Michaelmas Term
[2014] UKPC 41
Privy Council Appeal No 0097 of 2013

JUDGMENT

Stichting Shell Pensioenfonds (Appellant) *v* Krys and another (Respondents)

From the Court of Appeal of the British Virgin Islands

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

26 November 2014

Heard on 8 and 9 October 2014

Appellant
Catherine Newman QC
Arabella di Iorio

(Instructed by Herbert Smith Freehills LLP)

Respondents
Paul Girolami QC
Andrew Westwood
William Hare
(Instructed by Wragge Lawrence Graham & Co LLP)

LORD SUMPTION AND LORD TOULSON:

1. The question at issue on this appeal is whether, when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction should issue to prevent a creditor or member from pursuing proceedings in another jurisdiction which are calculated to give him an unjustifiable priority. This question falls to be decided under the law of the British Virgin Islands, which is not identical to the law of the United Kingdom, because of differences in their respective insolvency legislation. But for the purpose of the present issue, the laws of the two jurisdictions can be treated as the same.

Bernard L. Madoff Investment Securities LLC and Fairfield Sentry Ltd

2. Bernard L. Madoff Investment Securities LLC ("BLMIS"), was a New York-based fund manager controlled by the eponymous Bernard Madoff. Although not all of the facts are yet known, it appears that over a period of at least seventeen years he operated what was probably the largest Ponzi scheme in history, accepting sums variously estimated between $17 billion and $50 billion for investment. From at least the early 1990s there appear to have been no trades and no investments. Reports and returns to investors were fictitious and the corresponding documentation fabricated. On 11 December 2008, Mr Madoff was arrested, and in March 2009 pleaded guilty to a number of counts of fraud.

3. Funds for investment were commonly entrusted to BLMIS by "feeder funds", of which the largest was Fairfield Sentry Ltd, the company whose winding up has given rise to this appeal. Fairfield Sentry is incorporated as a mutual fund in the British Virgin Islands. Its liquidators have stated that as at 31 October 2008 about 95% of its assets, amounting to some US$7.2 billion, were placed with BLMIS. Investors participated indirectly in these placements by acquiring shares in Fairfield Sentry at a price dependent on the net asset value per share published from time to time by the directors. Investors were entitled to withdraw funds by redeeming their shares under the provisions of the Fund's Articles of Association, also at a price based on the published NAV per share. The information provided to investors was contained in a Private Placement Memorandum, which made it clear that funds subscribed for shares would be placed for investment with BLMIS, and described in general terms the way that the scheme was supposed to work.

4. Fairfield Sentry's business involved the use of a number of intermediaries. For present purposes three of them may be mentioned. Fairfield Greenwich Ltd was

a Cayman-incorporated associate which acted as its investment manager. Dealings with investors were handled by Citco Fund Services (Europe) BV, a company incorporated in the Netherlands which served as Fairfield Sentry's administrative agent. Citco Bank Nederland BV, an associated company of Citco Fund Services, is a Dutch bank which acted as Fairfield Sentry's asset custodian under its agreements with subscribers. Citco Bank Nederland had a branch in Dublin. It maintained an account in the name of Fairfield Sentry in which substantial cash balances were held.

5. The Appellant, Stichting Shell Pensioenfonds, which we shall call "Shell", is a Dutch pension fund incorporated and with its seat in the Netherlands. Between 2003 and 2006, it subscribed US$45m for 46,708.1304 Fairfield Sentry shares, under five successive subscription agreements. These agreements were governed by New York law and contained submissions to the exclusive jurisdiction of the New York courts. Before the first of its placements, Shell obtained a side-letter dated 26 March 2003 from Fairfield Sentry and its parent company Fairfield Greenwich Ltd containing various warranties, including a warranty that the contents of the Private Placement Memorandum were correct and complete.

The Dutch proceedings

6. On 12 December 2008, the day after Mr Madoff's arrest, Shell applied to redeem its shares. However, no redemption payment was received and, six days later on 18 December, the directors of Fairfield Sentry suspended determinations of its Net Asset Value per share, thereby in practice bringing redemptions to an end.

7. On 22 December 2008 Shell applied in the Amsterdam District Court for permission to obtain a pre-judgment garnishment or conservatory attachment over all assets of Fairfield Sentry held by Citco Bank up to a value of US$80m, including any credit balance on its account with Citco Bank's Dublin branch. An order in those terms was made on the following day, 23 December 2008. In accordance with that order, attachments were made on 23 December 2008, 21 January 2009 and 16 March 2010 of sums in the Dublin account totalling about US$71m. It is common ground that no other assets of Fairfield Sentry are subject to the Dutch attachments. The initial application for authority to attach was made *ex parte*. However, Fairfield Sentry was entitled to apply *inter partes* to lift the attachment and did so. The application was rejected by the District Court of Amsterdam on 16 February 2011.

