a corporation goes, I believe, beyond the position of a receiver and manager in Cayman. However, in neither case does the receiver sue in his own name. The suit is brought in the name of the person having the title to recover.

In *US* v. *Inkley* (5) the English Court of Appeal set out, on the basis of consideration of earlier cases which were cited to me, and others, the following propositions ([1989] Q.B. at 265):

> ". . . (1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law; (2) that regard will be had to the attitude adopted by the courts in the foreign jurisdiction which will always receive serious attention and may on occasions be decisive; (3) that the category of the right of action, i.e.

whether public or private, will depend on the party in whose favour it is created, on the purpose of the law or enactment in the foreign state on which it is based and on the general context of the case as a whole; (4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained; (5) that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country."

This case is a case brought by a corporate plaintiff seeking legal remedies well recognized by the laws of the Cayman Islands. The US receiver has been given power by a court there to "stand in the shoes of management" to maintain an action in the name of the plaintiff company and for the protection and benefit of the company and its investors and creditors. These would be the purposes of any private corporate plaintiff.

Although the disgorgement provisions of the US Securities Act 1933 and Securities Exchange Act 1934 have been found by this court to be penal in nature in *Stutts* v. *Premier Benefit Capital Trust (4)*, and the SEC is the regulatory agency charged with the primary responsibilities of enforcing those Acts and was the instigator of the proceedings which led to the appointment of the receiver, this is now a claim by a corporation asserting a good arguable case in respect of rights which are available to any private litigant. It is not the enforcement of a sanction or power at the instance of the state in its sovereign capacity. It is noteworthy too that the undertaking was given by the receiver in *Stutts* that assets recovered in the Cayman action would be applied in the disgorgement proceedings to compensate investors. In the present proceedings the application of funds recovered is a matter with which the US Court itself has dealt as part of the terms of the receivership. That, in my judgment, is an important distinction.

For these reasons, and applying the criteria set out in the passage from *US* v. *Inkley* (5) to which I have referred, and in particular points (3) and (4), I conclude that the application of the first defendant that the plaintiff's claim be struck out on the ground that it is an abuse of process of the court and that the action be dismissed, fails.

Order accordingly.

Attorneys: *Charles Adams, Ritchie & Duckworth* for the plaintiff; *W.S. Walker & Co.* for the first defendant.

EXHIBIT I

[1994–95 CILR 489]

BARCLAYS BANK PLC

v.

KENTON CAPITAL LIMITED, ETOILE LIMITED and HIGHLANDER LIMITED

Grand Court

(Smellie, J.)

6 October 1995

Conflict of Laws—jurisdiction—forum conveniens—Cayman Islands appropriate forum for suit involving offshore investment if relevant contracts governed by Cayman law, Cayman company solicited investments, money held in Cayman Islands and proceedings further advanced in Cayman Islands

Equity—tracing action—beneficiary's right to trace—investor making payment to intermediary for offshore investment venture subsequently cancelled for alleged illegality, under contract expressly stating that intermediary is bare trustee pending investment, entitled to trace and recover funds if reasonably identifiable and tracing not unjust

Banking—banker and customer—banker as constructive trustee—bank only liable as constructive trustee for knowing assistance in breach of trust if acted dishonestly

The plaintiff bank applied by interpleader summons for relief from competing claims by the defendants Kenton, Etoile and Highlander, to funds deposited in the bank in the name of Kenton.

Kenton was a Cayman company which solicited investments from, *inter alia*, the United States. 12 investors deposited money with Kenton for investment, signing standard form agreements which were expressed to be governed by Cayman law. Each investor's contribution was covered by a surety bond obtained by Kenton and paid for out of the deposits. The Securities Exchange Commission of the United States alleged that the solicitation of the investments was in breach of US law and obtained an order in the Washington District Court that Kenton pay all the funds invested to a bank account nominated by that court, with the objective that all investors be fully compensated. Over half of the investors, including Etoile and Highlander, expressed a wish that their money be returned to them directly in the Cayman Islands and consequently the bank brought the present proceedings to resolve the competing claims. All the investors were served with notice of the proceedings but only Etoile and Highlander chose to join in.

Kenton submitted that the court should stay the proceedings, either under the Grand Court Rules, O.17, r.7 or its inherent jurisdiction, on the basis that the United States was the *forum conveniens*, because Kenton's

offices were in the United States, the deposits had been made in US currency and channelled through a US bank and the investments were intended to be made through the United States.

