BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 136 OF 2009

AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

AND IN THE MATTER OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF AN APPLICATION FOR AND ANTI-SUIT INJUNCTION

BETWEEN:

KENNETH M. KRYS AND JOANNA LAU
(as Joint Liquidators of Fairfield Sentry Limited)

Applicants

STICHTING SHELL PENSIOENFONDS

Respondent

Appearances: Mr Paul Girolami QC, Mr Andrew Westwood and Mr Robert Nader for the Applicants
Ms Catherine Newman QC, Ms Arabella di Iorio and Mr Ben Mays for the Respondents

JUDGMENT

[2011: 20 July, 9 August]

(Members/creditors of Fairfield Sentry Limited obtaining pre-judgment attachment orders against the company in Netherlands – whether to be enjoined from further proceeding in the Dutch suits within which the attachment orders were obtained – whether member/creditors to be ordered to procure discharge in Holland of the attachments — comity - whether need to effect service upon one or both member/creditors – whether Court has power to give permission to serve out of the jurisdiction upon wither member/creditor – whether Court obliged by decision of Court of Appeal to grant order in favour of Applicants)

[1] **Bannister J [ag]:** On 8 March 2011 I heard an application by the Liquidators of Fairfield Sentry Limited ('the Liquidators', 'Fairfield') to restrain the Respondent Stichting Shell Pensioenfonds

('Shell') from continuing proceedings in Holland brought against Fairfield in the course of which it had obtained a form of attachment over funds standing to the credit of Fairfield at the Dublin branch of a Dutch Bank, Citco Bank Nederland NV ('the Bank'). I dismissed the application.

[2] The Liquidators appealed that decision, with my permission. In a short *extempore* judgment given by Rawlins CJ the Court of Appeal held (a) that I had correctly appreciated the applicable legal principles (b) that my assessment of the circumstances was more narrow than it should have been (c) that I should have given more weight to the fact of the exorbitant jurisdiction of the Dutch Court and (d) that that would have led to a conclusion that the balance of justice lies in favour of granting the order. The Court of Appeal did not grant a permanent anti suit injunction. Instead, it granted a temporary anti suit injunction until the hearing of the matter *inter partes*.

[3] Following directions given by Charles J some further evidence has been filed and the matter came on before me for a contested hearing on 20 July 2011.

[4] I have been troubled by the observations of the learned Chief Justice which I have summarized in paragraph [2] above in case they were intended to fetter my discretion at the *inter partes* stage. In the end, I have come to the conclusion that they were not. Neither side at the contested hearing suggested that they were and I believe that the Chief Justice was doing no more than saying that I should have granted an interim injunction at the *ex parte* stage, leaving it to Shell to apply to set aside should it choose to do so.

Background

[5] The background facts are taken from my earlier judgment.

[6] Shell carries on business at an address at SJ Rijswijk in the Netherlands. On 22 December 2008 (and thus before both the commencement of the winding up and the date upon which the originating application seeking the appointment of liquidators was filed[1]) Shell obtained a pre judgment garnishment order from the District Court in Amsterdam ('the District Court') garnishing

[1] 23 April 2009

the funds standing to an account of Fairfield at a Dublin branch of Citco Bank Nederland NV ('Citco', 'the Dublin account') up to a limited of US$80m. This figure was achieved by adding to Shell's claim in the liquidation (some US$63m) by adding unparticularised interest and costs. The garnishment caught some US$67m standing to Fairfield's credit with Citco. On 16 March 2009 Shell obtained a further pre-judgment garnishment order, based upon a submission that additional funds may have been received by Citco for Fairfield's account since 22 December 2008. On 26 March 2009 Fairfield's management applied to have the garnishment order set aside. That application was refused. The position when the originating application for the appointment of liquidators to Fairfield was filed was, accordingly, that Shell was in possession of two pre judgment garnishment orders effective to garnish Fairfield's funds at Citco's Dublin branch.