8. The effect of the attachments as a matter of Dutch law was the subject of argument in related proceedings in the Netherlands and of evidence in other

related proceedings in Ireland. The parties are substantially agreed about it. Three points should be noted:

(1) Where the asset attached is a debt, the fact that the debtor (in this case Citco Bank Nederland) is amenable to the jurisdiction of the Dutch courts is a sufficient basis on which to establish the jurisdiction of the Dutch courts to hear the substantive claim. Fairfield Sentry being resident outside the European Union, it is the only basis of jurisdiction available in the present case. It was a term of the court's permission to attach assets of Fairfield Sentry that Shell should begin proceedings in support of its substantive claim within four months.

(2) The attachments do not, as a matter of Dutch law, create any kind of proprietary interest in the balances on the Dublin account. But they purport to conserve the funds in the account so that they will be available to satisfy any judgment which may be obtained against Fairfield Sentry in due course. Subject to any relevant period of limitation, it would be open to any other person with claims against Fairfield Sentry to take the same course as Shell has done, and apply in the Dutch courts to attach its assets in the hands of Citco Bank. Where there is more than one judgment creditor with attachments over the same assets, the funds attached will then be shared between them.

(3) In principle a claimant is entitled as of right to attach assets in support of an arguable claim, subject only to the reservation that an attachment will not be authorised if the substantive claim is unarguable or the attachment would put the garnishee at risk of having to pay twice. However, except in cases governed by the insolvency legislation of the European Union, the fact that the debtor is in liquidation elsewhere and that the attachment will prevent its assets from being distributed *pari passu*, is regarded as irrelevant to the exercise of the power to authorise an attachment. In rejecting Fairfield Sentry's challenge to the attachment order, the District Court of Amsterdam explained that Dutch law does not treat a foreign insolvency, even where it is proceeding in the jurisdiction of incorporation, as applying to assets located in the Netherlands.

9. The four-month deadline for the commencement of proceedings on Shell's substantive claim was extended several times, and the proceedings were ultimately commenced within the extended time on 19 March 2010. The principal claim made was for US$45m damages for the alleged breaches of the representation and warranties contained in the side-letter of 26 March 2003. The present status of the Dutch proceedings is that they have been left to lie on the file pending the final resolution of the injunction proceedings in the BVI.

The winding-up proceedings

10. On 21 July 2009, Fairfield Sentry was ordered by the High Court of the British Virgin Islands to be wound up and Mr Kenneth Krys and Ms Joanna Lau were appointed as its joint liquidators. There are broadly speaking three categories of claimant or potential claimant in the BVI liquidation. First, there are what one can loosely call trade creditors, unpaid suppliers of goods or services. The Board was told that the value of their claims was small. Second, there are redemption claims, from shareholders in Fairfield Sentry who submitted redemption notices before the determination of its NAV per share was suspended on 18 December 2008. The Board understands that there are persons claiming to fall within this category. However, on 14 August 2014 Bannister J in the High Court directed that subject to any contrary order of the court the assets should be distributed on the footing that no outstanding redemption moneys were due to any member or former member of Fairfield Sentry. Third, there are shareholders entitled to share in any surplus. Somewhat unusually, therefore, it is likely that by far the greater part of the recoveries made by the liquidators will be distributed to shareholders in Fairfield Sentry. No one, however, suggests that these distributions will represent more than a small part of the losses that they will have suffered by investing in the company.

11. On 5 November 2009, Shell submitted a proof of debt in the liquidation for US$63,045,616.18. This amount was said to represent the redemption price of Shell's shares, calculated by reference to the NAV per share published by the directors of Sentry at 31 October 2008. It was claimed as a debt due under Shell's redemption notice of 12 December 2008. The joint liquidators rejected Shell's proof on 21 August 2014, as a result of Bannister J's direction of 14 August, subject to Shell's right if it objected to the assets being distributed in accordance with that direction to put forward its objection in writing by 17 October 2014. The Board was told that some other members claiming to be entitled to redeem have objected, and their objections will be heard by the BVI court later this year. But Shell has not objected, and the position at the time of the hearing of this appeal was that it was not intending to do so.

12. Manifestly, the effect of the attachments is that if Shell succeeds in its claim in the Dutch courts, it is likely to be able to satisfy its judgment-debt in full out of Fairfield Sentry's balance in the Dublin account, whereas others who have claims in the liquidation ranking with or ahead of theirs may recover only a dividend. Shell says that it would have been open to other claimants to obtain attachments through the Dutch courts against the Dublin account in support of their own claims against Fairfield Sentry. If that had happened, there would have to be a kind of mini-liquidation in the Netherlands in which Shell might or might not fare better than comparable claimants in the liquidation. Shell also says that if it had proved for its damages claim (as it was and remains entitled to do), it

would arguably be entitled to rank as a creditor ahead of other members and might have recovered in full anyway. These conjectural possibilities depend on questions that are not before the Board, and for present purposes can be ignored. Miss Newman QC, who appeared for Shell, candidly acknowledged, as she did below, that the real purpose of the Dutch attachments is to obtain priority which Shell would not, or not necessarily get in the liquidation. The issue on this appeal is whether Shell was in principle entitled to do that, and if not whether an injunction can issue to stop it.