Etoile and Highlander submitted that (a) the court should refuse to stay the proceedings on the ground of *forum conveniens* because (i) the agreements were expressly governed by Cayman law, Kenton was a Cayman company, the money was being held in the Cayman Islands and the Cayman proceedings were further advanced than those in the United States; (ii) staying the proceedings would essentially give effect to orders from foreign penal proceedings, which were unenforceable in the Cayman Islands; and (iii) the Grand Court Rules, O.17, r.7 only applied to situations in which, whilst an action was pending, a defendant applied for interpleader relief in that action, and moreover it did not apply to an application for a stay on the ground of *forum non conveniens*; (b) they were entitled to recover their deposits in the Cayman Islands, either in contract because of a total failure of consideration, or on the basis that, by the express terms of the agreements, Kenton was merely the trustee of the money pending investment and as beneficiaries they were entitled to trace their money, taking priority over Kenton itself; and (c) the bank, having notice of their claims as beneficiaries, would be liable to them as constructive trustee if it paid the money to the US court in accordance with Kenton's mandate.

Held, permitting recovery by Etoile and Highlander:

(1) The Cayman Islands were the more appropriate forum for the hearing of the suit because (i) all of the agreements between Kenton and the investors were expressed to be governed by Cayman law; (ii) Kenton was a Cayman company; (iii) the money deposited was held in the Cayman Islands; and (iv) the proceedings were further advanced in the Cayman Islands than in the United States, with the likely consequence that the cost of resolving the claims would be much less in the Cayman Islands. In addition, since the US proceedings were penal and therefore orders emanating from them were not enforceable in the Cayman Islands, it would be inappropriate to stay the Cayman proceedings. Finally, the Grand Court Rules, O.17, r.7 was not relevant as it applied only to situations in which, while an action was pending, a defendant applied for interpleader relief in that action, and in any case it did not apply to an application for a stay on the ground of *forum conveniens* (page 496, line 39 – page 497, line 7; page 497, lines 26–33; page 498, lines 4–14).

(2) Etoile and Highlander could not recover their deposits in contract because, as the deposits had been mixed in a single fund with their knowledge, they only had an action *in personam* against Kenton and no proprietary right in the money itself. However, the provisions of the agreements expressly stated that, pending investment, Kenton was trustee for the depositors, and Etoile and Highlander therefore had an equitable proprietary right in their money as beneficiaries. Moreover, since the

money was reasonably identifiable and the provision of a remedy would not work injustice, Etoile and Highlander were entitled to trace and recover their investments in the Cayman Islands and take priority over Kenton itself, which was obliged to meet their claims and those of all other investors who had not made a clear demand that their deposits be remitted to the US court. All payments were to be pro-rated according to the size of the respective deposits and would reflect rateable deductions such as the bank's administrative costs. Kenton would then be free to transfer the remainder of the funds to the US court (page 498, lines 37–40; page 499, lines 3–19; page 500, lines 1–29; page 502, lines 35–45).

(3) The bank would not be liable to Etoile and Highlander as constructive trustee if it were knowingly to assist Kenton in its breach of trust by honouring its mandate and paying the money to the US court unless it acted dishonestly in doing so. However, the question was immaterial because the bank, having brought the interpleader summons, had become amenable to the jurisdiction of the court and was therefore unable to comply with Kenton's mandate and obliged to comply with the orders of the court (page 501, lines 18–26; page 502, lines 5–14).

Cases cited:

(1) *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; 43 L.J. Ch. 513, considered.

(2) *Diplock, In re, Diplock v. Wintle*, [1948] Ch. 465; [1948] 2 All E.R. 318; on appeal, *sub nom. Ministry of Health v. Simpson*, [1951] A.C. 251; [1950] 2 All E.R. 1137, applied.

(3) *Hallett, In re, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; [1874–80] All E.R. Rep. 793, followed.

(4) *J.R.P. Plastics Ltd. v. Gordon Rossall Plastics Ltd.*, [1950] 1 All E.R. 241; (1950), 94 Sol. Jo. 114.

(5) *Karak Rubber Co. Ltd. v. Burden (No. 2)*, [1972] 1 W.L.R. 602; [1972] 1 All E.R. 1210, distinguished.

(6) *Mersey Docks & Harbour Bd., Ex p.*, [1899] 1 Q.B. 546; (1899), 68 L.J.Q.B. 540.

(7) *Royal Brunei Airlines Sdn. Bhd. v. Tan Kok Ming*, [1995] 2 A.C. 378; [1995] 3 All E.R. 97, applied.