[7] On 23 April 2009 the application for the appointment of liquidators to Fairfield was filed. The appointment was made on 21 July 2009.

[8] On 5 November 2009 Shell submitted a claim in the liquidation of Fairfield in the sum of US$63m. At the *inter partes* hearing Shell put in evidence of Dutch law from Mr Dennis Horeman and a factual affidavit from Shell's senior legal counsel evidencing its investments in Fairfield and the making of its redemption request on 21 December 2008. Mr Horeman has gone into some detail as to the nature of Shell's claims in Holland. Its claim on the merits brought in Holland on 19 March 2010 against Fairfield (to which one of the Liquidators has been joined as a party) is for 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 was induced, as it says, to become an investor in the first place.

[9] At the *inter partes* hearing Ms Newman QC referred to Shell's claim as a claim as a creditor (i.e. as a claim for unliquidated damages in tort and/or for breach of warranty). I have to say that I find this contention difficult to accept. In section 6 of the Form R184 Shell was asked to provide particulars of how and when the debt was incurred. The answer given was: 'Redemption notice served on December 12, 2009.' I take this to have been an assertion that Shell was a creditor because its redemption notice had gone unpaid[2], not because it had claims in misrepresentation or for breach

[2] we now know that for the purposes of the liquidation Shell has no claim as a creditor

of warranty. Shell has since made what was described by the Liquidators as an 'Investor Claim Form' on 5 November 2009, setting out the amount of its investment (US$45m) and claiming some US$63m. It seems to me, therefore, that whereas it is undoubtedly the case that Shell makes what we would call an unliquidated damages claim for misrepresentation/breach of warranty in Holland, there is no evidence that it has yet made such a claim in Fairfield's winding up.

[10] On 12 July 2010 the Liquidators commenced proceedings in the Irish High Court ('the Irish proceedings') against Citco, Shell and another company which has since dropped out of the picture claiming recognition of the BVI liquidation, a declaration that Fairfield and the Liquidators are entitled to the sum of US$71m standing to the credit of the Citco account, and a declaration that the District Court's pre judgment garnishment orders should not be recognized by the Irish Courts.

[11] Shell has challenged the jurisdiction of the Irish High Court. An application for that purpose was heard by that Court between 8 and 10 February 2011. At the time of the hearing of this application a decision was awaited. At the time of writing it appears that that judgment is still awaited.

The nature and effect of the District Court pre judgment garnishment orders

[12] I was referred at the *ex parte* hearing to a very helpful and comprehensive affidavit made by a Dutch lawyer, Hans, Antoon Stein ('Mr Stein') for use in the Irish proceedings upon the topic of pre judgment attachment and garnishment orders made by the Courts of the Netherlands. Mr Stein appears highly qualified to give evidence upon this topic, although in what follows I bear in mind that I have not been supplied with any expert evidence in reply.

[13] I hope I do justice to Mr Stein's evidence if I summarise it by saying that the Dutch Courts will grant attachments of this type where the applicant makes out a *prima facie* case that he has a money claim against a party and where the debtor, or the property to be attached or the person owing money to the debtor is situated in the Netherlands. It is the latter of these conditions which entitled the District Court to make the orders in this case, notwithstanding that the debt owed by Citco to Fairfield is itself situated in the Republic of Ireland. Pre judgment orders are made summarily without any detailed consideration of the underlying merits. It is a peculiarity of Dutch law that the

mere making of such an order grounds jurisdiction in the Dutch Courts to entertain a claim against the debtor, wherever resident or domiciled[3]. With the orders in place, therefore, and as things now stand the Liquidators are obliged to defend substantive proceedings for debt in the District Court on pain of having judgment entered against them in default.

