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

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

(1) STICHTING SHELL PENSIOENFONDS
(2) ATLANTA BUSINESS INC

Respondents

Appearances: Mr Gabriel Moss QC and Mr William Hare for the Applicant Joint Liquidators
The Respondents were not notified of the application and did not appear

JUDGMENT

[2011: 8, 17 March]

(Members/creditors of Fairfield Sentry Limited obtaining pre-judgment garnishment orders in Netherlands – whether to be enjoined from further proceeding in the Dutch suits within which the garnishment orders were obtained – whether members/creditors to be ordered to procure discharge in Holland of the garnishment suits – principles upon which Court acts in granting anti-suit injunctions - 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 either member/creditor)

[1] **Bannister J [ag]:** The Joint Liquidators of Fairfield Sentry Limited ('Sentry') apply *ex parte* for an order that two persons claiming to be creditors of Sentry, Stichting Shell Pensioenfonds ('Shell') and Atlanta Business Inc ('Atlanta') must (a) cease to prosecute proceedings in the Netherlands

against Sentry in which they have already obtained pre judgment garnishment orders and (b) take all necessary steps to procure the release of those orders.

[2] Shell carries on business at an address at SJ Rijswijk in the Netherlands. On 22 December 2008 it obtained a pre judgment garnishment order from the District Court in Amsterdam ('the District Court') garnishing the funds standing to an account of Sentry at a Dublin branch of Citco Bank Nederland NV ('Citco', 'the Dublin account') up to a limit of US$80m. This figure was arrived at by adding to Shell's claim in the liquidation (some US$63m) unparticularised interest and costs. The garnishment caught some US$67m standing to Sentry's credit in the Dublin account 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 Sentry's account since 22 December 2008. On 26 March 2009 Sentry's management applied to have the garnishment order set aside. That application was refused.

[3] On 8 April 2009 Atlanta obtained a pre judgment garnishment order from the District Court over the Dublin account. I do not think that I have been supplied with the amount of Atlanta's attachment.

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

[5] On 5 November 2009 Shell submitted a claim in the liquidation of Sentry in the sum of US$63m. As I read the documents, the claim is made as creditor or, alternatively as investor/member. Atlanta has submitted no claim in the liquidation.

[6] On 12 July 2010 the Liquidators commenced proceedings in the Irish High Court ('the Irish proceedings') against Citco, Shell and Atlanta claiming recognition of the BVI liquidation, a declaration that Sentry and the Liquidators are entitled to the sum of US$71m then standing to the credit of the Dublin account and a declaration that the District Court's pre judgment garnishment orders should not be recognized by the Irish Courts.

[7] Each of Shell and Atlanta has challenged the jurisdiction of the Irish High Court. An application to decide the issue was heard by that Court between 8 and 10 February 2011. At the time of the

hearing of the application before me a decision was awaited. At the time of writing I have received no further information on the progress of the Irish proceedings.

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

[8] I have been referred 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 in 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 in the nature of things I have not been supplied with any expert evidence in reply.

[9] 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 Sentry 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[1]. 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.

[10] 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 Sentry, 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 Sentry) will be entitled in priority to all other creditors of Sentry 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

[1] a direct inversion of the position under English and BVI law

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.

Jurisdiction to make the orders sought

[11] Sub-sections 176(1) and (4) of the Insolvency Act, 2003 ('section 176', 'the Act') are in the following terms

> 'Restriction on execution or attachment
>
> 176. (1) Subject to subsections (2) and (3), a creditor is not entitled to retain the benefit of any execution process, distress or attachment over or against the assets of a company in liquidation unless the execution, process or attachment is completed before the first occurring of the commencement of the liquidation and,
>
> (a) where the liquidator was appointed by the members under section 159(2), the date upon which the creditor had notice of the calling of the meeting at which the resolution was proposed; or
>
> (b) where the liquidator was appointed by Court, the date upon which the application to appoint the liquidator was filed.'

It is clear that if section 176 applied in the present case neither Shell nor Atlanta would be entitled to retain the benefit of their pre judgment orders because the attachments which they effected were not completed by 23 April 2009. However, it is also clear that section 176 has no extra territorial effect[2], in the sense that it does not operate automatically outside the jurisdiction.