(8) *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273; [1974] 3 All E.R. 451, followed.

(9) *Selangor United Rubber Estates Ltd. v. Cradock (No. 3)*, [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073, distinguished.

(10) *Sinclair v. Brougham*, [1914] A.C. 398; [1914–15] All E.R. Rep. 622, applied.

(11) *Spiliada Maritime Corp. v. Cansulex Ltd., The Spiliada*, [1987] A.C. 460; [1986] 3 All E.R. 843, followed.

(12) *Stutts v. Premier Benefit Capital Trust*, 1992–93 CILR 605, followed.

Legislation construed:

Grand Court Rules, 1995, O.17, r.7: The relevant terms of this rule are set out at page 498, lines 6–8.

D.M. Murray for the plaintiff;

C.G. Quin for the first defendant;

R.L. Nelson for the second and third defendants;

N.R.F.C. Timms for the Securities Exchange Commission.

SMELLIE, J.: In this matter the bank applies for relief, by way of interpleader summons, from competing claims with which it is faced. The claims relate to moneys which it received on accounts in the name of Kenton. The competing claims come from Kenton itself, from Etoile and Highlander and from 10 other persons or entities, as depositors to the account.

The Securities Exchange Commission of the United States ("the SEC") was allowed to make representations in these proceedings as *amicus curiae*. It has brought a claim to the funds in the account in the context of proceedings ongoing before the Washington District Court in the United States.

Factual background

The factual background is undisputed as between the present parties. Kenton is a company incorporated in the Cayman Islands and maintains its registered office in George Town, but its main office had been kept in Little Rock, Arkansas, until May 1995, when it ceased operations there as a result of the actions of the SEC.

During March and April 1995, Kenton approached various investors within and outside the United States inviting them to invest with it. It offered to place the pool of investment capital through what is referred to as a standard form joint venture agreement, into one or more "offshore trading programs." The joint venture was promoted by Kenton as offering potentially exorbitant returns. None the less, a total of 12 investors or groups participated, each entering into the standard form of agreement. Eventually they deposited by international bank transfers a total of approximately US$1,700,000 into the account at the bank.

Each investor's contribution appears to be covered by a surety bond obtained by Kenton and issued by a US surety company, Atlantic Pacific Guarantee Corporation. For that and related investment purposes, Kenton expended approximately 15–20% of the investment deposits. The balance remains on deposit with the bank, on an interest-bearing suspense account, pursuant to an order of this court of July 10th, 1995, and pending the outcome of this application.

Each joint venture agreement is expressed to be governed by the laws of the Cayman Islands. Importantly also for present purposes, each contains

standard provisions in the following terms which Etoile and Highlander contend provide for an express trust over the respective deposits pending investment by Kenton. I quote, for example, from Clause 1 of the Etoile agreement:

> "1 The Investment
>
> The investor hereby commits the sum of [US$100,000 in Etoile's case] .. and will pay the said amount to the joint venture on or before the execution of this agreement. The investment amount, after payment of the fees and costs described below, *shall be held on trust by the joint venture for the investor pending investment of the net proceeds of the investment account in one or more of the programmes.* The investor warrants that the investment amount represents funds which are clean, clear and of non-criminal origin." [Emphasis supplied.]

Etoile and Highlander also contend that the bank, having been put on notice of their respective claims and of the express trust in their favour in the agreement, has become constructive trustee of their deposits respectively remaining in the account. This they advance notwithstanding that the account contains the mixed funds of all the investors. They also claim that the constructive trust in their favour overrides the contractual obligations owed by the bank to Kenton in respect of their funds.

The bank neither admits nor refutes their claim and brings its interpleader action to interplead all the money. This is in the light also of Kenton's contractual claim, as the bank's customer, to the entire account.

But for the intervention of the SEC, the affidavit and correspondence evidence indicates that the investors would be quite content that the investments should proceed. That intervention arises, based on what the SEC alleges, because Kenton's solicitation of the investments was in breach of SEC regulations and amounted to what the Washington District Court has found to be *prima facie* regulatory fraudulent conduct. Kenton and its principals have been directed by the District Court on pain of penalty to "repatriate" all funds standing to the Kenton account to a bank account nominated by that court. A number of investors, having a claim to just over half of the total deposits, have expressed the wish that Kenton complies with that court's directives.