[14] Until those proceedings (if they run their course) are determined, and as I understand Mr Stein, the pre judgment orders confer no immediate security interest in the Dublin account. They merely prevent Citco from paying away the funds. If, however, the substantive Dutch proceedings result in judgments for Shell and Atlanta against Fairfield, then Shell and Atlanta (together with any other parties which may obtain similar orders in respect of the Dublin account and which go on to obtain judgment against Fairfield) will be entitled in priority to all other creditors of Fairfield to share in the proceeds of the Dublin account. That result, however, is subject to the condition that the Courts of the Republic of Ireland must recognize the validity of the Dutch pre judgment orders, in order that Citco does not become obliged to pay over the funds in the Dublin account twice. It is this point that is at the heart of the Irish proceedings.

The *inter partes* hearing

[15] Counsel on both sides argued their cases with great skill. By the end of the hearing it was clear that a critical (although not the only) issue was whether, by claiming in the liquidation, Shell put itself under an immediate obligation to surrender the fruits of any executions over assets of Fairfield it might have levied elsewhere (not this case) and to abandon any attempts to achieve security for its claims over assets of Fairfield in another jurisdiction (this case). I was taken in detail to the authorities upon this point and I now turn to examine them.

[16] It was agreed that the principles upon which the Court will grant anti suit injunctions against foreigners in cases of this sort are to be gathered from **Bloom & Ors v Harms Offshore AHT 'Taurus' GmbH and Co KG**.[4] 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. The cases

[3] a direct inversion of the position under English and BVI law
[4] [2009] EWCA Civ 632

also establish, however, that even though the person sought to be restrained is subject to the jurisdiction of the Court, the Court will ordinarily refrain, partly out of considerations of comity towards the foreign court which is seized of the proceedings and partly out of a concern not to deprive a foreign creditor of remedies available to him where he resides, from restraining the creditor from commencing or continuing his foreign proceedings. This general rule was departed from in **Bloom v Harms**[5] because it appeared on the facts to the Court of Appeal, upholding the Judge below, that the creditors (which were German registered companies) had set a trap for the (in that case) administrators after the commencement of the administration by arranging for funds in certain bank accounts to be attached, knowing that the administrators would be using those accounts in funding payments to be made during the course of the administration.

[17] In the course of the hearing I was taken with great care to the authorities leading up to the decision in **Bloom v Harms**.[6]

[18] In **Ex parte Flower**[7] there was no foreign element. A creditor of the bankrupt had proved in his estate. No dividend was declared, so he sued the bankrupt for the same debt in the County Court. The bankrupt applied to the County Court to stay the action on the grounds that by proving in the bankruptcy the creditor had made an election but the County Court Judge was not attracted by that submission. The bankrupt thereupon petitioned the Court in Bankruptcy for an injunction staying the County Court proceedings. The creditor argued that a proof was not a conclusive election and that where no dividend had been paid a creditor might proceed at law. In reply the bankrupt relied on section 59 of a statute of George IV and a case called **Ex parte Chambers**[8]. The Chief Judge held that the proof amounted to an election and stayed the County Court proceedings. I do not find this case of any assistance since it seems clear that decision turned on section 59 of the statute referred to, which appears to have been accepted by both Counsel as having altered the previous law[9]. The provision in question was not produced to me, so that it is not possible for me to elicit any general principle from the report.

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[5] (supra)
[6] (supra)
[7] (1847) De G 503
[8] M&M'A
[9] see footnote (a) to the report

[19] In **Ex parte Tait, In re Tait & Co**[10], the estate of a firm of which Sir Peter Tait was a member as well as Sir Peter's own separate estate were being administered under an English deed of inspectorship. A creditor claimed under the deed for money due to him by the firm, but the claim was rejected by the inspectors. The creditor, who was resident in Ireland, then sued Sir Peter in Ireland for the debt he claimed as due from the firm and for the balance of money said to be due to him from Sir Peter separately. Sir Peter applied to the English bankruptcy Court for an injunction restraining the creditor from proceeding against him in Ireland, relying upon **Ex parte Flower**[11].

