THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2011/036

(On appeal from the Commercial Division)

BETWEEN:

[1] KENNETH M. KRYS
[2] JOANNA LAU
(as Joint Liquidators of Fairfield Sentry Limited, in Liquidation)

Appellants

and

STICHTING SHELL PENSIOENFONDS

Respondent

Before:

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]
The Hon. Mr. Geoffrey Bell	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Girolami, QC, with him, Mr. Andrew Westwood, and Mr. Robert Nader for the Appellants
Ms. Catherine Newman, QC, with her, Ms. Arabella di Iorio for the Respondent

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2012: April 17;
September 17.

Anti-suit injunction – Company in liquidation – Respondent submitting proof of claim in liquidation – Pre-judgment garnishment orders obtained by respondent in Netherlands against company prior to liquidation – Funds garnished main asset of company in liquidation – Funds held by Dutch Bank at its branch in Ireland for account of company in liquidation – Respondent commencing proceedings in Netherlands – Basis of jurisdiction of Dutch courts – Priority of claims – Whether respondent should be restrained from continuing proceedings in Dutch courts – Principles for granting anti-suit injunction

The appellants are liquidators of Fairfield Sentry Limited ("Sentry"), a BVI fund, now in liquidation under the Insolvency Act, 2003 of the Virgin Islands. It was a major feeder fund to the now notorious Bernard L. Madoff Investment Securities LLC ("BLMIS") which turned

out to be a massive Ponzi scheme. Like all Ponzi Schemes eventually do, BLMIS collapsed and Sentry went into liquidation. The respondent, Stichting Shell Pensioenfonds ("Shell"), is a pension fund foundation with a registered place of business in the Netherlands. Like many others, Shell had invested with Sentry. Sentry, at all relevant times, had an account with Citco Bank ("Citco") at its Dublin branch in Ireland with a credit balance slightly in excess of US$71m ("the Dublin Account"). Shell claims to be a creditor of Sentry in respect of its investment to the tune of some US$63m (excluding interest and costs) in respect of redemption proceeds. On 22nd December 2008, Shell applied for and obtained a pre-judgment garnishment order from the District Court in Amsterdam ("the Dutch Court") garnishing the Dublin Account to a limit of US$80m. This sum was comprised of Shell's claim in the liquidation for the US$63m plus sums for particularised interest and costs. This pre-judgment garnishment accordingly caught some US$67m in the Dublin Account. On 16th March 2009, Shell obtained a further pre-judgment garnishment order based upon a submission that additional funds may have been received by Citco for the Dublin Account. On 23rd April 2009 application was made for the appointment of liquidators over Sentry. Liquidators were appointed on 21st July 2009. On 5th November 2009, Shell submitted proof of its claim to redemption proceeds in the liquidation. On 19th March 2010, Shell then commenced proceedings before the Dutch court (after having submitted its proof of claim in the BVI liquidation). Sentry sought before the Dutch court to set aside the pre-judgement garnishment orders after becoming aware of them but failed. Sentry then applied to the court in the Virgin Islands to restrain Shell from continuing its proceedings in the Dutch court. The learned trial judge refused to grant Sentry injunctive relief. Sentry appealed.

Held: allowing the appeal, that:

1. The submission by Shell of its proof of claim in the liquidation was a submission to the BVI jurisdiction in respect of the liquidation process; it indicated Shell's acceptance of the statutory scheme under the Insolvency laws of the Virgin Islands for the benefit of all unsecured creditors (foreign and local) to be treated equally. Accordingly, Shell ought not to be permitted to pursue the Dutch proceedings where, by virtue of its pre-judgment garnishment orders, it may gain a priority over Sentry's general body of creditors having claimed in the liquidation.

   In re Vocalion (Foreign), Limited [1932] 2 Ch 196 cited; Robertson (1875) LR 20 Eq 733 cited.

2. The ends of justice in the circumstances of this case require that the integrity of the court's process in the supervision and administration of the statutory scheme under the Insolvency laws be protected. Accordingly, Shell, is restrained from pursuing or continuing its proceedings in the Dutch courts.

   Amchem Products Inc. v Workers' Compensation Board (1993) 102 DLR (4th) 96 cited.

3. The learned judge erred in proceeding on the assumption that the basis of the Dutch courts' jurisdiction was the fact that the respondent was a Dutch company.

The respondent commenced proceedings in the Dutch courts merely because Citco Bank is a Dutch entity. The evidence strongly suggests that Shell instituted the Dutch proceedings not in reliance on any principle of natural forum, but solely for the purpose of gaining a priority over other creditors of Sentry.

JUDGMENT

[1] PEREIRA JA: This is a judgment of the Court. This appeal arises from the refusal of the learned trial judge to grant the appellants, as Joint Liquidators of Fairfield Sentry Limited, in Liquidation ("Sentry"), injunctive relief by which Sentry sought to restrain the respondent ("Shell') from continuing proceedings in Holland brought against Sentry and Citco Bank Netherland NV, a Dutch bank ("Citco").

The Background

[2] Sentry is a BVI fund, now in liquidation under the Insolvency Act, 2003[1] of BVI. It was a major feeder fund to the now notorious Bernard L. Madoff Investment Securities LLC ("BLMIS") which turned out to be a massive Ponzi scheme. Like all Ponzi Schemes eventually do, BLMIS collapsed. The news broke and reverberated around the world in December, 2008. The fraud perpetrated against investors runs into billions. Shell, as its full name implies, is a pension fund[2] foundation with a registered place of business in the Netherlands. Like many others, Shell had invested with Sentry. Sentry, at all relevant times, had an account with Citco at its Dublin branch in Ireland with a credit balance slightly in excess of US$71m ("the Dublin Account"). Shell claims to be a creditor of Sentry in respect of its investment to the tune of some US$63m (excluding interest and costs) by way of redemption proceeds[3] and submitted a proof of claim in the liquidation. Shell also commenced proceedings against Sentry in the Netherlands. A short chronology of the steps taken is necessary for placing the issue with which this appeal is concerned into context:

(a) On 22nd December 2008, Shell applied for and obtained a pre-judgment garnishment order from the District Court in Amsterdam

[1] Act No. 5 of 2003, Laws of the Virgin Islands.
[2] For the employees of the well-known Shell oil company.
[3] Shell's redemption request made in December 2008 was not honoured by Sentry.

("the Dutch Court") garnishing the Dublin Account to a limit of US$80m. This sum was comprised of Shell's claim in the liquidation for the US$63m plus sums for particularised interest and costs. This pre-judgment garnishment accordingly caught some US$67m in the Dublin Account.

(b) On 16th March 2009, Shell obtained a further pre-judgment garnishment order based upon a submission that additional funds may have been received by Citco for the Dublin Account. The two pre-judgment garnishment orders are together called the "Dutch Garnishment Orders".