13. On 8 March 2011, shortly after the District Court of Amsterdam rejected Fairfield Sentry's challenge to the attachments, the joint liquidators applied in the High Court of the British Virgin Islands for an anti-suit injunction restraining Shell from prosecuting its proceedings in the Netherlands and requiring it to take all necessary steps to procure the release of the attachments. The application was heard *inter partes* by Bannister J in July 2011, who rejected it in a judgment delivered on 9 August. His main reason, in summary, was that as a matter of principle the BVI court would not prevent a foreign creditor from resorting to his own courts, even if he was amenable to the BVI court's jurisdiction. The Court of Appeal allowed the appeal and made an order in substantially the terms which the joint liquidators had asked for in their notice of appeal. The order restrained Shell from taking any further steps in the existing Dutch proceedings against Fairfield Sentry or commencing new ones, but did not refer in terms to the attachments. The Court of Appeal's reasons, in summary, were (i) that Shell was subject to the personal jurisdiction of the BVI court by virtue of having lodged a proof in the liquidation, (ii) the assertion by the Dutch courts of a jurisdiction to attach assets on the sole ground that it consisted in a debt owed to the insolvent company by a Dutch entity was exorbitant; and (iii) Shell should not be allowed to avail itself of that jurisdiction so as to gain a priority to which it was not entitled under the statutory rules of distribution applying in the British Virgin Islands.

Anti-suit injunctions in insolvency cases

14. In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute: *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167. In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court, but all assets world-wide. In England, this follows from the unqualified terms of section 144(1) of the Insolvency Act 1986. In the British Virgin Islands, it is provided for in terms by section 175(1) of the Insolvency Act 2003, combined with the inclusive definition of "asset" in section 2(1) ("every description of property, wherever situated"). It reflects the ordinary principle of private

international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation *pari passu* among unsecured creditors and, to the extent of any surplus, among its members.

15. This necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction. The *lex situs* is of course relevant to the question what assets are truly part of the insolvent estate. It will generally determine whether the company had at the relevant time a proprietary interest in an asset, and if so what kind of interest. Thus, if execution is levied on an asset of the company within the territorial jurisdiction of a foreign court before the company is wound up, it will no longer be regarded by the winding-up court as part of the insolvent estate. But short of a transfer of a proprietary interest in the asset prior to the winding-up order, it is generally for the law of that jurisdiction to determine the distribution of the company's assets among its creditors and members, at any rate where the company is being wound up in the jurisdiction of its incorporation. In England and the BVI the court may, and commonly does, assert dominion over the local assets of an insolvent foreign company by conducting an ancillary winding-up. But it does so in support of the principal winding-up, and so far as it can in such a way as to ensure that creditors and members are treated equally regardless of the location of the assets. It does not seek to ring-fence local assets or local creditors. As Sir Nicolas Browne-Wilkinson V.-C. put it in *Re Bank of Credit and Commerce International SA* [1992] BCLC 570, 577:

> "an attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions."

16. In the present case the attachments were obtained some six months before the company was ordered to be wound up in the British Virgin Islands. Therefore at the time that they were obtained there could have been no inconsistency with the law of the British Virgin Islands. If the effect of the attachments as a matter of Dutch law had been to charge the assets attached or otherwise transfer a proprietary interest in them to Shell, and if that were held to be effective in relation to an asset situated in Ireland, the interest thus created would have ranked prior to the statutory trust created upon the winding-up order and there would be no basis for an anti-suit injunction. It is, however, common ground that no alteration in the proprietary interests in the Dublin balance was effected at the time of the attachments and that no right to execute against the balance had yet arisen. Any proprietary interest which might come into existence in future upon

execution being levied against it would in the eyes of BVI law be postponed to the administration of the statutory trust. It must follow that since the date of the winding-up order, 21 July 2009, the attachments, which exist only for the purpose of enabling property in the Dublin balance to be transferred to Shell if and when it recovers judgment in the Dutch proceedings, have been directly inconsistent with the mandatory statutory scheme resulting from the winding up order in the British Virgin Islands.

17. The fundamental principle applicable to all anti-suit injunctions was stated at the outset of the history of this branch of jurisprudence by Sir John Leach V-C in *Bushby v Munday* (1821) 5 Madd 297, 307. The court does not purport to interfere with any foreign court, but may act personally upon a defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require.

18. The 'ends of justice' is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject-matter and the circumstances. In *Carron Iron Company Proprietors v Maclaren* (1855) 5 HLC 415, Lord Cranworth LC (at pp 437-439) identified three categories of case which, without necessarily being comprehensive or mutually exclusive, have served generations of judges as tools of analysis. The first comprised cases of simultaneous proceedings in England and abroad on the same subject-matter. If a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject-matter, the court might restrain him on the ground that his conduct was a 'vexatious harassing of the opposite party.' The second category comprised cases in which foreign proceedings were being brought in an inappropriate forum to resolve questions which could more naturally and conveniently be resolved in England. Proceedings of this kind were vexatious in a larger sense. The court restrained them "on principles of convenience to prevent litigation which it has considered to be either unnecessary, and therefore vexatious, or else ill-adapted to secure complete justice". Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience". It is with this third category that the House of Lords was concerned. The appeal arose out of the administration by the English court of the insolvent estate of a deceased who appears to have been domiciled in England. The estate comprised property in both England and Scotland. The Carron Iron Company, which had claims against the estate, brought proceedings against the executors in Scotland, in which they obtained letters of arrestment. These attached the deceased's Scottish property and would have resulted in the application of that property to the satisfaction of their own claim in priority to claims in the liquidation. The House of Lords by a majority (Lord Cranworth LC and Lord Brougham, Lord St. Leonards dissenting) refused an injunction to restrain the Scottish proceedings

on the ground that the company was not amenable to the personal jurisdiction of the English court. The Board will return to that question below. But all three members of the House agreed on the principle on which such an injunction would issue if personal jurisdiction had existed. Lord Cranworth LC, at p 440 said:

> "In general, after a decree under which the creditors of a Testator may come in and obtain payment of their demands, the Court does not permit a creditor to institute proceedings for himself. The decree is said to be a judgment, or in the nature of a judgment, for all the creditors. The court takes possession of the assets, and distributes them rateably, on principles of equality, giving, however, due effect to any legal rights of preference which any one creditor may possess. To allow a creditor, after such a decree, to institute proceedings for himself, would give rise to great inconvenience and injustice: it would disturb the general principle of equal distribution which the court is always anxious to enforce, and would leave the executors exposed to actions after the assets have been taken out of their hands. Of the general justice, therefore, of the rule on which the court acts, no doubt can, I think, be entertained."

The basis of this conclusion, as the reasoning of all three members of the House shows, is that the court has an equitable jurisdiction to restrain the acts of persons amenable to the court's jurisdiction which was calculated to violate the statutory scheme of distribution.

19. The principle thus stated has been applied on a number of occasions. In *Re Oriental Inland Steam Company, Ex p Scinde Railway* (1874) 9 Ch App 557, a creditor proved in the liquidation of the Oriental Inland Steam Company in England but attempted to obtain priority to other creditors by attaching property of the company in India. He was restrained by injunction from proceeding in India, but obtained the value of his debt from the liquidator in return for lifting the attachment, without prejudice to the question whether he should be allowed to retain it. The Court of Appeal affirmed an order of Malins J requiring him to repay it. Sir William James LJ said, at p 559:

> "All the assets there would be liable to be torn to pieces by creditors there, notwithstanding the winding-up, and there would be an utter incapacity of the Courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust

> property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way… One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust* . So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. The assets must be distributed in *England* upon the footing of equality."

20. In *Re North Carolina Estate Co Ltd* (1889) 5 TLR 328, Chitty J applied the same principle, observing that

> "Under the Companies Act of 1862 it was clear that after a winding up order the assets of the company were to be collected and applied in discharge of its liabilities, and that the assets were fixed by the Act of Parliament with a trust for equal distribution among creditors (*In re Oriental Steam Company*, L.R. 9 Ch App at p. 559); *In re Vron Colliery Company* L.R. 20, Ch. D., 442). No creditor, therefore, could be allowed, by taking proceedings at his own will and pleasure, to destroy, waste, or impair assets which were subjected to a trust for the general benefit of all creditors alike."

21. In *Mitchell v Carter* [1997] 1 BCLC 673, Millett J referred to the jurisdiction as well established. He said at p 687:

> "… a creditor who successfully completes a foreign execution is able to gain priority over the unsecured creditors. To prevent this, the English court has jurisdiction to restrain creditors from bringing or continuing the foreign execution process."

22. In the United States, the Supreme Court has independently arrived at the same position and recognised the right of the state of an insolvent's domicile to restrain proceedings in another state designed to obtain a more favourable distribution of the assets, notwithstanding the constitutional duty of each state to give full faith and credit to judicial proceedings in every other state: *Cole v Cunningham* (1890) 133 US 107. As Fuller CJ observed, delivering the opinion of the Court at p 122:

> "At the time of these proceedings, as for many years before, the Commonwealth of Massachusetts had an elaborate system of insolvent laws, designed to secure the equal distribution of the property of its debtors among their creditors. Under these insolvent laws, all preferences were avoided and all attachments in favor of particular creditors dissolved. The transfer of the debtor's property to his assignees in insolvency extended to all his property and assets, wherever situated. This was expressly provided as to such as might be outside the state…. Nothing can be plainer than that the act of Butler, Hayden & Co. in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tended directly to defeat the operation of the insolvent law in its most essential features, and it is not easy to understand why such acts could not be restrained within the practice to which we have referred."

The Court regarded this, as the English courts do, as the enforcement of an equitable right: see p 116.

23. The leading modern case on the jurisdiction to restrain foreign proceedings is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. This was an alternative forum case, in which the Judicial Committee, sitting on appeal from Brunei, granted an injunction restraining proceedings in Texas on the ground that Texas was not the appropriate forum and the proceedings there were oppressive. Lord Goff, delivering the advice of the Board, pointed out at that the insolvency cases proceeded on a different principle, which was based not on protecting litigants against vexation or oppression, but on the protection of the court's jurisdiction to do equity between claimants to an insolvent estate. At pp 892H-893E, he observed:

> "The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of the injunction is to protect the jurisdiction of the English court…. Another important category of case in which injunctions may be

> granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry v. Lewis* (1882) 22 ChD 397 and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 ChD 225."