[20] The Chief Judge, Sir James Bacon, held that he had jurisdiction under section 72 of the statute of 1861, whose effect he described as being that every question which could arise under or in connection with the deed of inspection was brought within and subjected to the jurisdiction of the bankruptcy Court (sc in London). Section 72 provided as follows:[12]

> 'Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in such a case.'

The judge went on to say that despite the fact that the creditor was in Ireland, he (the judge) had a right to restrain the creditor

> 'personally, because he claimed under this deed and sues in respect of a claim under this deed; and whatever may be the nature of the claim said to exist, it is clear that he claims to be a creditor under the deed. The question between the parties is one that must be decided here.'

The judge summarised the effect of his decision as follows:

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[10] (1872) 13 LR Eq 311

[11] (supra)

[12] the text is set out in a foot note at the end of the report of **Ex Parte Robertson** (1875) LR 20 Eq 733

> 'the effect of this order will be merely to transfer the question in dispute from the Court in Ireland in which it is pending to this Court.'

[21] The reader may ask how the Chief Judge managed to persuade himself that section 72 gave him jurisdiction over persons not present in England and Wales. In this respect it is instructive to look at part of the submission on this point made by Mr de Gex to the same judge in **Ex parte Robertson**[13]**:**

> 'Section 72 of the Act gives the Court of Bankruptcy no higher jurisdiction than that of the Court of Chancery or the Courts of Common Law. **Ex parte Tait** does not apply. Proof of debt does not amount to a complete submission to the jurisdiction of the Court. **Ex parte Hilton** only shows that the dividend on the debt proved for may be retained, or the dividend recalled. It is no authority for saying that the Court has jurisdiction to order a creditor who has proved to repay some other fund which he has received from the debtor.[14]'

[22] In **In re Oriental Inland Steam Company**[15] an English creditor of the Oriental Steam Company ('the company') obtained a money judgment against the company in India on 23 May 1867. The company, which was incorporated in England, was wound up there on 8 November 1867 and on 12 March 1868 the creditor claimed in the liquidation. On 28 January 1869 the creditor attached property in India belonging to the company. On 4 March 1869 the winding up Court in England ordered the creditor to release its Indian attachment. The creditor released its attachment and was paid the outstanding amount of its Indian judgment debt out of the proceeds of sale of the property, upon its undertaking to repay the money if so ordered, A subsequent application to Malins V-C that the creditor should repay the money was successful.

[23] The creditor appealed, offering to give up its proof in the English liquidation. It was pointed out on the creditor's behalf that if it had not attached the property, there were plenty of other creditors

[13] (supra)
[14] the judge's sarcastic rejoinder is to be found at page 741 of the report
[15] (1873-4) LR 9 Ch App 557

outside the jurisdiction of the Court who would have done so instead and that it was hard on the creditor to be forced to stand back, as it were, and watch others steal a march merely because it was within the jurisdiction of the English Court. These observations cut no ice. Counsel for the company was not called upon. Sir William James LJ treated the position as identical to a case where one particular beneficiary manages to get his hands on part of the trust property after he has had notice of the trust. The beneficiary must, it was held, bring the property in for distribution amongst all the beneficiaries. Sir George Mellish LJ, having observed that the provisions of the English statute restraining actions and uncompleted executions after the commencement of a winding up had no extra-territorial effect, took the same approach as Sir William James LJ, treating the property of a company in liquidation as subject to a trust for its creditors.

[24] This line of reasoning has been consistently applied in the subsequent cases and forms the foundation of the decision in **Bloom v Harms**.[16]

[25] It will be noticed that the reasoning of the Lords Justices did not turn upon the fact that the creditor had proved. It turned upon their view that the creditor was subject to an equitable obligation to account for the proceeds of the attachment. Since the creditor was within the jurisdiction of the English Court, that Court had *in personam* jurisdiction to force it to satisfy the equity.