(c) On 23rd April 2009 application was made for the appointment of liquidators over Sentry. Liquidators were appointed on 21st July 2009.

(d) On 5th November 2009, Shell submitted proof of its claim to redemption proceeds in the liquidation.

(e) On 19th March 2010, Shell then commenced proceedings before the Dutch court (after having submitted its proof of claim in the BVI liquidation).

[3] Sentry, after becoming aware of the Dutch Garnishment Orders sought in the Netherlands to set them aside, without success. Accordingly, at the time of the commencement of Sentry's winding up, Shell held the Dutch Garnishment Orders against Sentry, the effective purpose of which was to garnish the funds in the Dublin Account which is said to be Sentry's main asset.

[4] Shell's claim in Holland is said to be for the recovery of the US$45m invested together with interest and costs and alternatively for damages for misrepresentation and/or breach of warranty arising out of the circumstances under which it says it was induced to become an investor in Sentry. Sentry's claim in the winding up however, as found by the learned trial judge based on the 'proof of claim' submitted to the joint liquidators, was limited to the claim for redemption proceeds only. It is not disputed that Sentry's liquidators have so far not ruled on

Shell's proof of claim. Counsel for Shell surmises that this may be due to the current state of the law as interpreted by this Court in Westford Special Situations Fund Ltd. v Barfield Nominees Limited et al[4] in which it was held, that a redeeming shareholder claiming redemption proceeds was not a creditor for the purposes of bringing insolvency proceedings under the Insolvency Act, 2003 of the Virgin Islands. I underline this portion to make clear that Westford did not decide that an unpaid redeeming member is not a creditor of the company. It merely decided that as between outside creditors and redeeming members who, may be termed 'inside' creditors, the Insolvency Act, 2003 subordinated the 'inside' creditor's rights to those of the 'outside' creditor, and that the Insolvency Act, 2003 restricted the right of an inside creditor, whose claim was derived from the inside creditor's character as a member, to bring insolvency proceedings as a creditor in reliance on such a claim. There is no statement in Westford which can or should be taken to mean that an unpaid redeemer is not a creditor of the company at all.[5] It has also not been disclosed by the liquidators whether Sentry has any acknowledged creditors ('inside' or 'outside') in the liquidation, although it is now a notorious fact that many investors in Sentry (in a similar position as Shell) have been adversely affected on BLMIS's collapse.

[5] On 12th July, 2010, Sentry commenced proceedings in Ireland, ("the Irish Proceedings") against Citco Bank, Shell and another company[6] seeking recognition of the BVI liquidation, and declarations that Sentry's liquidators are entitled to the monies in the Dublin Account and that Shell's Dutch Garnishment Orders should not be recognised in Ireland. Shell, in turn, challenged the Irish Court's jurisdiction.[7]

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[4] Territory of the Virgin Islands High Court Civil Appeal No. 14 of 2010 (delivered 28th March 2011, unreported).

[5] See for example section 62(1)(c) of the BVI Business Companies Act, 2004 (Act No. 16 of 2004) which says in part that a redeeming shareholder ranks as an unsecured creditor of the company for the sum payable on redemption as from the date of redemption.

[6] The other company, being Atlanta Business Inc. (a Panamanian company), no longer features in the matter.

[7] Shell's challenge was unsuccessful.

[6] By the time this appeal came on for hearing, the Irish Court had delivered judgment on 28th February 2012. Both sides agree that the decision of the Irish Court has taken the matter no further. The Irish Court, in effect, recognised the BVI liquidation and also recognised the Dutch Garnishment Orders. As Ms. Newman, QC, counsel on behalf of Shell, put it: 'Nothing was gained from the Irish proceedings one way or the other.' Both sides accept however, based on the expert evidence adduced before the Irish Court, that the Irish Court's statements of the nature and effect of the Dutch Garnishment Orders, and the Dutch Court's jurisdiction to make them, are adequately captured in Ms. Justice Finlay Geoghegan's judgment beginning at paragraph 62.[8] This court may then rely on those statements in relation the jurisprudential basis, process, nature and effect of the Dutch Garnishment Orders. This will be considered later in the course of this judgment.

[7] On 8th March 2011, Sentry applied ex-parte to the court in the Virgin Islands for an order restraining Shell from pursuing its proceedings commenced against Sentry in the Dutch courts. The learned trial judge refused to grant such relief to Sentry. Sentry immediately appealed to this Court which granted a temporary injunction pending the inter-partes hearing coming on before the trial judge. The inter-partes hearing came on before the trial judge on 20th July 2011. The trial judge, in his written judgment delivered on 9th August 2011 again refused Sentry injunctive relief against Shell. It is from this refusal that Sentry once more appeals to this Court.

The trial judge's conclusions

[8] The trial judge, after identifying the primary issue before him as being whether Shell by claiming in the liquidation had, in essence, submitted to the BVI Court's jurisdiction to the extent that it was obliged to abandon any attempts to achieve security for its claim over assets of Sentry in another jurisdiction, went on to review the case law which was submitted to him in the course of argument. He noted that

[8] Expert evidence was led by Sentry and also by Shell in the Irish proceedings.

the court has jurisdiction in equity to make orders against persons subject to or capable of being made subject to its jurisdiction restraining them, in a proper case, from commencing or continuing proceedings abroad against a company in liquidation. He also stated[9] that the principles upon which the court will grant anti-suit injunctions against foreigners in cases of this sort are those to be distilled from the case of Bloom and others v Harms Offshore AHT "Taurus" GmbH and Co. KG and another.[10]

[9] He then concluded, in effect, (paraphrasing it and hoping that I have done no violence to the learned trial judge's reasoning in so doing) that:

(a) No compelling reason had been advanced for preventing Shell from pursuing proceedings in its home court; that it had not been suggested that Shell had been guilty of any sharp practice;[11]

(b) The Netherlands being a civil law jurisdiction which does not recognise the law of trusts and the whole foundation of the court's equitable jurisdiction being based upon an equitable trust for creditors[12] that it would be inappropriate for a BVI court to restrain Shell from seeking its remedies at home on the basis of a juridical concept which is not recognised there;[13]

(c) The fact that the Dutch Court does not recognise non-European Union insolvencies was not a matter to which much weight ought to be attached as it was Sentry in essence who chose to conduct its business in a jurisdiction which would not recognise its own insolvency and no fault for this could be attributed to Shell;[14]

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[9] See para. 16 of the judgment.
[10] [2009] EWCA Civ 632.
[11] See para. 42 of the judgment.
[12] In re Oriental Inland Steam Company (1873-74) LR 9 Ch App 577; Mitchell and another v Carter and another [1997] 1 BCLC 673; Bloom and others v Harms Offshore AHT "Taurus" GmbH and Co. KG and another [2009] EWCA Civ 632.
[13] See para. 43 of the judgment.
[14] See para. 44 of the judgment.