All investors are assured by the SEC that the objective of its "remedial" action in the Washington District Court is their full compensation. The representations made by Mr. Timms on behalf of the SEC with the leave of the court in these proceedings are also to that effect. I quote from the affidavit filed herein by Mr. Larry Elsworth, an attorney with the SEC, on which Mr. Timms relied:

> "The SEC is an agency of the US Government. By the Securities Exchange Act of 1934 it is charged with enforcing the Federal Securities Law of the United States and with protecting investors in securities sold in the United States. This protection includes bringing

> what are regarded in the United States as civil proceedings for disgorgement of investor funds obtained in breach of the US Securities Law. While the purpose of disgorgement is to deprive defendants of any unjust enrichment, the normal result is that any moneys recovered are returned to investors, and that is the SEC's stated objective in the case pending in the United States."

Those assurances notwithstanding, a majority, in nominal terms but not in terms of value, of investors have required to have their money returned directly to them. Still others have vacillated between the two recourses of direct and indirect reimbursement.

Etoile and Highlander have been most forthcoming among those who require direct reimbursement. Although all investors have been served with notice of these proceedings and given the opportunity to join in, Etoile and Highlander have chosen to join in as parties to these proceedings to secure the result they seek and have consistently objected to Kenton's remitting their deposits to the US court. They object to the SEC intervention, controverting any suggestion of fraud or misrepresentation on Kenton's part, and asserting the total absence of merit in what they describe as the SEC's extra-jurisdictional outreach.

Etoile is a company incorporated in the British Virgin Islands and the deposits of $100,000 on its behalf were wire transferred to the bank by its principals, from Israel. It denies any real connection between its investment in the joint venture and the United States.

Highlander is incorporated in the Bahamas and wire transferred its deposit of $200,000 from Nassau to the bank on April 3rd, 1995. Its stance is the same as Etoile's in respect of the SEC's intervention and it too cites the absence of any real connection with the United States.

The nature of the action

The bank filed its interpleader summons as a stakeholder seeking the protection of the court in respect of the competing claims. The process compels the claimants to bring their claims before the court in order that, at their expense, the entitlement to the account at stake can be decided: see 22 *Atkin's Court Forms*, 2nd ed., at 377 (1991).

As interpleader relief is discretionary and cannot be claimed as of right (*ibid.*, at 377), the bank had first to satisfy this court that it fulfilled the conditions precedent to ground the relief sought. It did so by showing not only the competing claims but also that it faced threats of being sued by Etoile and Highlander (and ostensibly by other depositors) as constructive trustee, having been given notice of their respective rights as beneficiaries of the express trusts imposed by the agreements on Kenton.

For reasons given in writing during the earlier stages of these proceedings, this court determined to hear the competing claims of the parties against the bank as stakeholder. For reasons also given, it was determined that the bank should be kept in as a party until the matter was

resolved, notwithstanding that it sought to withdraw, having brought the entire Kenton account into court by way of interpleader. The most important of those reasons were (a) that the bank was stakeholder of a mixed fund containing other investors' moneys as well as the present claimants'; and (b) that the bank may be required to account for any costs to which it may be entitled and to pro-rate entitlements to be paid out pursuant to any order to be made in that regard. The fact that it holds a mixed fund may also affect the bank's attitude towards the absent claimants and may influence the order to be made in these proceedings.

The court has a wide discretion when determining this summons, as governed by the rules. It is a discretion to be exercised when the court is satisfied that in the circumstances of the case it is just and proper that relief should be granted: see *Ex p. Mersey Docks & Harbour Bd.* (6) ([1899] 1 Q.B. at 551), cited in *Atkin's Court Forms* (*loc. cit.*, at 377) The proceedings are governed by the Grand Court Rules, 1995, O.17.

The bank also submitted that it is entitled to the protection of the court by an order which would bar it from being sued by those claimants who elected not to join in as parties. In that respect it seeks to rely on O.17, r.5(3) which provides:

> "Where a claimant, having been duly served with a summons for relief under this Order, does not appear on the hearing of the summons or, having appeared, fails or refuses to comply with an order made in the proceedings, the Court may make an order declaring the claimant, and all persons claiming under him, forever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him, but such an order shall not affect the rights of the claimants as between themselves."

Since the absent claimants have been given notice of the proceedings by order of this court of July 10th, 1995 and of that order itself and have declined to appear in the proceedings, it is clear that the court is seised of jurisdiction to grant an order pursuant to r.5(3). The question is whether, and if so, in what circumstances, it would be just to do so: see *J.R.P. Plastics Ltd.* v. *Gordon Rossall Plastics Ltd.* (4).