It is clear from Lord Goff's formulation that he was making the same distinction as Lord Cranworth made in *Carron Iron* between cases such as the insolvency cases, in which there is an equitable jurisdiction to enforce the statutory scheme of distribution according to its terms, and cases in which the court intervenes on the ground of vexation or oppression.

24. The conduct of a creditor or member in invoking the jurisdiction of a foreign court so as to obtain prior access to the insolvent estate may well be vexatious or oppressive, in which case an injunction may be justified on that ground. An example is provided by the decision of the English Court of Appeal in *Bloom v Harms Offshore AHT Taurus GmbH & Co KG* [2010] Ch 187, where a creditor used a foreign attachment order in a manner which the court regarded as amounting to sharp practice. However, vexation and oppression are not a necessary part of the test for the exercise of the court's jurisdiction to grant an anti-suit injunction in a case where foreign proceedings are calculated to give the litigant prior access to assets subject to the statutory trust. In the Board's opinion there are powerful reasons of principle why this should be so. The whole concept of vexation or oppression as a ground for intervention, is directed to the protection of a litigant who is being vexed or oppressed by his opponent. Where a company is being wound up in the jurisdiction of its incorporation, other interests are engaged. The court acts not in interest of any particular creditor or member, but in that of the general body of creditors and members. Moreover, as the Board has recently observed in *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36, 23, there is a broader public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of its jurisdiction. In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends upon its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of assets depends on the

adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered.

25. The Board is not prepared to say that Shell acted vexatiously or oppressively by invoking the jurisdiction of the Dutch courts, but for the reasons that it has given, this does not prevent the issue of an anti-suit injunction.

26. It does not, however, follow that an injunction must issue. There are at least two matters to be considered before that step can be justified. The first is whether Shell, as a foreign entity, is amenable to the court's jurisdiction. The second is whether, even on the footing that an anti-suit injunction is available in principle, it is right to make one as a matter of discretion. To those questions the Board will now turn.

Jurisdiction

27. As Chitty J pointed out in *In re the North Carolina Estate Co Ltd* (1889) 5 TLR 327, it necessarily follows from the fact that the court acts *in personam* against the foreign litigant, that the latter must be must be amenable to its personal jurisdiction. He must be present within the jurisdiction or amenable to being served with the proceedings out of the jurisdiction, or else he must have submitted voluntarily.

28. Subject to a reservation to which the Board will return, Miss Newman QC accepted that her clients had submitted to the jurisdiction of the BVI courts for the purpose of being amenable to an anti-suit injunction, by participating unconditionally in the injunction proceedings. Mr Girolami QC said that they had submitted not just by doing that but also by proving for the debt alleged to arise under their redemption notice of 12 December 2008. In common with the Court of Appeal, the Board considers that Shell submitted in both ways. The Board will deal first with the consequences of the lodging of a proof of debt, about which the parties are fundamentally at odds, before turning to Miss Newman QC's reservation about the effect of participating in the injunction proceedings.

29. In *Ex p Robertson; In re Morton* (1875) LR 20 Eq 733, a Scottish merchant proved in the bankruptcy of his debtor for a debt of £367 and recovered a dividend without bringing into account £120 which he had obtained from the insolvent estate separately. He was held to be subject to the jurisdiction of the court in proceedings to recover the £120 for the benefit of the estate. Sir James Bacon CJ observed, at pp 737-738:

> "what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate…. can there be any doubt that the Appellant in this case has agreed, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit. . . . [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England."

30. This was a case where the creditor had actually received a dividend. However, in *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57, where no dividend had been received, the Full Court of the Federal Court of Australia held that in *In re Robertson* the submission consisted in the lodging of the proof and not the receipt of the dividend. Accordingly:

> "formal submission of a proof of debt to the insolvency administration will generally be adequate to support a conclusion that the court supervising the administration thereafter has jurisdiction to make orders in matters connected with the administration against the creditor who has proved."

The same view was taken by the Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236. Lord Collins (with whom on this point the rest of the court agreed) held at paras 165, 167, citing *Ex p Robertson*, that there was:

> "no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court .... having chosen to submit to New Cap's Australian insolvency proceeding, the syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding."

31. It has been suggested by Professor Briggs in a recent lecture in Singapore (*New Developments in Private International Law: A Busy 12 Months for the Supreme Court*, 21 November 2013) that this conclusion was "astonishing" because no proof had been admitted and no dividend had been paid. Miss Newman QC, adopting this criticism, submitted that Lord Collins was wrong on this point. The Board is satisfied that his statement was correct. The present case is not properly speaking a case of election, like those in which a party must elect between two mutually inconsistent remedies. In such cases he is usually not taken to elect until he has actually obtained one of the remedies. The question here is not what remedy is Shell entitled to have, but whether it has submitted to the jurisdiction of the court. A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets *pari passu* in satisfaction of his claim and those of other claimants.