(d) The fact that Shell claimed in the liquidation here is, *de minimis,* as Shell was not invoking the protection of the BVI Court but merely responding presumably to the liquidators' advertisements for claims.[15]

[10] In his penultimate paragraph the learned trial judge had this to say:

> "I appreciate how serious this matter is from the point of view of the other parties having an interest in this liquidation and I would have been very glad for their sake to have seen some way consistent with principle to produce a different result. But the reason for the appearance of unfairness is not when correctly analysed, the result of any inequitable behaviour on the part of Shell (without which the jurisdiction is not available[55] [*In re Oriental Steam Company (supra); Mitchell v Carter (supra); Bloom v Harms (supra)*]). It is the result of the way in which Fairfield [Sentry] constructed and conducted its business and of the fact that when the lights went out the assets were in the 'wrong' place.[56] [*I appreciate that for conflict of law purposes the situs of the debt is Ireland, but that does not affect the point which I am making*] That … is the fault of Fairfield's management, not of Shell."

The Appeal

[11] Sentry contends on appeal that the learned trial judge erred in law and/or in properly exercising his jurisdiction in holding that:

(i) Shell's submission of its claim in the liquidation was *de minimis.* Rather, that he ought to have held that in so doing Shell was invoking its rights under the BVI statutory insolvency scheme and therefore ought not to be free to pursue remedies outside the scheme to the detriment of the general body of Sentry's creditors.

(ii) By submitting the claim in the liquidation Shell had not thereby elected to pursue such claims as it might have in the liquidation of Sentry. Rather, that he ought to have found that Shell did elect or alternatively, ought to have restrained Shell from continuing its proceedings in the Netherlands until it had irrevocably elected not to prove or take any benefit from the liquidation.

[15] See para. 47 of the judgment.

Further, that he failed to give proper weight to:

(a) the exorbitant nature of the Dutch Court's jurisdiction in relation to the proceedings brought by Shell;

(b) the Dutch Court's refusal to recognise the BVI liquidation;

(c) the integrity of Sentry's liquidation pursuant to the Insolvency laws of the Virgin Islands and the fact that this would be undermined by Shell's continued pursuit of the Dutch proceedings;

(d) the existence of the Irish proceedings by Sentry claiming entitlement to the Dublin Account.[16]

The arguments

[12] The main thrust of Sentry's case is that the trial judge ought to have adopted a "universalist" approach rather than what it has called a "territorialist" approach to the effect and reach of a BVI liquidation and the assets subject to it. Mr. Girolami, QC, on behalf of Sentry, stated that the BVI Insolvency scheme is one of modified universalism and makes the following points in support:

(a) A BVI liquidation encompasses all assets of the company wherever situate worldwide. The objective is not so as to exert an exorbitant extra-territorial jurisdiction but rather to maximise the fair distribution of all the company's assets amongst all its creditors (foreign and local alike), with the appropriate court exercising primary supervision and control over the distribution. That court would be the place of incorporation of the company applying the full regime of its insolvency laws.

(b) BVI Insolvency law is relevantly modified in that it incorporates two reciprocal features:[17]

(i) It will permit winding up in BVI of a foreign company but will recognise the winding up of the company in its home jurisdiction as the principal

[16] I have already referred to the outcome to date of the Irish proceedings in para. 6 above.
[17] See Part XVIII of the Insolvency Act, 2003.

liquidation, and will in general cooperate to ensure that all the company's assets are distributed to its creditors in accordance with a single system of distribution.

(ii) It would generally recognise the right of a foreign jurisdiction to take insolvency proceedings against a company where there are assets and creditors local to that jurisdiction and to administer those assets in accordance with their local laws.

[13] Sentry makes these further points:

(i) That the Dublin Account for the purposes of BVI insolvency law, is an asset of Sentry to be treated in accordance with BVI insolvency law in Sentry's liquidation which is the only liquidation in process. It cannot be doubted that the Dublin Account is an asset in the liquidation although it is subject to (under seizure) the Dutch Garnishment Orders.

(ii) That the Dutch proceedings do not relate to an asset within the Netherlands, nor are they proceedings for the insolvent administration of Sentry's estate in accordance with Dutch law for the benefit of Sentry's creditors (whether local to the Netherlands or foreign); rather, says counsel for Sentry, the Dutch proceedings (Shell having 'pre-booked' the Dublin Account) will ensure that Shell gains priority by taking the funds in the Dublin Account solely for itself.

(iii) That the appropriate forum for determination of the question whether Shell is a creditor of Sentry is BVI which is also the jurisdiction for the administration of the Dublin Account and distribution to Sentry's creditors.

(iv) An unsecured BVI creditor who sought to take steps abroad to establish his claim and seize an Irish asset for himself rather than sharing in the distribution of that asset with all unsecured creditors in BVI would be restrained by the court.[18] Similarly, says Sentry, a foreign creditor amenable to the jurisdiction should be treated no differently, and given the nature of the Dutch proceedings, they do not call for a modification to that approach. The anti-suit relief is directed at Shell (and not the foreign court) to restrain it from pursuing the proceedings in the Netherlands.

(v) That Shell is amenable to the BVI court's winding-up jurisdiction having submitted a proof in the liquidation.[19] Sentry further says that not only was this a submission to the jurisdiction but also an assertion of its right to share in the assets of the BVI liquidation as a creditor. This imposes a duty on the liquidators to treat with the claim pursuant to section 207 of the Insolvency Act, 2003. In essence, that Shell by submission of its proof accepted the entire statutory scheme for the administration and distribution of Sentry's assets for the benefit of all its creditors as a collective process whether local (BVI) or foreign. Sentry points out that this statutory scheme which treats all assets of Sentry as assets falling to be administered under the BVI liquidation for the benefit of all creditors, is driven in the main by notions of fairness – 'universalism'. It seeks to prevent scrambles for assets, and prevents creditors from obtaining advantages over other creditors simply on the happenstance of the location of the asset.

(vi) Sentry contends that Shell commenced the Dutch proceedings with full knowledge of the liquidation simply to be in a position to 'eat its cake and still have it'.

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[18] In re Oriental Inland Steam Company (1873-74) LR 9 Ch App 557.
[19] Pursuant to s. 209 of the Insolvency Act, 2003.

[14] The question then is whether Shell should be required not to obtain a priority which would be inconsistent with the statutory scheme laid down under the Insolvency Act, 2003.

[15] Shell, on the other hand, makes the following points:

(i) That Shell's claim in the Dutch proceedings are wider, and not merely for redemption proceeds. Its claim is also for misrepresentation based on a side letter and accordingly is a genuine legal claim and not one in the insolvency. The Dutch proceedings are also against Fairfield Greenwich.