Even though the absent claimants have opted not to join in to advance their claims, the bank and Kenton are on notice of their claims, their factual bases are admitted and I must be satisfied that it is just to bar them before I so order. It is trite that in arriving at a just disposition of the case, I must apply the principles of equity and remind myself that equity follows the law except where to do so would be unjust. In that event the rules of equity prevail: see *Snell's Equity*, 29th ed., at 29 (1990) and the Grand Court Law (1995 Revision), ss. 11(2) and 16.

The case was heard summarily, *i.e.* pursuant to the Grand Court Rules, O.17, r.5(2), for reasons separately given in writing, and the following issues were identified as those to be determined:

1. Whether, on Kenton's application, the matter should be stayed on the

ground of *forum non conveniens* pursuant to the Grand Court Rules, O.17, r.5(2); r.7; r.8; r.11(2), or pursuant to the court's inherent jurisdiction.

2. Whether Kenton is a bare trustee for Etoile and Highlander and, if so, whether it is obliged in the present circumstances to pay over to them sums held in trust for them.

3. Whether the bank is obliged to honour the instructions from its account holder Kenton, in light of the competing claims, to transfer all the funds to the Washington District Court.

4. If so, whether the bank, being on notice of Etoile's and Highlander's claims, would be liable in damages to them as constructive trustee if it were to honour the conflicting instructions from Kenton to pay over the funds to the Washington District Court.

5. The fifth issue, which arises from the bank's application to bar other claimants, must also be decided.

1. *The application for the stay*

I found no proper basis for a stay.

Mr. Quin, for Kenton, relied on the oft-cited principles of *Spiliada Maritime Corp.* v. *Cansulex Ltd., The Spiliada* (11). In that case the House of Lords stated that the fundamental principle was that the court should choose that forum in which the case could be tried more suitably in the interests of all the parties and to achieve the ends of justice. The burden of proof lay on the defendant to show that the stay should be granted and in so doing to establish that the foreign forum is the more suitable.

The headnote to the case in *The All England Law Reports* mentions the following factors to be taken into account ([1986] 3 All E.R. at 844):

> "In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction."

In this case the facts showed a stronger connection with the Cayman Islands than with any other jurisdiction. The agreements relied upon by Kenton, Etoile, Highlander and all other claimants are expressed to be governed by Cayman law. Kenton is a Cayman company. The money remitted to its bank account is being held in the Cayman Islands. In nominal terms, a majority of the investors wish to have their claims resolved here although, in terms of value of claims, the reverse is the case by a narrow margin.

The case before this court is more advanced than that before the Washington District Court with the present parties being able to come expeditiously and properly before this court on the basis of the bank's interpleader summons. As a result, the evidence suggests that the costs of having their claims resolved here is likely to be much less than before the foreign court. It is thus apparent that the claims can also more conveniently be dealt with before this court. The matter of availability of witnesses does not become an issue before this court. All the relevant factual material is already filed by way of affidavit evidence.

Despite the SEC's allegations, there are no clear assertions of fraud by way of charges against any person. The temporary restraining order made by the Washington District Court is, for the injunctive purposes, a matter only of a *prima facie* finding of regulatory fraud. Mr. Quin also recited Kenton's position as a party to the US proceedings, where it has undertaken to that court to reimburse all the investors. He urges that the more convenient forum for those purposes must be the United States.

Mr. Timms, on behalf of the SEC, submitted that the SEC's jurisdiction to intervene as it did arose from three main things which connected the case to the United States. First, the fact that Kenton kept offices in Arkansas. Secondly, because all deposits were denominated in US currency and had to be channelled through a clearing bank in the United States. Thirdly, because the investments were intended to be made in or through the United States.

By comparison, it is to my mind clear that the more real and substantial connection is with the Cayman Islands.

There appeared a further reason of principle which, to my mind, militated against ordering a stay of the proceedings on the ground of *forum non conveniens.* The proceedings brought by the SEC, although described as remedial or civil, are to be regarded by this court as penal in nature. Orders deriving from such proceedings are not recognizable or enforceable in this jurisdiction as they would involve the enforcement of the penal laws of a foreign state. Authority on this point is legion and I need cite only a few of the more recent cases.

In *Stutts* v. *Premier Benefit Capital Trust (12),* this court refused the recognition of the appointment of a foreign receiver on the basis that it would not execute the laws of a foreign country and would not give effect to foreign penal laws. The receiver had been appointed by a US court pursuant to applications brought by the SEC based on its regulatory powers which were deemed to be penal in nature. In *Schemmer* v. *Property Resources Ltd.* (8) the English court adopted that same approach after reviewing a long line of authority to the same effect.