[26] In **Ex parte Robertson**[17] Sir James Bacon dealt with a case where the creditors of some English merchants had resolved upon a liquidation by arrangement and had appointed trustees of the debtors' property. English merchants were indebted to a Scottish supplier. On 17 February 1874 they had sent the supplier a cheque for GBP 120 in part payment of the sums then outstanding. On 18 February 1874 they filed their own winding up petition. On the following day the Scottish supplier presented the cheque for GBP120, which was honoured on the same day. The Scottish supplier proved for the balance of his debt in the liquidation and received a dividend of 4s 6d in the pound. Subsequently the liquidation trustees served the supplier in Scotland with a notice of motion to be heard at the Newcastle upon Tyne County Court for the recovery of the GBP120.

[16] (supra) see also **Mitchell v Carter** [1997] 1BCLC 673 (CA)
[17] (1875) LR 20 Eq 733

[27] Once again Sir James Bacon held that section 72 of the Bankruptcy Act 1869 gave him jurisdiction over persons in all parts of the United Kingdom. He went on to restate the approach which he had adopted in **Ex Parte Tait**[18] in the following terms:

> ' . . .can there be any doubt that [the creditor] has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit, and is entitled as is any other creditor, though not more than any other creditor, to insist in the due distribution of the whole of the debtor's estate?'

The learned judge described this as a 'compact.'

[28] In **In re International Pulp and Paper Company**[19] the company was an English registered company which carried on part of its business in Ireland (which was then part of the United Kingdom). In May 1875 Gorman, an Irish creditor of the company, started proceedings against the company in Ireland for specific performance of an agreement for a lease. By November 1875 Gorman had obtained a registered judgment against the company and a charge over its property. He had also obtained an order for sale of that property from the Irish Landed Estates Court. It appears that the judgment had nothing to do with the specific performance action. In December 1875 the company was compulsorily wound up in England and the official receiver applied to restrain Gorman, who was not within the jurisdiction of the English Court, from proceeding with the sale or with the specific performance proceedings.

[29] In submissions for the official liquidator Mr Davey QC cited a *dictum* of Lord Cranworth in **Carron Iron Company v Maclaren**[20], where he said:

[18] (supra)
[19] (1876) 3 ChD 594
[20] 5 HLC 436

> 'The Court acts *in personam*, and will not suffer any one within its reach to do what is contrary to equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction.'

[30] In deciding the case, Sir George Jessel MR analysed the relevant provisions of the UK Companies Act 1862 and went on:

> 'I agree, if any creditor in Turkey, Russia or any other purely foreign country, were to bring an action, although it would be desirable in the interests of the person concerned in the litigation to make the person come in with the rest, yet the Court cannot restrain the action from 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. But it has been decided in several cases that these words are general. It has been decided in these cases that the Court not only can, but ought to grant an injunction to restrain a creditor within the jurisdiction from proceeding with an action out of the jurisdiction.'

The Master of the Rolls then went on to hold that he had what amounted in the circumstances to *in personam* jurisdiction over Gorman under section 122 of the Companies 1862 and made the order sought.

[31] This decision proceeds upon the footing that in order to be able to restrain proceedings instituted abroad against an English bankrupt the English Court needs to be in a position to enforce its order. The Master of the Rolls decided that he could do that in the case of a creditor resident in Ireland, which was then a part of the United Kingdom and apparently not treated by him as a 'purely foreign country'.

[32] In **Re North Carolina Estate Co**[21], a British subject permanently resident in England was a creditor of the company in liquidation and had proved in the winding up for GBP9,000. He took proceedings in the United States seeking to attach property of the company in North Carolina. After referring to **In re Oriental Steam Company**[22] for the proposition that the assets of the company were held on trust for equal distribution to creditors, Chitty J held that this precluded all creditors from proceeding in their own interests outside the statutory scheme of the liquidation. But he went on to say:

> 'Supposing, for instance, the case was one of a French creditor suing in a French Court, or an American creditor in an American Court, the Court of course could not grant an injunction, the reason being that the order would be ineffectual.'