32. Turning to Miss Newman QC's reservation, the argument was that Shell had not submitted to the jurisdiction of the BVI courts for all purposes. In particular, it was said to have submitted only for the purpose of claims under the Insolvency Act and Rules, and not for the purpose of claims governed by the general law, such as its claim in the Netherlands for misrepresentation and breach of warranty. This, it was said, was because the BVI courts have no subject-matter jurisdiction over the damages claim that is being asserted in the Netherlands. The Board has no hesitation in rejecting this contention. It has no bearing on the question whether Shell submitted by participating in the injunction proceedings, because that submission necessarily involved an acceptance on its part of the court's jurisdiction to grant the injunction sought in those proceedings. The point appears to the Board to be equally irrelevant to the question whether Shell submitted by lodging a proof of debt for the redemption price. Liquidation is a mode of collective enforcement of claims arising under the general law. There is, in the present context, no relevant difference between the claim for which

Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being proved in the liquidation. If they are proved, the BVI courts will have subject-matter jurisdiction to adjudicate on them. And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it.

Application to foreign litigants

33. Against that background, the Board turns to Miss Newman QC's main point, which was that even on the footing that Shell submitted to the jurisdiction of the BVI court, that was not enough to make it amenable to an anti-suit injunction. This, she contended, was because there was a distinct principle that an anti-suit injunction will not issue so as to prevent a foreign litigant from resorting to the courts of his own country (or at any rate some foreign court).

34. In the Board's opinion, there is no such principle. Where an English company is being wound up in England or a BVI company in the BVI, all of its assets are subject to the statutory trusts including those which are located within the jurisdiction of foreign courts. The rights and liabilities of claimants against the assets are the same regardless of their nationality or place of residence. A distinction between foreign and English claimants would respond to no principle known to the law. The true principle, which applies to all injunctions and not just anti-suit injunctions in the course of insolvency proceedings, is that the English and BVI courts will not as a matter of discretion grant injunctions affecting matters outside their territorial jurisdiction if they are likely to be disregarded or would be, as the colourful phrase went, "brutum fulmen". With one exception, to which the Board will return, the various judicial statements suggesting a wider rule are in reality concerned either with personal jurisdiction over the person sought to be restrained or else with the practical efficacy of the remedy.

35. In *Carron Iron* Lord Cranworth, having set out the principles on which the court acts, continued at p 441:

> "the first question is, whether there is any rule or principle of the Court of Chancery which, after a decree for administering a Testator's assets, would induce it to interfere with a foreign creditor resident abroad, suing for his debt in the courts of his own country? Certainly not. Over such a creditor the courts here can

> exercise no jurisdiction whatever. He is altogether beyond their reach, and must be left to deal as he may with his own forum, and to obtain such relief as the courts of his own country may afford."

The observation that over such a person the English court can exercise "no jurisdiction whatever" shows that Lord Cranworth was in fact addressing the question of personal jurisdiction. The issue which divided the House was whether the Carron Iron Company was domiciled in England as well as Scotland (as Lord St. Leonards thought) or only in Scotland (as the majority thought). The injunction was refused for want of personal jurisdiction, not because the Carron Iron Company was a Scottish company proceeding in the Courts of Scotland. That this was the issue is apparent from Lord Cranworth's observation at pp 442-443 that the position would have been different if the Carron Iron Company had "come under the decree so as to obtain payment partially from the English assets" or had "sought or obtained any relief in this country".

36. Cases in which the courts have been concerned with the practical efficacy of their injunctions include *In re Chapman* (1872) 15 Eq 75, 77. In that case, Sir James Bacon CJ refused an injunction to restrain proceedings brought by American creditors in New York on the ground that "neither this Court not the Court of Chancery ever grants injunctions that will be wholly ineffectual." In *In re International Pulp and Paper Company* (1876) 3 Ch D 594, Sir George Jessel MR granted an injunction restraining proceedings brought by an Irish creditor in Ireland. He distinguished between creditors resident in another jurisdiction of the United Kingdom and those resident in a "purely foreign country" such as Turkey or Russia. They were both equally outside the territorial jurisdiction of an English court. The difference was that there were statutory procedures for enforcing English judgments in Ireland as if they were judgments of the Irish courts. Without such procedures, the English court's orders were likely to be disregarded by locally resident litigants. At p 599, Sir George Jessell said:

> "…although it would be desirable in the interests of the person concerned in the litigation to make that creditor come in with the rest, yet the Court cannot restrain the action for want of power - not from want of will or want of provisions in the Act of Parliament, but simply that the Act of Parliament cannot give this Court jurisdiction over *Turkey* or over *Russia*. That is the only reason…. Therefore, as to a purely foreign country, it is of no use asking for an order, because the order cannot be enforced."

In *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328, Chitty J observed that it was:

> "quite true… that Parliament did not legislate for a foreign country. The point, however, was would the Court grant an injunction which was ineffectual, not as being against the foreign court but as being against a person who could not be reached?"