With those principles and decided cases in mind it would seem an incongruous and wholly inappropriate exercise of discretion to allow a stay in this case on the ground that the Washington District Court affords the more appropriate forum. The proceedings before that court are penal in

nature, to enforce the SEC regulatory provisions. They provide no proper basis for a stay of the application joined between the parties before this court.

Finally, it was submitted that I should grant the stay pursuant to the Grand Court Rules, O.17, r.7 which provides:

> "Where a defendant to an action applies for relief under this Order in the action, the Court may by order stay all further proceedings in the action."

That provision appears to address a situation where, during the pendency of an action, a defendant brings an application for interpleader relief in that action: see 22 *Atkin's Court Forms*, 2nd ed., at 384 (1991). Even if I am wrong on that, in any event I do not consider that provision at all addresses an application for a stay on grounds of *forum non conveniens*.

2. *Is Kenton trustee of their deposits for Etoile and Highlander?*

Now that the bank has brought its application for relief by way of interpleader, this question must be addressed as a means of arriving at what order would be proper for resolving the competing claims. As matters stand, the bank now seeks protective orders from the court, having established that it has a proper basis for its interpleader application.

It is accepted by all the parties that in resolving this and the other issues the court may make such order as is just: see the Grand Court Rules, O.17, r.5(2). But here, nevertheless, I consider the exercise of that discretion must be guided by the merits of the competing claims having regard, in particular, to the principles which governed their interrelationships prior to the bringing of the bank's interpleader action. Those principles are to be founded, it is agreed on all sides, either in contract or in equity.

Although it is agreed that as a matter of contract the bank would be obliged to honour Kenton's mandate, I am urged by Mr. Nelson on behalf of Etoile and Highlander to find that the respective joint venture contracts do create express trusts in favour of his clients such that Kenton is the bare trustee of the funds deposited. Consequently, he argues, the bank, being on notice of the trusts in favour of his clients, has become a constructive trustee of their funds in the account. Depending on the finding, the court will be advised as to what orders to make.

As a matter of construction of the joint venture agreement, it is to my mind plain that Kenton is the trustee of the funds deposited. The express intention of the parties to create a trust, and the effective creation of the trust is sufficiently evinced from the context of the agreement. Whether an intention to create a trust is sufficiently evinced is a question of interpretation of the agreement: see Underhill & Hayton, *Law of Trusts & Trustees*, 14th ed., at 39–40 (1987). Subject to that, no technical words are necessary and there is no suggestion as between the parties before me, or in any claim in this jurisdiction, that the contract itself, in any case, is void

for illegality or for any other reason so as to vitiate the provisions creating the express trust.

It may also be the case that the depositors would be entitled to recover, as against Kenton in claims at common law, for moneys had and received on the basis that the consideration on which the agreement is based has failed.

The impediment to such a claim would, however, be the fact that the deposits have become mixed into a single fund in Kenton's bank account with the prior knowledge or acquiescence of the depositors. At common law, the case law suggests (see *Sinclair* v. *Brougham* (10) ([1914] A.C. at 420)) that such an action would be one *in personam* (in this case against Kenton) but not one vesting a proprietary right in the *res*, the money itself. This is on the basis that the money, a fungible, having been paid into Kenton's bank account, becomes mixed with other funds and gives rise to a claim only to a chose in action.

On the other hand, the devolution of the funds on express trusts—in the manner advanced on behalf of Etoile and Highlander and as I accept having regard to the express provisions of the contract—gives rise to a proprietary tracing claim to the funds into Kenton's bank account. The proposition is given authoritative expression in *Sinclair* v. *Brougham* (*ibid.*, at 442) citing *In re Hallett* (3) from which I quote (and which is considered in *Snell's Equity*, 29th ed., at 298 *et seq.* (1990)):

> "The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *In re Hallett's Estate* . . . by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case, this principle was held applicable when the trust money had been paid into the trustee's banking account."

By reference to the express contractual provisions and to the right of Etoile and Highlander in equity to trace or follow their money, I conclude that they retain a proprietary interest in the money in the account at the bank and that Kenton remains their bare trustee, *i.e.* one having no beneficial interest in their moneys and obliged to pay over on request: see Underhill & Hayton, *Law of Trusts & Trustees*, 14th ed., at 29 (1987). This is so notwithstanding that their funds have been mixed with that of other depositors and, perhaps, with funds of Kenton's in the account: see *In re Diplock* (2).