(ii) That Sentry's arguments proceed on the assumption that Shell is a creditor whereas the liquidators of Sentry have made no such determination; neither is it known whether Sentry has other creditors or whether the reference to Sentry's general body of creditors comprises investors in a similar position as Shell;[20]

(iii) That Shell has various connections with Holland which justified it proceeding there, and that the Dutch Court's jurisdiction was not grounded merely on the fact that Citco with whom the funds were deposited, happened to be a resident Dutch bank; Shell contends that the damage was done in the Netherlands, and thus the jurisdiction is also based on misrepresentation.

(iii) That Sentry sought and failed in the Dutch courts to have the Dutch Garnishment Orders discharged and was now attempting a second bite for the same ends in BVI; [21]

[20] Being mainly members of the Fund (Sentry) who had not redeemed prior to the discovery and collapse of BLMIS's Ponzi scheme.

[21] Sentry points out that its application to set aside was based on jurisdictional grounds which are different to the basis of the application here.

(iv) That the filing of proof in the liquidation was not a submission to the BVI jurisdiction, whereas, Sentry had already submitted to the Dutch Court's jurisdiction by filing applications in the Dutch proceedings.[22]

(v) That the key to the grant of an anti-suit injunction against Shell was the need to show vexatious, oppressive or unconscionable behaviour on Shell's part, which had not been found, warranting the refusal of such relief and that no different principles apply to 'priority' cases.

(vi) That Shell is a foreigner to BVI and Sentry has no cause of action against Shell, nor does Shell have any claim against Sentry which must be brought in BVI. She makes the point that insolvency does not establish rights, it merely deals with enforcing established rights.[23]

(vii) That Shell is entitled to take advantage of the juridical advantage by way of the garnishment procedure available to Shell in its home court (the Dutch Court).

[16] Before addressing the relevant authorities, we think this is a convenient point to address the basis and nature of the Dutch Garnishment Orders. Beginning at paragraph 62 of her judgment[24] Ms. Justice Finlay Geoghegan, with the benefit of the experts' opinions on the Dutch law in this regard, stated as follows:

> "62. Under Dutch law, an application for a conservatory garnishment is made *ex parte*. A party such as Shell may apply for an order of conservatory garnishment against a third party (Citco) which is resident in the Netherlands and owes a debt to the party against whom the applicant has a claim on the merits (Fairfield [Sentry]). Under the Dutch Civil Code, the jurisdiction of the Dutch courts to grant such an order exists where the third party, Citco, is resident within the jurisdiction of the relevant court. It

[22] The expert evidence led in the Irish court suggests that an application to set aside a garnishment order may be made without submitting to the Dutch courts for the purposes of the claim on the merits. See para. 68 of the judgment of Ms. Justice Finlay Geoghegan delivered 28th February 2012.
[23] See Rubin and another.v Eurofinance SA and others. [2011] Ch 133.
[24] Fairfield Sentry limited (in Liquidation) and Kenneth Kyrs v Citco Bank Nederland NV, Stichting Shell Pensioenfonds and Atlanta Business Inc. Irish Commercial Court [2010 No. 239 COM] (delivered on 28th February 2012).

is irrelevant for the purposes of the initial application that the debt due by the resident third party to the intended defendant of the claim on the merits (Fairfield) is located outside of the Netherlands, or that the Dutch courts do not otherwise have jurisdiction over the intended claim on the merits.

"63. … The orders of conservatory garnishment, (presumably once notified) prevent Citco from paying the debts due by it to Fairfield pending the determination of the claims on the merit by Shell … against Fairfield.

"64. There is no requirement that the proceedings on the merit be commenced prior to the application for the order of conservatory garnishment. The order granting leave to levy the conservatory garnishment requires that the claim on the merits … be commenced within a specified period of time. …

"65. As Fairfield is resident outside of the EU, pursuant to the Dutch Civil Code, the making of the orders of conservatory garnishment also gives the Dutch courts jurisdiction to hear and determine [Shell's] …. claims on the merits against Fairfield. Absent the orders of conservatory garnishment, there is no evidence that the Dutch courts would have jurisdiction to entertain the claims now being pursued in the Netherlands against Fairfield.

"66. In addition to the preventative nature of the orders of conservatory garnishment, they also have what has been described a "pre-booking" effect. If the claims on the merits brought by Shell and Atlanta against Fairfield result in either or both obtaining judgments against Fairfield, then it appears to follow that the successful party or parties are entitled to execute the judgments obtained against the Dublin Account and other funds, if any, which have been subject to the conservatory garnishment. …

"67. The Dutch experts are in agreement that Fairfield does not at any time participate in the proceedings before the Dutch courts in which the order of conservatory garnishment was made. The application was made by Shell or Atlanta without notice to any party." (my emphasis)

She also went on to refer to Sentry's or Citco's right to apply to lift the garnishment orders and that such an application may be repeated more than once. We accept the above statements to be an accurate summary of the Dutch Law as it relates to the basis, nature and effect of the Dutch Garnishment Orders. BVI law has no equivalent law or doctrine which allows for pre-judgment garnishment.

[17] It seems plain to me that the jurisdictional basis of the Dutch court's entertainment of Shell's claims against Sentry, (notwithstanding its wider scope in the Dutch proceedings), rests solely on the Dutch Garnishment Orders obtained against it merely by virtue of Citco's residency status in the Netherlands. The sole juridical link, if one may describe it this way, for obtaining such a garnishment order lies not with the residency, of the parties to the claim, or the establishment of some connection as between the locus and the claims, but simply on the basis of the residency of the third party – here, the third party Citco bank which is resident in the Netherlands. The Dublin Account is itself held outside of the Netherlands at its Citco branch in Ireland. Accordingly, it seems to follow as argued by Mr. Girolami, QC, counsel on behalf of Sentry, that indeed anyone (local or foreign to the Netherlands) is entitled to such an attachment by reason of the fact that the third party (Citco) is a Dutch bank. Atlanta, a Panamanian company (one of the respondents in the Irish proceedings), sought the same relief. Absent the Dutch Garnishment Orders, the Dutch courts will have no jurisdiction to hear and determine Shell's claims on the merits.