[12] Sub-section 175(1)(c) of the Act ('section 175(1)(c)') is in the following terms:

> 'Effect of liquidation
>
> 175. (1) Subject to subsection (2), with effect from the commencement of the liquidation of a company
>
> (c) unless the Court otherwise orders, no person may

[2] **In re Vocalion Ltd** [1932] 2 Ch 196 at 201

(i) commence or proceed with any action or proceeding against the company or in relation to its assets, or

(ii) exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company'

Like section 176, however, sub-section 175(1)(c) has no effect upon proceedings being carried on outside the jurisdiction.

[13] Notwithstanding this position, a line of English authority, commencing with **In re Oriental Inland Steam Co**[3] and ending, on the authorities to which I have been referred, with **Bloom and Ors v Harms Offshore AHT 'Taurus' GmbH and Co KG**[4] establishes that the Court nevertheless 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 with proceedings or attachments abroad against a company in liquidation (or, for that matter, in administration). The cases also establish, however, that as a general rule, and even although the person sought to be restrained is subject to the jurisdiction of the Court, the Court will 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 in the jurisdiction in which he resides, from restraining the creditor from commencing or continuing his foreign proceedings.

[14] This general rule was departed from in **Bloom and Ors v Harms Offshore**[5] because it appeared on the facts to the Court of Appeal, upholding the Judge below, that the creditor had set a trap for the administrators after the commencement of the administration by arranging for funds in certain bank accounts in New York to be garnished, knowing that the administrators would be using those accounts in funding payments to be made to creditors in the administration.

[3] (1874) LR 9 Ch App 557
[4] [2009] EWCA Civ 632
[5] (supra)

The present cases

[15] No such sharp practice is to be attributed to either of Shell or Atlanta (which I am told has agreed to stay its Dutch proceedings). Shell, in particular, started its garnishment proceedings in its home country four months before the originating application for the appointment of liquidators was filed and some seven months before the Liquidators were appointed. It was attaching a debt due by a Dutch national, albeit one payable elsewhere. There is very little evidence about Atlanta, but it, too, obtained its order from the District Court before the originating application was filed and well before the liquidation commenced.

[16] Mr Gabriel Moss QC, who has appeared, together with Mr William Hare, for the Liquidators on this application, submits, however, that there are two features of the application against Shell (one of which also applies in the case of Atlanta) which justify a departure from the general rule.

[17] First, he submits that one of the foundations of the general rule is that the home Court is reluctant in the interests of comity to interfere, even though indirectly by means of an *in personam* injunction, with the processes of a foreign court[6]. Drawing on the evidence of Mr Stein, however[7], he points out that the Courts of the Netherlands decline to recognise any foreign insolvency other than one proceeding in a member state of the European Union. Thus they decline to recognise that Sentry is in liquidation. Mr Moss QC submits that is those circumstances I need have no inhibitions on grounds of comity about making orders which, if complied with, would interfere with the processes of the District Court.

[18] As the discussion in Dicey shows[8], comity is a word of very elastic meaning. When used in the sense of reciprocity its scope is generally restricted to the context of international treaties or the adoption of international conventions dealing, for example, with such matters as the enforcement of judgments and awards. The fact that the District Court declines to recognise my winding up order does not, in my judgment, give me a licence to retaliate, as it were, by ignoring the fact that it is presently seised of the matter or the right of Shell, a Dutch National, to make application to it for whatever remedies it may grant. It seems to me that the comity which informs the general rule

[6] **Bloom v Harms Offshore** (supra) at paragraph 27
[7] and no doubt on his own experience
[8] Dicey, Morris & Collins, The Conflict of Laws, 14th Ed, paragraphs 1-008 to 1-017

about restraining foreign proceedings and attachments is the comity which requires home courts to respect the integrity of the proceedings of foreign courts. I do not think that that requirement is diminished by the fact that the foreign court in question declines to recognise certain types of order made by the home court. The refusal of the District Court to do so is not a refusal to respect general principles of international law but the result, as I see it, of a perfectly rational policy of the foreign government to make Dutch assets available to Dutch creditors. That, in my judgment, does not make the District Court a sort of pariah whose processes can be ignored as a factor in deciding whether to make an anti suit injunction. As James LJ said in **In re Oriental Inland Steam Co**[9]**:**

> 'There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The court abroad may sometimes not be disposed to assist this court, or take the same view of the law as the courts of this country have taken as to the proper mode of dealing with such companies and also with such assets. If so, we must submit to these difficulties where they occur.'