That being the case, it follows that the right of tracing into the mixed funds, *vis-à-vis* Kenton, affords the *cestui que trust*—in this instance Etoile and Highlander respectively—priority over Kenton itself: see *In re Diplock.*

Finally, I conclude on this issue that Kenton is obliged to accept the claims of Etoile and Highlander despite the claims of others to the mixed fund and must meet their claims *pari passu* and pro-rated with the others. The principles for ranking and pro-rating have been well established since *Hallett's case* (3) and *Sinclair* v. *Brougham* (10). They are restated in the following passage which I quote from the headnote to *In re Diplock* (2) in the *Law Reports* ([1948] Ch. at 466–467):

> "The equitable right of tracing into a 'mixed fund' is not confined to cases like *Hallett's* case . . where the right is asserted against the original 'mixer' who was in a fiduciary relationship to the claimant. The case of *Sinclair* v. *Brougham* . . . decided that *Hallett's* case . . was an illustration of a much wider principle, viz.: that one whose money has been mixed with that of another or others may trace his money into the mixed fund (or assets acquired therewith) though such fund (or assets) be held, and even though the mixing has been done by an innocent volunteer, provided that (a) there was originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; (b) the claimant's money is fairly identifiable; and (c) the equitable remedy available, i.e., a charge on the mixed fund (or assets), does not work an injustice."

To turn to the facts of this case, the final order to be made in this matter will reflect the conclusion that all of those three last-mentioned prerequisites, cited in the passage from *In Re Diplock,* are established in this case.

3 & 4. *The bank's position as stakeholder*

Both of these questions I believe are to be appropriately considered together as they relate to the bank's respective obligations to the competing claimants and as the bank has not yet been released by the court from its obligations as stakeholder.

Having concluded that the depositor and, in this context, Etoile and Highlander as parties before me, are entitled to trace their deposits into the mixed fund, the issues remaining as between Kenton and the bank may seem largely academic. Nevertheless, they remain to be addressed because a number of the claimants are not parties to the present action and the bank seeks a final resolution of the entire matter, including as to the full extent of Kenton's claim against it. Moreover, Etoile and Highlander seek declaratory orders which would be binding on the bank as custodian of their funds.

Vis-à-vis Kenton and the other claimants, Etoile and Highlander submit

that the bank, having received their funds on deposit on Kenton's account and having been put on notice of their claim against Kenton as trustee, would be liable to account to them as constructive trustee if the bank were to assist Kenton in its breach of trust by paying that money out. This would be so, the argument implies, even if neither Kenton nor the bank had a dishonest intention. Put another way, the argument is that the bank becomes liable to account as constructive trustee if it pays out for any purpose, including "repatriation" to the US court, because it is now in "knowing receipt" of property which is trust property and would "knowingly assist" the breach of trust.

The only authorities cited in support of this submission were 3(1) *Halsbury's Laws of England*, 4th ed. (Reissue), para. 174, at 152–153 and the cases foot-noted at note 3 thereto, most notably *Selangor United Rubber Estates Ltd.* v. *Cradock (No. 3)* (9) and *Karak Rubber Co. Ltd.* v. *Burden (No. 2)* (5). But neither of those cases dealt with a situation where a trustee and hence a bank, acting with knowledge of the trust, paid out against the wishes of the beneficiary but without an intent to defraud and without acting in bad faith. Moreover, to the extent that those cases propounded the test of "knowingly assisting" a breach of trust as a basis for liability in a bank, they have been expressly disapproved by the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn. Bhd.* v. *Tan Kok Ming* (7). In that regard "dishonesty" is now the test.

I am not persuaded from the authorities cited that the bank could be liable to the claimants as constructive trustee if it honoured Kenton's mandate, legally issued on the basis of Kenton's contractual relationship with the bank, and without an intention to defraud or without bad faith. Kenton's mandate is in response to the Washington District Court's order made for the stated purpose of compensating *all* depositors even if against the strict directives of some, as beneficiaries of the express trusts. It may well be arguable therefore whether Kenton's mandate to the bank is in breach of trust.

48 *Halsbury's Laws of England*, 4th ed., para. 585, at 301, citing *Barnes* v. *Addy* (1) states:

> "A stranger [*e.g.* a bank] who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to it in breach of trust [*i.e.* 'knowing receipt'] will, however, also be a constructive trustee of that property."