[18] Counsel for Sentry makes the further point that Shell's claims in the Dutch proceedings are for torts and breach of contract under New York law. Shell alleges that the content of the Private Placement Memorandum was in fact false contrary to the representations made by Sentry.[25] Indeed Shell bases its claims on New York law.[26] He posits that Shell's position is not that it simply wants its claim determined in the appropriate forum. Without the attachment, the proper forum, he says, would be either BVI or New York. Therefore, the only reason for the Dutch court's exercise of jurisdiction is the attachments. On this basis, counsel argues, the Dutch court is thereby exercising an exorbitant jurisdiction. The Dutch court does not recognise the insolvency of Sentry and thus will give the benefit to anyone who chooses to proceed in Holland, not on the basis that the Netherlands is the appropriate forum or a convenient forum, but only on the basis that the garnishment process enables attachment of an asset without regard to

[25] See Affidavit of Dennis Horeman, para. 18, Record of Appeal Vol. 1, Tab.5.
[26] See the prayer to Shell's claim in the Dutch proceedings, Record of Appeal Vol. 1, Tab 6 (pp. 406-407).

other creditors of Sentry. Counsel accordingly argues that the basis of the jurisdiction is not where the asset is located but rather where the third party is said to reside. If Sentry held the account in BVI in a branch of Citco, then the Dutch court would exercise the same jurisdiction merely by virtue of the fact that Citco is a Dutch company. Accordingly, the Dutch jurisdiction is not due to the fact that Shell is a Dutch company in a Dutch court, but rather due to the fact that the third party Citco is a Dutch company. On this basis, says counsel, the learned trial judge was wrong to assume this as the basis of the Dutch jurisdiction.

[19] The other major complaint of Sentry is with regard to the learned trial judge's treatment of the case. Counsel submits that the learned trial judge failed to take account of the object of Shell's proceedings which was to gain a priority. He did not treat the case as a priority case but rather seemed to treat it as an ordinary case. Counsel says that this was the wrong approach which led in turn to the wrong result. Indeed, says counsel, the issue of priority did not feature in the learned trial judge's decision. He described the learned trial judge's approach this way:

(i) He identified 'pure foreign claimants' and concluded that the case should be treated as a 'pure foreigner case';

(ii) He took the view that for there to be jurisdiction there should be some inequitable behaviour or sharp practice and since such was not present, there was no jurisdiction to grant the anti-suit injunction.

This approach, says counsel, was wrong in principle as:

(i) The case of Bloom v Harms does not support his approach and is against the case law;

(ii) He did not refer to the test as laid out by Lord Millett in Mitchell and another v Carter and another;[27]

(iii) His line of reasoning caused him to lose sight of the significance of the proof – which he called '*de minimis*';

[27] [1997] BCLC 673.

(iv) Failing to take account of the objective of Shell's proceedings which was to gain a priority. Counsel says that the learned trial judge misread In re Vocalion (Foreign), Limited[28] which was not a 'priority' case as is the case here.

The jurisdiction and the principles

[20] There is no doubt that the court has jurisdiction *in personam,* where 'the ends of justice' so require, to restrain a person amenable to its jurisdiction from commencing or continuing with proceedings in a court abroad. It is well established that principles of comity and restraint in interfering in the conduct abroad of foreigners inhibit the exercise of the jurisdiction and is a jurisdiction which must accordingly be exercised with caution. The granting of such an injunction must afford an 'effective remedy'. A court would not grant a remedy which is a *brutum fulmen*.[29] Parameters within which this jurisdiction must be exercised must not be fixed but remain fluid or flexible as equity must adapt and find new solutions to new problems in fulfilling 'the ends of justice'. Similarly, broad statements of general principle will not suffice. If the question is merely one as to the appropriate forum this is usually not enough to justify the grant of an anti-suit injunction but would be a starting point. If it is considered that the local court is the appropriate forum, then the court must go on to consider whether 'the ends of justice' require the granting of an anti-suit injunction. In this regard, the court must take into account whether the respondent has any juridical advantage in the foreign forum in respect of which it would be unjust to deprive him. 'It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English [BVI] court and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.' [30]

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[28] [1932] 2 Ch 196.
[29] A futile threat or display of force.
[30] Deutsche Bank AG and another v Highland Crusader Offshore Partners LP and others [2010] 1 WLR 1023 at 1036C.

[21] The anti-suit injunction has, in our view, an equally important additional role to play: that is in protecting the integrity of the judicial process and the due administration of justice. Thus, an anti-suit injunction may be granted so as to protect the exercise of the local court's jurisdiction over an administration of assets, a bankruptcy or winding up proceedings. As Gee[31] puts it in the context of bankruptcy and winding up:

> "… there is an English public policy of treating creditors equally and distributing proceeds *pari passu* and the foreign proceedings seeking to seize foreign assets are inconsistent with and an attempted evasion of an important English public policy." (my emphasis)

It cannot be doubted that the statutory scheme of the Insolvency Act, 2003 embraces similar public policy considerations as it seeks to treat creditors of a company in liquidation under the court's jurisdiction equally by ensuring that any assets of the company are distributed amongst all the company's creditors (foreign or local) on a *pari passu* basis. It is important for the liquidation to be a collective proceeding having universal application, such that no advantage should be given to a creditor because he happens to live in (or in Shell's case, happen to have access to the courts of) another jurisdiction.[32]

The case law

[22] We now turn to consider the authorities from which the principles informing the jurisdiction and its exercise have been culled whilst bearing in mind that each case turns on its own facts and circumstances. The authorities make it clear that the principles are not etched in stone, nor can a circle be drawn around them outside of which no one must go.

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[31] Steven Gee, QC: Commercial Injunctions (5th edn., Sweet & Maxwell 2004) 417, para.14.026.
[32] See the observations of David Richards J in Re HIH Casualty and General Insurance Ltd. and other companies [2006] 2 All ER 671, pp. 680-682.

[23] In Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others[33] European investors in a shipping business had borrowed some US$300m on the New York bond market for the purchase of gas transport vessels. The vessels, registered in Liberia, were held by a group of Manx companies which in turn were owned by a management company and the management company in turn held by a holding company N which was held through a web of offshore companies including the appellant which was a Caymanian company said to hold 70% of the shares of N. The investors brought and obtained Chapter 11 relief in New York pursuant to the US Bankruptcy Code. The Bankruptcy judge confirmed a plan for the taking over of the assets by the creditors and ordered that the plan be carried into effect. The US Bankruptcy Court issued a letter of request to the Manx High Court for its assistance in giving effect to the plan. The creditors sought an order vesting the shares of N in their representatives which would enable them to control the shipping companies and implement the plan. The appellant cross-petitioned the Manx Court asking that the plan not be recognised or enforced on the basis that it was a separate legal entity (a Caymanian company), which had never submitted to the jurisdiction of the US bankruptcy court and that accordingly no order of that court could affect its rights of property in the Isle of Man. The case reached the Privy Council on appeal by the appellant. Lord Hoffmann, in delivering the opinion of the Privy Council, had this to say at paragraph 16:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

[24] In In re Oriental Inland Steam Company[34] the English court made clear, in essence, that when a company is being wound up there, judgment creditors who are in England and had proved under the winding-up would not be allowed to

[33] [2007] 1 AC 508. See also Rubin and another v Eurofinance SA and others [2011] Ch 133; Cambridge Gas, per Lord Hoffmann at para. 15.
[34] (1873-74) LR 9 Ch App 557.

attach property in India belonging to the company. In In re Oriental the English court was restraining creditors in England, who had submitted proof in the English winding up proceedings from pursuing attachment proceedings in India against the company's asset located in India. The court recognised that the liquidation of the company was confined to England but held that since the process of execution and attachment of the property in India (which by virtue of the winding-up had become trust property for the benefit of all creditors), had not been concluded, the creditors seeking to attach the property in India ought not to be allowed to get any priority over their fellow creditors by reason of having gotten possession of the company's property in that way and that the assets were accordingly to be distributed in England upon the footing of equality.