[33] In **In re Belfast Shipowners Company**[23] the petitioning creditors were British subjects carrying on business in London and, until recently, in Ireland. They sought to attach certain freights situate within the jurisdiction of the Superior Court of Massachusetts. The Vice-Chancellor of Ireland held that by presenting the winding up petition the petitioning creditors had submitted to the jurisdiction of the Court for all purposes and went on to say that the question for his decision was whether the Court had power to restrain them from proceeding further in Massachusetts. The judge said that while the Court had no power to restrain or interfere with any foreign Court, it might act *in personam* against persons interfering with a proceeding for winding up in which they were parties or claimants. He said that there were two answers to the objection that the petitioning creditors were no longer within the territorial jurisdiction of the Irish Court: first, that section 122 of the Companies Act 1862 provided for enforcement in England[24]; and secondly, that by petitioning the creditors had submitted to the jurisdiction of the Irish Court for all purposes. He therefore made the order sought. The decision was upheld on appeal.

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[21] (1899) 5 TLR 328
[22] (supra)
[23] [1894] 1 IR 321
[24] this was the converse of the position adopted by Sir George Jessel MR in **In re International Pulp and Paper Company** (supra)

[34] In **In re Vocalion Limited**[25] the respondent bank was incorporated, and thus domiciled in Australia but it had a branch in London and was registered as a foreign company under section 334 of the Companies Act 1929. It was therefore subject to the jurisdiction of the English Court, since registration under section 334 was treated as a submission to the jurisdiction[26]. The Official Receiver sought to restrain the bank from continuing proceedings against the company in liquidation in Melbourne. The respondent bank had not proved in the English liquidation.

[35] Maugham J was addressed by very experienced Counsel for the Official Receiver in support of the injunction. Of the cases which have been cited to me, the judge was referred to **Carron Iron Company v Mclaren**[27], **In re Oriental Steam Company**[28], **In re International Pulp and Paper Company**[29], **In re North Carolina Estate Co**[30], and **In re Belfast Shipowners Company**[31] He was referred to some other cases which have not been cited to me, but was not referred to any of the other pre**-Vocalion** cases which were cited to me. He was not referred to **Ex Parte Flower**[32] or to either of the two bankruptcy cases decided by Bacon CJ.[33]

[36] Having held that none of the sections of the Companies Act 1929 staying proceedings, executions, etc, had any effect outside the United Kingdom, Maugham J went on to refer to the decision of Chitty J in **In re North Carolina Estate Co**[34] and held that the basis for it was not that English Company legislation had extra territorial effect but rather the equity identified in **In re Oriental Steam Co**[35]. Having observed that the Court had jurisdiction over the respondent bank, Maugham J said that the difficult question was whether or not to exercise it.

[37] Maugham J observed, consistently with the authorities to which he had been referred, that the Court is very reluctant to exercise a jurisdiction *in personam* against a foreigner in relation to a

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[25] [1932] 2 Ch 196
[26] **Vocalion** at page 204
[27] (supra)
[28] (supra)
[29] (supra)
[30] (supra)
[31] (supra)
[32] (supra)
[33] **Ex Parte Tait** (supra); **Ex parte Robertson** (supra)
[34] (supra)
[35] (supra)

matter where there cannot be an effective (i.e. enforceable) order. He went on to point out that the only result of preventing one foreigner from taking proceedings abroad may be to enrich others who are out of the reach of the restraining Court[36]. Noting that civil law jurisdictions often had pre-judgment procedures in place similar to that available to Shell today in the Dutch Courts, he pointed out the potential injustice of depriving foreign creditors of the right to proceed against debtors resident and carrying on business in the same country simply because of the fact that a foreign Court is presiding over the debtor's insolvency abroad.