That statement of principle has been disapproved as regards "knowing assistance" by the Privy Council in *Royal Brunei Airlines Sdn. Bhd.* v. *Tan Kok Ming* (7), but in any case it does not cover the position of the bank here, because the bank did not receive the deposits in breach of trust.

It seems to me Etoile and Highlander have not clearly shown the separate basis of a claim against the bank. But I need not decide that issue for the proper and just resolution of the claims. I need not take a definitive view of the separate claim against the bank as raised by them. There is no

longer a basis for the anticipated breach of trust. Although the bank is still technically the stakeholder and custodian of the moneys, it is not at present in a position to honour Kenton's instructions against the wishes of the other parties.

Having filed its interpleader summons, the bank became amenable to the jurisdiction of this court and has been ordered to keep the funds on an interest-bearing suspense account. That state of affairs suspends its contractual relationship with Kenton pending determination of this matter and I conclude would also suspend any duties of constructive trusteeship which the bank may owe to any depositor as well.

It follows that the bank will not only be unable to comply with Kenton's mandate *per se* but instead will be obliged to comply with any orders of the court, the nature of its contractual duty to Kenton or of any duty, legal or equitable, to any depositor, notwithstanding.

Conclusion

Having regard to the foregoing findings of fact and law the just orders as they commend themselves to my mind are as follows:

1. Kenton is declared to be trustee of all remaining funds held to its account with the bank which represent deposits by Etoile and Highlander and, indeed, by any other investor.

2. Etoile and Highlander are entitled to trace into those funds and charges against those funds are declared in their favour to the extent of their proper and respective tracing claims.

3. Those tracing claims are to rank *pari passu* with those of the other investors and the bank is directed to pay Etoile and Highlander's claims pro-rated to reflect amounts already expended by Kenton, as against amounts deposited by them.

4. As the account represents a mixed fund and as all depositors are to rank *pari passu*, the bank is directed to pay all other claimants of whom it has notice that require to be paid in the Cayman Islands as well as those who have not expressed a clear requirement that their deposits be sent to the Washington District Court. All payments are to be pro-rated according to their respective deposits and to reflect rateable deductions.

5. As to the remainder of the funds on deposit, Kenton (and hence the bank) are to be at liberty to fulfil their obligations (in the case of Kenton its contractual and equitable obligations to those depositors and in the case of the bank, its contractual obligations to Kenton) by honouring the request of those depositors to transfer their deposits, pro-rated as above, to the account of the Washington District Court. The bank is then to be at liberty to pay to Kenton any funds remaining to the proper credit of Kenton. I should expressly note that this is neither by way of direct nor indirect compliance with the order of the Washington District Court but, as stated, in accordance with the wishes of depositors who wish to have their moneys transferred and in accordance with Kenton's mandate.

6. Upon compliance by the bank with the foregoing and other aspects of this order, all depositors and Kenton are forever barred from prosecuting their claims against the bank in respect of the subject-matter interpleaded in this action.

7. As the bank doubtlessly owes a fiduciary duty to Kenton to account, it is ordered to render an account to the court copied to all claimants in respect of all payments out and to do so within 30 days.

In respect of the bank's costs of bringing this application and of complying with the orders of the court, appropriate orders are to be made.

Some administrative costs will be involved with pro-rating and accounting for the deposits. Although such costs are typically deductible by the bank on the basis of its contract with its account holder, the bank is on notice that the bulk of, if not all the funds in the account, belong to the depositors/investors as trust moneys.

None the less, it is just that the bank should be allowed to deduct those costs—the depositors would have been aware that their respective deposits were going to a mixed fund. In the event that the investments did not go ahead, as actually happened, they would have anticipated the incidence of costs involved in accounting for their money, particularly as it was likely to be pro-rated after deductions of the costs to be incurred by Kenton in obtaining the surety bonds. That would have been anticipated to be an immediate expenditure. I am informed it may be recoverable from the surety company by Kenton and will be refunded rateably to the depositors if recovered.

As to the bank's costs of this application, the only order I can properly make is that those be recoverable on the basis of taxation, failing agreement. I have been referred to no authority by which to order that its costs of the action be paid on an indemnity basis. Nor would it be just to order that it may recover the full indemnity costs of this action from the account on the basis of its contractual arrangement with Kenton, as the depositors would not have anticipated them.

Order accordingly.

Attorneys: *W.S. Walker & Co.* for the plaintiff; *Quin & Hampson* for the first defendant; *Nelson & Co.* for the second and third defendants; *Maples & Calder* for the Securities Exchange Commission.