37. In some of the older cases, the foreign residence of a claimant combined with the foreign location of the relevant assets, was treated as a reason for expecting an order of the English courts to be disregarded. In an age when assets and persons were less mobile, the English courts were realistic enough to appreciate that the mere existence as a matter of English law of personal jurisdiction over a foreign resident offered no assurance that the injunction would in practice be observed. In modern conditions, with an increasingly unified global economy, the English courts have generally assumed that their injunctions will be obeyed by those who are subject to their personal jurisdiction, irrespective of their place of residence. The modern law takes the more robust position stated by the Court of Appeal in *In re Liddell's Settlement Trust* [1936] Ch 365, 374 (Romer LJ), that it is "not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed." In *Castanho v Brown & Root* [1981] AC 557, 574 Lord Scarman, with the agreement of the rest of the House of Lords, regarded this retort as a sufficient answer to the submission that an anti-suit injunction should be refused because it was liable to be disregarded by a Portuguese party suing in Texas.

38. The case which on the face of it does most to advance Miss Newman QC's submission is the decision of Maugham J in *In re Vocalion (Foreign) Ltd* [1932] 2 Ch 196. Maugham J declined to issue an injunction restraining proceedings by a resident of Victoria in Melbourne. His reason, expressed at pp 209-210 was:

> "I can find, however, no reason to doubt that a person domiciled abroad can sue in his own Courts a company which, in carrying on business there, has incurred a debt or liability to him, whether or not that company is being wound up in this country, to which he owes no allegiance and with the laws of which he is not acquainted; though, as pointed out in Dicey, p 377, if he desires to benefit under the English winding-up he must, generally speaking (see for an exception Moor v. Anglo-Italian Bank), 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 or a corporation incorporated under our law, nor am I dealing with the

> case where the person sought to be restrained from proceedings abroad has made himself a party to the proceedings in the liquidation, for instance by putting in a proof or in some other way."

Maugham J concluded (at p 210) that where a foreigner is proceeding in his own courts

> "in general it will be more conducive in such a case to substantial justice that the foreign proceedings should be allowed to proceed."

These observations were not a statement of law. As Millett LJ observed in *Mitchell v Carter* [1997] 1 BCLC 673, they went to the court's discretion. What is thought to be "conducive to the ends of justice" is liable to change over time. The Court of Appeal in the present case considered that Maugham J's remarks could no longer be regarded as consistent with the policy of the law relating to international insolvencies. The Board is of the same view. Maugham J's approach would be fair enough if the common law regarded insolvency proceedings as purely territorial. But it has not taken that view for many years, either in relation to its own winding up proceedings which have always been universal, or in relation to the corresponding proceedings of foreign courts dealing with the insolvency of their own companies. The object of the winding up court in dealing with an international insolvency is to ensure, so far as it properly can, that the world-wide assets of the company and the world-wide claimants to those assets are treated on a common basis: see *Re HIH Casualty and General Insurance* [2008] 1 WLR 852, 30 (Lord Hoffmann); *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36, 19.

39. The Board concludes that where a creditor or member who is amenable to the personal jurisdiction of the Court begins or continues foreign proceedings which will interfere with the statutory trusts over the assets of a company in insolvent liquidation, in principle an injunction will be available to restrain their prosecution irrespective of the nationality or residence of the creditor in question.

40. The Board would accept that as a general rule, there can be no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court, provided that it is an appropriate jurisdiction and that litigation there is not vexatious or oppressive to the liquidators or other interested parties. But it is in principle inimical to the proper winding up process for a creditor to seek or enforce an order from a foreign court which will result in his enjoying prior access to any part of the insolvent estate. In *Kemsley v Barclays Bank Plc & Ors* [2013] EWHC 1274 (Ch), 41 Roth J observed that where the foreign litigant

undertakes to bring any assets realised in the foreign proceedings into the bankruptcy so that no advantage would be obtained over other creditors, the basis on which an anti-suit injunction might otherwise be justified will not apply. The Board wishes to record its endorsement of that approach.

Discretion

41. As with any injunction, this is subject to the court's discretion to refuse relief if in the particular circumstances it would not serve the ends of justice. It is neither possible nor desirable to identify what circumstances might have that effect. But it has often, and rightly, been said that the jurisdiction to grant anti-suit injunctions is to be exercised with caution. There may in particular be factors at work other than the desire to obtain an advantage over comparably placed creditors or members which make it just to allow the foreign proceedings to continue, either without restriction or on terms which will sufficiently protect other interests. In the present case, the Judge having concluded that the issue of an injunction would be contrary to principle, the Court of Appeal were entitled to overrule him and to exercise their own discretion. They exercised it in the liquidators' favour, and the Board will not interfere unless it is shown that they were guilty of some error of principle or misconception of fact, or that they were plainly wrong.