[25] In Bloom and others v Harms Offshore AHT "Taurus" GmbH and Co. KG and another[35] an English company went into administration. It had no place of business or assets in the US. The creditors of the company similarly had no place of business in the US. They applied in the US courts for attachment orders without informing the US court of the administration order among other things and obtained them. Successful attachment depended on property coming into the jurisdiction of the US District Court during the course of the administration. The creditors did not inform the administrators of the attachment orders they had obtained until after they had succeeded in attaching sufficient funds to secure their claims from funds sent by the administrators to a New York account for the purpose of paying post-administration supplies and services. It was said that the creditors had thereby 'set a trap for the administrators [of the company]'. Burnton LJ, after citing extensively from the judgments of James LJ and Mellish LJ in In re Oriental, opined in essence that although the jurisdiction conferred by the statutory scheme was confined territorially, the finding of a trust resulted in an effective extra-territorial jurisdiction. At paragraph 25 he went on to say thus:

> "… although the court has jurisdiction to prevent a creditor from taking advantage of a foreign attachment, it does not follow that the jurisdiction should be exercised in any particular case. The exercise of the

[35] [2009] EWCA Civ 632.

jurisdiction will depend on the facts of the case, and must be tempered by considerations of comity. The judgment of Maugham J in In re Vocalion (Foreign) Ltd. [1932] 2 Ch 196 is helpfully summarised in the headnote:

> 'Section 177 of the Companies Act 1929 only applies to proceedings pending in a court of Great Britain and does not apply to proceedings pending in a foreign or colonial court. The court can, however, in the exercise of its equitable jurisdiction in personam restrain a respondent properly served in this country from proceeding with an action brought in a foreign or colonial court to enforce a liability incurred abroad. But as against a respondent domiciled abroad substantial justice is more likely to be attained by allowing the foreign proceedings to continue, and in such a case the court will not as a rule exercise that jurisdiction.' "

At paragraph 27 he continued thus:

> "The court should exercise its powers so as to enable the administrators to exercise their statutory functions and to fulfil their statutory duties, so far as necessary in any particular case. The comity owed by the courts of different jurisdictions to each other will normally make it inappropriate for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction. In this particular case, this court recognises that the bankruptcy and district courts are experienced in commercial and insolvency matters. None the less, the conduct of the creditor against whom an injunction is sought, and the circumstances of the attachment of the property of the company, may justify the grant of an injunction despite the strong presumption that this court will not interfere with the proceedings of a foreign court. In particular, if the conduct of the creditor can be castigated as oppressive or vexatious ... or otherwise unfair or improper, this court can and should grant relief in order to protect the performance by administrators of their functions and duties, and thus the creditors of the company, pursuant to orders of the court." (my emphasis)

[26] Some observations made by Maugham J in In re Vocalion, which decision may be said to be somewhat out of step with the more modern approach of universality in insolvency administration, warrants setting out. At pages 209-210 he had this to say:

> "I can find … no reason to doubt that a person domiciled abroad can sue in his own Courts a company which, in carrying on business there, has incurred a debt or liability to him, whether or not that company is being wound up in this country, to which he owes no allegiance and with the

> laws of which he is not acquainted; though ... if he desires to benefit under the English winding-up he must generally speaking ... give up for the benefit of other creditors any advantage which he may have obtained for himself by the proceedings abroad. If these views be well founded it is difficult to see why an English Court should attempt to restrain such a creditor from enforcing his rights in his own country merely because it is possible to serve him with process here. To prevent a misconception, I should point out that I am not here dealing with the case of a British subject, … nor am I dealing with the case where the person sought to be restrained from proceedings abroad has made himself a party to the proceedings in the liquidation, for instance by putting in a proof or in some other way." (my emphasis)

It is also noteworthy that Maugham J took note of the fact that the Melbourne Court would properly deal with the matter and in essence 'not disregard … the legal effects of the liquidation of the Company and the trust for creditors which has been thereby established …'[36]

[27] In Robertson,[37] Sir James Bacon CJ held that 'a foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the Court as to the administration of the estate, just as if he were residing within it'.

Is a finding of unconscionably or 'sharp practice' on the part of a respondent a *'sine qua non'* for the grant of an anti-suit injunction in circumstances where its aim is to protect the court's process in the administration of the assets of an insolvent Company?

[28] Ms. Newman, QC placed considerable emphasis on the need to show inequitable conduct for warranting the exercise of the jurisdiction. She posited that comity, common sense and juridical advantages form the basis on which the court acts, and if there is no inequitable conduct, the jurisdiction should not be exercised. The learned trial judge appears to have agreed.[38] She relied on Bloom v Harms, the dictum of Millett LJ in Mitchell v Carter as well as a number of other

[36] See pp. 210-211 of the judgment.
[37] (1875) LR 20 Eq 733.
[38] See para. 48 of judgment delivered on 9th August 2011.

authorities. Millett LJ in Mitchell v Carter stated,[39] following Hoffmann J in Barclays Bank plc v Homan and others,[40] that 'there must be a good reason why the decision to stop foreign proceedings should be made here rather than there. The normal assumption is that the foreign judge is the person best qualified to decide if the proceedings in his court should be allowed to continue. Comity demands a policy of non-intervention'.

[29] In Barclays Bank plc v Homan the Court of Appeal distilled the relevant principles for deciding whether to grant an anti-suit injunction:

(a) If the only issue was whether the English or the foreign court was the more appropriate forum, that question should normally be decided by the foreign court on the principle of forum non conveniens.

(b) However, if exceptionally the English court decided that the action before the foreign court would be vexatious or oppressive and that the English court was the natural forum it could properly grant an injunction restraining the action in the foreign court.

(c) In deciding whether the action was vexatious or oppressive, account must be taken of the possible injustice to the defendant if the injunction was not granted and the possible injustice to the plaintiff if it was granted. The English court must strike a balance.