[38] After referring to **Moor v Anglo-Italian Bank**[37] Maugham J remarked that a creditor who had obtained security on personal property in a foreign country ought not in equity to be deprived of his rights because of a supervening 'statutable' trust for the creditors of a debtor. Although the evidence in the present case does not support the notion that Shell has security in the sense of having a proprietary interest in movable property, there can be no doubt that it has some form of protection and that that protection was substantially achieved over six months before Fairfield went into liquidation[38].

[39] Having made some observations about the impact of dual liquidations, which is not something which arises in the present case, Maugham J turned to the authorities on exercise of the jurisdiction. Referring to **Carron Iron Co v Maclaren**[39], he cited Lord Cranworth as saying that while the facts may justify the grant of an anti-suit injunction in any given case:

> 'they will not, as I apprehend, make it the duty of the Court so to act if from any cause it appears more likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course.'

Maugham J went on to say that he could see no reason to doubt that a person domiciled abroad could sue in his own Courts a company which, in carrying on business there, had incurred a debt to him, whether or not the debtor was being wound up in some other jurisdiction, although he pointed

[36] precisely the same argument which had fallen upon such stony ground in **In re Oriental Steam Company** (supra)
[37] (1879) 10 ChD 681
[38] and four months before the originating application was issued
[39] (supra)

out that if he wished to benefit under the foreign liquidations, he would have to surrender any benefit he had obtained in his home jurisdiction. He then made clear that he did not intend his observations to cover the case of a British subject or an English incorporated company, nor with the case where the person sought to be restrained from proceedings abroad has made himself party to the liquidation by putting in a proof or in some other way. He observed that merely because the respondent bank had submitted to the jurisdiction of the English Court was not determinative of the question whether he should or should not grant an anti-suit injunction and expressed the expectation (which is certainly not one that I can entertain in this case) that the Court in Melbourne would defer to the legal effects of the liquidation in London and of the trust for creditors which the authorities showed to have arisen.

[40] Maugham J refused to grant the anti suit injunction because he considered that in the circumstances it would be more conducive to substantial justice that the Australian proceedings should be permitted to continue.

Discussion

[41] An examination of these authorities shows that as a general rule no anti suit injunction will be granted in favour of a home liquidation against a 'pure foreigner'[40]. So far as the English and Irish cases are concerned, 'pure foreigners' do not include persons resident in other parts of the United Kingdom against whom orders may be enforced under the relevant Companies or Insolvency legislation[41]. With the exception of **Bloom v Harms**[42] **t**here is no 'pure foreigner' case[43] where the English Courts have granted anti suit injunctions restraining proceedings in the foreigner's home jurisdiction. Indeed, in **Mitchell v Carter**[44] Millett LJ referred to that as being the position in October 1996. Of the cases cited to me, **Ex parte Flower**[45] had no foreign element. Neither **Ex**

[40] **In re International Pulp and Paper Company** (supra) at page 599; **In re Vocalion** (supra) at pages 209, 210
[41] **In re International Pulp and Paper Company** (supra) at pages 599, 600; **In re Belfast Shipowners Company** (supra) at page 328.
[42] (supra)
[43] or at any rate none has been cited to me
[44] (supra)
[45] (supra)

parte Tait[46] nor **Ex parte Robertson**[47] was a 'pure foreigner' case and each proceeded at least in part upon an insupportable construction of section 72 of the 1861 Bankruptcy Act. Those decisions figure in none of the regular company or insolvency textbooks and seem to lurk in passages in Dicey which could probably benefit from a spring clean.

[42] Leaving aside for the moment the fact that Shell has claimed in the liquidation here, I can see no compelling reason, on the facts of this case, why Shell should be restrained from pursuing its litigation in its home jurisdiction. Shell commenced its proceedings well before Fairfield went into liquidation. That fact was known to Fairfield at the time because it made attempts to have the proceedings dismissed. It is true that a further order was obtained after the winding up had commenced but I cannot see that that is significant given the fact that it was in effect merely by way of amendment to that which had already been obtained. No one could suggest, nor has it been suggested, that Shell has been guilty of any sharp practice.