So I am against Mr Moss QC on the comity point.

[19] Next, Mr Moss relies upon a passage from the judgment of Maugham J in **In re Vocalion Ltd**:[10]

> '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 his 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 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.'

[9] (supra) at page 558
[10] (supra) at page 210

[20] Mr Moss QC says, rightly in my judgment, that Shell made itself party to the winding up proceedings when it served its proof on 5 November 2009. He relies upon passages in **In re Oriental Inland Steam Company**[11], set out in the decision of the Court of Appeal in **Bloom v Harms Offshore**[12]**,** for the proposition that where a creditor of a company in liquidation is in the process of perfecting, in a foreign jurisdiction, a security that had not been perfected at the date when the winding up commenced, he is liable to be restrained, although the jurisdiction to restrain him will be used with caution[13]. I confess to finding some of the authorities difficult to reconcile. On the one hand, there is the principle laid down by Maugham J in **In re Vocalion Ltd**[14] and reiterated by the Court of Appeal in **Bloom v Harms Offshore**[15] that foreigners, who must by definition have been creditors of the companies in question, are generally to be left to pursue their remedies in foreign courts and, on the other, the principle, to be found set out in **In re Oriental Inland Steam Co**[16] itself and reflected in the judgment of Millett LJ in **Mitchell v Carter**[17] that creditors should not be allowed to retain the proceeds of executions not completed until after the commencement of winding up but must surrender them for the benefit of the estate as a whole.

[21] Although I say so with some considerable diffidence, it seems to me that where the creditor has come in under the winding up[18], is within the jurisdiction of the Court conducting the winding up[19] and is a national of the country whose Courts are conducting the liquidation[20], then he will readily be restrained from taking steps against the company abroad in order to improve his position. In the case of the true foreigner who has not participated in the winding up, on the other hand, the authorities seem to show that generally speaking he will be permitted to proceed to enforce his security in the country where he is resident unless there are special circumstances (such as were present in **Bloom v Harms Offshore**[21]).

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[11] (supra) at 558-561
[12] (supra)
[13] see also the judgment of Millett LJ in **Mitchell v Carter** [1997} EWCA Civ 1067 and the text at paragraph 30-080 of Dicey, Morris & Collins, The Conflict of Laws, 14th Ed
[14] (supra)
[15] (supra)
[16] (supra)
[17] (supra)
[18] see **In re North Carolina Estate Co** (1889) 5 TLR 328, cited by Maugham J at page 202 of **In re Vocalion Ltd** (supra)
[19] **In re North Carolina Estate Co** (supra); **In re Vocalion Ltd** (supra)
[20] **In re North Carolina Estate Co** (supra); **In re Vocalion Ltd** (supra) at pages 208, 209, 210
[21] (supra)

[22] Shell has come in under the winding up but is not within the Court's jurisdiction nor is it a BVI registered company. I cannot persuade myself that the mere fact that it has proved in the winding up means that it should be restrained from maintaining its proceedings in the District Court. Shell lodged its claim only after it had obtained its pre judgment garnishments and I can see no reason in justice why that act should require this Court to compel it to cease to attempt to perfect its attachments in the District Court. In my judgment the true position is not that the lodging of the claim deprives it of the right to pursue its Dutch proceedings but rather that it will not be permitted to take any benefit under the winding up here unless it abandons them and any security it might have acquired in the course of them. In effect, Shell is put to its election. That is how Maugham J put it in **In re Vocalion Ltd**[22]:

> '. . . if he desires to benefit under the English winding-up he must, generally speaking . . . give up for the benefit of other creditors any advantage which he may have obtained for himself in the proceedings abroad.'

[23] Mr Moss QC placed great weight on the words of the final sentence of the passage from **In re Vocalion Ltd**[23] which I have set out at paragraph [19] above. He submitted that in this passage Maugham J was laying down an exception to the general rule such that the Court would ordinarily restrain any creditor who had submitted a proof from prosecuting proceedings against the company or its property abroad. In my judgment Maugham J was saying no more than that he was not considering what would be the effect of the creditor's being a British subject or having submitted a proof or having become a party to the liquidation proceedings in some other way. In my judgment, he was merely leaving open the question whether **In re North Carolina Estate Co**[24] and **In re Belfast Shipowners Co**[25] or similar cases were rightly decided. I do not think that this passage assists Mr Moss QC.