42. The only substantial criticism made of the way that they exercised their discretion was that as a matter of comity they ought to have left to the Dutch courts the decision whether the Dutch proceedings should be allowed to proceed. The District Court of Amsterdam having rejected Fairfield Sentry's application to lift the attachments, it was said that the courts of the British Virgin Islands Court should have respected that decision. In the Board's opinion this submission misunderstands the role that comity plays in a decision of this kind. Where the issue is whether the BVI or the foreign court is the more appropriate or convenient forum, it can in principle be decided by either court. Comity will normally require that the foreign judge should decide whether an action in his own court should proceed: *Barclays Bank v Homan* [1993] BCLC 680, *Mitchell v Carter* [1997] BCLC 673 (Millett LJ). In the present case, however, there is no room for deference to the Dutch court's decision. In the first place, the question does not turn on the relative convenience or appropriateness of litigation in the courts of the Netherlands and the BVI. Both courts can adjudicate on the substantive dispute, the Dutch courts in Shell's current proceedings, and the BVI court in ruling on a proof if Shell lodges one. But the BVI is the only forum in which priorities between claimants generally can be determined. The question before the Court of Appeal was whether Shell should be allowed to invoke the jurisdiction of the Dutch courts to obtain an unjustified priority in violation of a mandatory statutory scheme in the British Virgin Islands. Second, the relevant principles of Dutch law would prevent the Dutch courts from deciding in which

court the issues would be better determined. It is apparent from the evidence of Dutch law and the judgment of the Amsterdam District Court rejecting Fairfield Sentry's application, that the decision does not involve identifying the most appropriate forum. Save in the case of unarguable claims or those in which an attachment would expose the garnishee to a real risk of having to pay twice, the issue of an attachment is a matter of right in the Netherlands. The Dutch courts have no regard to foreign insolvencies so far as they conflict with Dutch domestic law or limit the recovery of local creditors. Third, although when a company is being wound up under the law of the jurisdiction of its incorporation the distribution of its assets among creditors and members is in general a matter for that law, there may well be circumstances in which as a matter of discretion an English or BVI court might refuse an injunction on the ground that the foreign court had a special interest in asserting dominion over an asset forming part of the insolvent estate within its own territory. However, that question could not arise in the present case, because the relevant asset was not located in the Netherlands but in Ireland. The jurisdiction of the Dutch court under its own law to authorise the attachment of an Irish debt owed to a BVI company in liquidation in the BVI may fairly be described, as the Court of Appeal did, as exorbitant. There are cases, as Hoffmann J observed in *Barclays Bank v Homan* [1993] BCLC 680, 688, in which "the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law". In the Board's opinion, this is such a case.

43. There appears to the Board to be nothing to suggest that allowing Shell an advantage over other comparable claimants would be consistent with the ends of justice. Nor, in the circumstances, should Shell find this surprising. It invested in a company incorporated in the British Virgin Islands and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction.

The scope of the order

44. It is necessary, finally, to refer to an issue about the scope of the relief sought which arose in the course of the hearing of the appeal. The reasoning of the Court of Appeal was based on the inconsistency between the Dutch attachments and the statutory trust of Fairfield Sentry's assets. But its order, following the form proposed in the notice of appeal, restrained Shell from pursuing the Dutch proceedings generally without any specific reference to the attachments. As the Board has pointed out, merely by invoking the adjudicatory jurisdiction of a foreign court, a creditor does not necessarily act inconsistently with the statutory trusts. The vice of the Dutch proceedings lay in the attachments. In the generality of such cases, absent vexation or oppression, an order restraining the entire proceedings would be too wide. Miss Newman QC, however, objected to the

order being modified so as to limit it to the attachments because no application to limit it in that way had been made in the Court of Appeal and an attempt to modify it after judgment failed. The result is that both parties were contending for an all or nothing solution.

45. In the particular circumstances of this case, the Board is persuaded that it should leave the order of the Court of Appeal as it stands. The effect of that order is that there can be no judgment on the merits in the Netherlands to which the attachment could relate. The order as framed therefore achieves the desired result of preventing the attachments from leading to execution against the Dublin account. In theory, it achieves more than that by also preventing the exercise of the Dutch court's adjudicatory jurisdiction. But this is rather unreal. The sole substantial purpose of the Dutch proceedings was to obtain the attachments and the resulting priority. The attachments are also the sole basis in Dutch law for the Dutch court's exercise of any adjudicatory jurisdiction. Therefore an injunction requiring Shell to procure the lifting of the attachments would in reality have brought an end to the Dutch proceedings as a whole by removing their jurisdictional basis, just as the order of the Court of Appeal does. This will not deprive Shell of any advantage to which it is legitimately entitled. It may prove in the liquidation for its damages for misrepresentation and breach of warranty. While the position as regards limitation has not been explored in detail on this appeal, Miss Newman QC was not able to assert that a proof of debt for the claims brought in the Netherlands would be time-barred in the British Virgin Islands, and nothing in the material before the Board suggests that it would be. Since the operative date for limitation purposes in the liquidation will be the date of the winding up order and the Dutch substantive proceedings were begun after that date, if the claim which Shell have brought in the Dutch courts is not time-barred there, there is no reason to think that a proof of debt would be time-barred either.

46. The practical inconvenience of the present state of affairs is that the Dutch proceedings and the attachments may remain for some time in existence without going anywhere, and that in the meantime the liquidators will be unable to access the balance on the Dublin account. As between responsible parties such as these, the Board would expect this problem to be resolved by agreement. If that does not happen, and the result is that the money in Dublin remains in balk when the liquidators need it to fund distributions, it may well be appropriate for the liquidators to make a further application in the High Court for an order requiring the attachments to be released.

Conclusion

47. The Board will humbly advise Her Majesty that the appeal should be dismissed.