[43] An additional factor which I consider is to be taken into account is that (I think it may safely be inferred) the Netherlands, as a civil law jurisdiction, will not recognize the law of trusts. Since the whole foundation of this jurisdiction is based upon an equitable trust for creditors[48], it seems to me to be singularly inappropriate for a BVI Court to restrain Shell from seeking its remedies at home on the basis of a juridical concept which is not even recognised there.

[44] With the greatest of respect to those who might have been inclined to take another view, having had all the relevant authorities cited to me, I am unable to persuade myself that the fact that the Dutch Court does not recognise non European Union insolvencies takes the matter much further. What is at issue is this Court's right to interfere with the exercise by a foreigner in his home country of rights afforded to him by his local law. The fact that Fairfield chose to conduct business in a jurisdiction which would not recognise its own insolvency is not the 'fault' of Shell and should not affect the question whether it should be restrained for exercising its rights in its national Courts. That question is to be answered by considering the principles upon which this Court exercises its

[46] (supra)
[47] (supra)
[48] see **In re Oriental Steam Company** (supra), **Mitchell v Carter** (supra) and **Bloom v Harms** (supra)

anti suit jurisdiction against pure foreigners (as set out in **Bloom v Harms**[49]), which are not affected (at least, no authority has been shown to me to indicate that they are affected) by the foreign Court's attitude to insolvencies being administered in other jurisdictions.

[45] Does it make any difference that Shell has claimed in the liquidation? That point was left open by Maugham J in **In re Vocalion**[50]. The only cases where that has been held to have been a factor are **In re Tait**[51], which was not a 'pure foreigner' case and which is unsatisfactory for the other reasons which I have mentioned; **In re North Carolina Estate Co**[52], where the creditor was an English resident, anyway; and **In re Belfast Shipowners Company**[53], which was another intra-United Kingdom case and where the persons restrained had not merely proved in the liquidation but were themselves the petitioning creditors (i.e. they had invoked the protection of the Irish Court and had set its processes in motion), something which in my judgment puts that case on an entirely different category from the present one.

[46] As I held in my earlier judgment, 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, as **In re Vocalion Limited**[54] shows, the mere fact that a pure foreigner, to stay with the terminology of Sir George Jessel, has submitted to the jurisdiction or is amenable to service is not determinative of the question whether it should be restrained from pursuing proceedings in its home jurisdiction.

[47] When the authorities setting out circumstances in which and the grounds upon which the BVI Court will stop a foreigner from proceeding in his own country are considered, it can be seen that the fact that Shell may have claimed in the liquidation here is *de minimis*. In claiming, Shell was not invoking the protection of the BVI Court, it was responding, I have no doubt, to the Liquidators' advertisements for claims. All parties knew that it had been proceeding in the Dutch Courts for months before the liquidation and I regard it as fanciful to suppose that upon receiving the Form

[49] [2009] EWCA Civ 632
[50] (supra)
[51] (supra)
[52] (supra)
[53] (supra)
[54] (supra)

R184 the Liquidators had any grounds for taking the view that that was the end of the Dutch proceedings on the basis some sort of election by Shell. The best evidence of that is their failure to react in any way to that fact until this application was made some four months later.

[48] 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 if I could 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]). It is the result of the way in which Fairfield constructed and conducted its business and of the fact that when the lights went out the assets were in the 'wrong' place[56]. That, as I have said, is the fault of Fairfield's management, not of Shell.

Conclusion

[49] This application is accordingly dismissed.

Commercial Court Judge

9 August 2010

[55] **In re Oriental Steam Company** (supra); **Mitchell v Carter** (supra); **Bloom v Harms** (supra)

[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