[24] The position as against Atlanta, which has not proved in the liquidation, is *a fortiori*, although as I understand it Atlanta has agreed to stay its Dutch proceedings.

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[22] (supra) at page 210
[23] (supra)
[24] (supra)
[25] (supra)

In personam jurisdiction

[25] It seems to me that what **In re Vocalion Ltd** undoubtedly confirms is that such anti-suit injunctions may be made only against persons subject to the jurisdiction or capable of being made subject to the jurisdiction[26]. The first question is whether there is anything in the CPR which enables service to be effected upon Shell (which has no presence here) in Holland. Mr Moss QC relied upon CPR 7.3(5) – claim to enforce any judgment or arbitral award made within the jurisdiction. He submitted that the order appointing the Liquidators was a judgment made within the jurisdiction and that the claim for an anti suit injunction would be a claim to enforce it. With respect to Mr Moss QC this is hopeless. Even if the word 'judgment' in CPR 7.3(5) is wide enough to embrace orders, such as an order appointing liquidators, to describe an anti-suit injunction made against a creditor as enforcement of the order appointing liquidators would be a misuse of language, just as it would be a misuse of language to describe the issue by the Liquidators of an application under section 245 of the Act as enforcement of the order appointing liquidators.

[26] Mr Moss QC next relied upon Insolvency Rule 24(1), which applies CPR Parts 5 and 7 (a) to service of documents listed in Insolvency Rule 24(2) 'as if the document was a claim form' and (b) to documents required to be served, sent or delivered in the course of an insolvency proceeding before the Court, 'in each case with such modifications as are necessary'. Mr Moss QC submitted that these words mean that where an application notice, for example, is permitted to be served in the course of insolvency proceedings then CPR Part 7.3 is modified to provide that permission may be given to serve out where the document to be served is one which is permitted to be served in insolvency proceedings. I cannot accept this submission. The 'necessary modifications' to CPR Part 7 to which Insolvency Rule 24(1) refers are modifications necessary to ensure, for example, that applications to set aside service under CPR 7.5 cover not only claim forms, but also all other types of documents specified in Insolvency Rules 24(1) and (2).

[26] See pages 205, 206, 209, 210

[27] I have considered whether in lodging its claim in the liquidation on 5 November 2009 Shell submitted to the jurisdiction. Mr Moss QC did not suggest that it did and the passage in Dicey on submission to the jurisdiction[27] deals only with submission to the Court's legal process, whether by engaging with it without protest or because the defendant has expressly or impliedly accepted that it may be sued within the jurisdiction. If, however, I had reached the conclusion that an injunction ought to issue, I would have held that the lodging of Shell's proof amounted to a sufficient submission to the jurisdiction for the purpose of any proceedings in or ancillary to the liquidation. As I understand it a similar rule of practice is applied in the courts of the United States and in my judgment there is no reason why it should not be followed here.

[28] In my judgment, therefore, if, I had been of the view that Shell ought to be restrained from prosecuting the Dutch proceedings, I consider that I would have had power to permit service of the order imposing the injunction on Shell in Holland by reason of the fact that Shell had made itself party to the winding up proceedings.

Ancillary relief in the US

[29] In these circumstances it seems to me that the Liquidators' other application, for permission to apply to the United States Bankruptcy Court for the Southern District of New York, where His Honour Judge Lifland is presiding over a Chapter 15 regime granted in favour of the Funds, for an injunction in aid falls away. Mr Moss QC asked me, in case I was minded to refuse the Liquidators' primary application, to deliver a letter of request to Judge Lifland asking him to make a stand alone injunction in the Chapter 15 proceedings. As I understand Brown Rudnick's memorandum of 3 March 2011, however, it is their view that the United States Bankruptcy Court would be unlikely to make a self standing injunction against Shell because it would not operate to protect any of Sentry's assets within the United States. Quite apart from that, it would seem impertinent for me to ask Judge Lifland to do what I am not prepared to do myself.

[27] Dicey, Morris & Collins, The Conflict of Laws, 14th Ed, paras 11-130 to 11-138

Conclusion

[30] These applications must accordingly be dismissed. Given the costs that could have been saved had I granted the application, the Liquidators were justified in making them and their reasonable costs of doing so, fixed under section 430 of the Act, will be paid out of the estate.

Commercial Court Judge

17 March 2010