[30] In SNI Aérospatiale v Lee Kui Jak and another[41] Lord Goff of Chieveley made it clear that an anti-suit injunction will only be granted where the ends of justice so require. The ends of justice may so require, where it is shown that a claimant by proceeding in a foreign court is acting oppressively. In Glencore International AG v Exter Shipping Ltd and others[42] Lord Justice Rix opined that jurisprudence had limited the conditions under which the grant of an anti-suit injunction may be

[39] At p. 685.
[40] [1993] BCLC 680.
[41] [1987] 3 All ER 510.
[42] [2002] 2 All ER (Comm) 1.

regarded as being 'just and convenient'. As one of those conditions he stated that 'the threatened conduct must be "unconscionable"' and 'includes conduct which is "oppressive or vexatious or which interferes with the due process of the court"'. The underlying principle he says is 'one of justice in support of the "ends of justice." … It is analogous to "abuse of process"; it is related to matters which should affect a person's conscience'; it 'must be necessary to protect the applicant's legitimate interest in English proceedings'.

[31] In Airbus Industrie GIE v Patel & Ors.[43] Lord Goff of Chieveley gave the leading speech in the House of Lords where the question of granting an anti-suit injunction again arose. There, English claimants sued a French Aircraft company in Texas in relation to an air crash in India. The aircraft company sought an anti-suit injunction in England restraining Texas proceedings. The contest as to forum was therefore between India and Texas. It was held that no injunction could be granted as this would be inconsistent with comity because the English jurisdiction had no interest in or connection with the matter in question. England was not the natural forum. In single forum cases where the English court was asked to restrain proceedings in a foreign court which alone had jurisdiction the question of connection with the English jurisdiction might involve consideration of the extent to which the relevant transactions were connected with the jurisdiction or whether the injunction was required to protect the policies of the English forum. In an alternative forum case the court had to consider whether England was the natural forum for resolution of the dispute. Lord Goff in his speech stated again that the jurisdiction is to be exercised 'when the ends of justice require [it]'; that generally speaking, 'this may occur when the foreign proceedings are vexatious or oppressive'. He referred to the Amchem Products case[44] in which Sopinka J expressed a preference for the formulation of the principle based simply on 'the ends of justice' without reference to oppression or vexation and opined that nonetheless the jurisdiction must be exercised having regard to comity and accordingly, must be exercised with caution.

[43] [1998] CLC 702.
[44] Amchem Products Inc. v Workers' Compensation Board (1993) 102 DLR (4th) 96.

Discussion

[32] The guidance which we derive from these cases is that the most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or oppressive or otherwise unconscionable. However, we do not understand the authorities to be suggesting that without a finding of oppressive or unconscionable conduct the jurisdiction is not available. We do not read the statements by Lord Goff as requiring such a finding. Indeed we also prefer Sopinka J's formulation of the principle as being based simply on the 'ends of justice' as in our view the emphasis on the expressions 'vexatious' or 'oppressive' conduct runs the risk of imposing a rigid formulation in respect of a jurisdiction which must remain fluid in its development and adaption to new challenges precisely for the purpose of meeting the 'ends of justice'.

[33] It should be pointed out also that these cases, relied on by Ms. Newman, QC, were ordinary civil actions either of single forum or alternate forum cases, where a major feature, as Mr. Girolami, QC pointed out, would be some element of unconscionable or oppressive conduct. Here, what is in process is a liquidation of Sentry which is proceeding on the basis of a statutory scheme the objective of which is to treat all its creditors fairly and equally, without any creditor gaining an advantage over the other in the distribution of the assets. It seems to us that both Lord Rix (in the Glencore case) and Lord Goff (in the Airbus case) tacitly recognised that the jurisdiction is available where the conduct of the claimant by pursuing the foreign proceedings would interfere with the 'due process of the court' or where it is required to protect the polices of the local forum, as a separate and distinct consideration although when looked at from the other end of the spectrum, it may very well be viewed as an abuse of process.

Can Shell be said to be amenable to the BVI court's jurisdiction?

[34] The learned trial judge held that the fact that Shell has claimed in the liquidation means that it is amenable to be served and thus to be subjected to the jurisdiction in all matters arising in the liquidation but held that that fact was *de minimis*.[45] He relied on In re Vocalion. Maugham J, in In re Vocalion, made it clear that it would be inappropriate to restrain a foreign claimant from pursuing foreign proceedings. He also made clear however, that he was not there 'dealing with the case where the person sought to be restrained from proceedings abroad has made himself a party to the proceedings in the liquidation, for instance by putting in a proof or in some other way.' (my emphasis). We understand this to mean that in the case where the person sought to be restrained has put in a proof, as is the case here, then this is an important factor in considering the question whether or not he ought to be restrained from pursuing, foreign proceedings notwithstanding that in all other respects that person is a foreign claimant. The case of Robertson bears this out.

[35] In Mitchell v Carter the applicants had previously, obtained judgment against the respondent company. Less than a year later, joint administrative receivers were appointed over the company. The applicants obtained writs of garnishment in Florida (the Florida court having recognised the applicant's judgment) in respect of sums owed to the company by seven of its US subsidiaries. The writs were the equivalent of the English court's garnishee order nisi. Before the garnishment process could be completed a petition for winding up the company was presented and liquidators were appointed. The liquidators applied in the Florida court to stay the writs of garnishment. They also obtained in the US court a temporary order restraining the applicants from commencing or continuing any proceedings against the company in the United States. The applicants then sought in the English winding up proceedings an order to the effect that in the event of a winding up order being made that they should in the event be at liberty to retain the benefit of the Florida writs of garnishment notwithstanding the winding up order. It was held

[45] See judgment of the learned trial judge (dated 9th August 2011), paras. 46 and 47.

that the court had jurisdiction to decide a question of priorities in an English liquidation and thus whether the applicants could retain the fruits of the garnishment proceedings, if awarded them, and to act by way of declaration since that was a matter of English law. The court had jurisdiction over liquidators and had power to act by way of declaration or injunction to restrain any act which would not be lawful. The English court's jurisdiction did not depend on which of the parties made the application. Millett LJ in his judgment had this to say:

> "The making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company. The responsibility for collecting the assets and implementing the statutory scheme is vested in the liquidator subject to the ultimate control of the court. The creditors do not themselves acquire a beneficial interest in any of the assets, but only a right to have them administered in accordance with the statutory scheme. … They apply to all the assets of the company, both in England and abroad, for the making of a winding-up order is regarded as having worldwide effect.
>
> "The powers of the court are, of course, more limited. But it has power to take whatever steps are open to it within the territorial limits of its own jurisdiction to enable the liquidator (one of its own officers) to get in and realise for the benefit of the creditors all the assets of the company which are subject to the statutory scheme, wherever in the world they may be. Where the assets are overseas and are subject to an uncompleted process of execution, they are nevertheless subject to the statutory scheme. Once the execution is complete, however, and the assets have been successfully seized by the execution creditor, then they cease to be subject to the statutory scheme and the liquidator's ability to collect them for the benefit of the creditors is defeated. This is because s 183 of the Insolvency Act 1986 applies only to execution proceedings in England and because the liquidator and the other creditors have no beneficial interest in the assets which could sustain a restitutionary claim.
>
> "Accordingly, a creditor who successfully completes a foreign execution is able to gain priority over the unsecured creditors. To prevent this, the English court has jurisdiction to restrain creditors from bringing or continuing foreign execution process (see, for example, *Re Oriental Inland Steam Co, ex p Scinde Rly Co* (1874) 9 Ch App 557 and *Re North Caroilina Estate Co* (1889) 5 TLR 328). In all the cases in which the court has hitherto exercised this jurisdiction, the creditors in question were resident in England. In *Re Vocalion (Foreign) Ltd* [1932] 2 Ch D 196, Maugham J did not doubt that the jurisdiction existed, even in the case of

> a creditor who was properly served here but was resident abroad, and who was merely seeking to recover a debt due to him by resorting to the courts of his own country; but he declined to exercise the jurisdiction in such a case. But although the English court has jurisdiction to grant what amounts to an anti-suit injunction in order to restrain execution proceedings in a foreign court which would prevent the liquidator from getting in the assets, … it is a jurisdiction to be exercised with caution." (my emphasis)

[36] We adopt entirely the sentiments of Millett LJ as expressed above. In my view it reflects the nature and effect of insolvency under BVI law. It is accepted that similar to the position under section 183 of the UK Insolvency Act, similarly, sections 175 and 176 of the Insolvency Act, 2003 apply only to execution proceedings in BVI. Here, Shell obtained the Dutch Garnishment Orders ex-parte. They are not based on a judgment on the merits of the claim but merely on the basis of the third party Citco being a Dutch bank with funds on account in the Dublin Account on behalf of Sentry. We is accepted that the Dutch Garnishment Orders confer no immediate security interest in favour of Shell. Accordingly, the Dublin Account is not the subject of a completed execution process and as such the Dublin Account, notwithstanding that it is situate abroad in Ireland, is subject to the statutory scheme over which the BVI court has ultimate control as the place where Sentry's liquidation is being administered by the liquidators who are officers of the BVI court. It is also clear that were Shell to proceed and succeed in the Netherlands (where Sentry's liquidation is not recognised at all) Shell would in essence gain a priority over Sentry's general body of unsecured creditors. There is no ancillary administration or liquidation process taking place in the Netherlands. Accordingly, there is no basis on which an assumption can be made as Maugham J said in In re Vocalion that the Dutch court 'will not disregard … the legal effects of the liquidation of the Company and the trust for creditors which has been thereby established'.

[37] Further, there is strong evidence that in the absence of the Dutch Garnishment Orders, the Dutch courts would have no jurisdiction to entertain Shell's claim. The stronger connections point to either BVI or New York as being the natural forum

for the trial of its claims. This bolsters the view that Shell instituted the Dutch proceedings not in reliance on any principle of natural forum but solely for the purpose of securing the advantage which they hope to achieve – that of gaining a priority over other creditors of Sentry. We agree with counsel for Sentry that the learned trial judge was wrong to proceed on the assumption that the Dutch jurisdiction was due to Shell being a Dutch entity when in fact the basis of the Dutch Court's jurisdiction was due to the fact that the third party Citco is a Dutch entity. We also agree, although quite mindful of the principles of comity, that the criticism levelled in terms of the Dutch court exercising an exorbitant jurisdiction in the circumstances of this case, may be viewed as fair.

[38] Moreover, Shell, in keeping with the BVI statutory scheme by submission of its claim in the liquidation, has at the very least evinced its intention to participate in and be guided by the statutory scheme for the distribution of all Sentry's assets for the benefit of all its creditors fairly and equally on a *pari passu* basis without regard to location of the assets or nationality or residency of creditors. This can only be treated, in our view, as a submission to the jurisdiction for the purpose of being governed by the statutory scheme. To allow Shell to prove in the liquidation and at the same time pursue its proceedings in the Dutch courts (the substratum of which is grounded in the claim to redemption payments) which permits it to gain a priority over other unsecured creditors would seem to me to be a sanction by this court of a course which is clearly counter to and inconsistent with BVI public policy. Furthermore, it would, in our view, be an abdication of this court's responsibility to protect the integrity of its judicial process and thus the due administration of justice. Shell ought not to be allowed, in fairness, to have it both ways. Shell, armed with its Dutch Garnishment Orders nonetheless submitted its proof of claim in the liquidation. In so doing, Shell ought to be treated as having made an election to participate in and be bound by the liquidation process being administered by the BVI court pursuant to the statutory scheme laid down in BVI's insolvency laws. It may also be said that in so doing, Shell demonstrated its intention to surrender any advantage it may have gained by virtue of the Dutch Garnishment Orders in favour of the fair and equal distribution amongst Shell's

general body of unsecured creditors. This would be in keeping with Maugham J's observations in In re Vocalion.

[39] We are of the view that the learned trial judge erred when he failed to treat the case as one dealing with priorities. The gaining of a priority is the objective of Shell's case in the Netherlands and the case ought to have been approached from this perspective and not as one treating with ordinary civil claims. The learned trial judge also erred in treating the fact of Shell's submission of proof as *'de minimis'*. In my view this is a very relevant and pertinent factor in the circumstances of this case, as it clearly demonstrates Shell's intention and agreement to be bound by the statutory scheme afforded under the provisions of the Insolvency Act, 2003. The fact that the liquidators have so far not ruled on the question of admission of Shell's claim is not a factor which provides any traction in favour of Shell. As Lord Hoffmann said in Cambridge Gas, there are procedures within the liquidation process to settle disputes over claims.

Conclusion

[40] For the foregoing reasons, we consider that on a proper application of the principles and having due regard for comity, the circumstances of this case warrant the exercise of the jurisdiction. This court should not flinch from so doing in achieving the ends of justice. We would allow Sentry's appeal and make an order in the following terms:

That Shell be restrained from taking any further steps in proceedings commenced on 19th March 2010 in the District Court of Amsterdam, the Netherlands against Sentry, or from issuing or otherwise commencing any proceedings against Sentry in the District Court of Amsterdam or elsewhere in the Netherlands.

[41] Finally, we are grateful to counsel for the parties for their helpful submissions and the skill with which they addressed the issues during the hearing of the appeal. Our only regret is not being able to have sooner rendered this judgment which was due to time constraints related to this Court's consistently busy schedule.