THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP: 11-16, 23-28 of 2016

In the Matter of The Insolvency Act 2003

In The Matter of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation) and Fairfield Lambda Limited (In Liquidation)

BETWEEN:

ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sentry Ltd)
[3] Fairfield Sentry Limited (in liquidation)

Respondents

[BVIHCMAP2016/0011]

ABN AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and Others

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sigma Ltd)
[3] Fairfield Sigma Limited (in liquidation)

Respondents

[BVIHCMAP2016/0012]

Bank Julius Baer & Co. Limited and Another

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Lambda Ltd)
[3] Fairfield Lambda Limited (in liquidation)

Respondents

[BVIHCMAP2016/0013]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA
[5] UBS Deutschland AG/Dresdner Lateinamerika AG
[6] UBS Fund Services (Cayman) Limited
[7] UBS (Grand Cayman) Limited
[8] UBS Fund Services (Ireland) Limited
[9] UBS Zurich

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sentry Ltd)
[3] Fairfield Sentry Limited (in liquidation)

Respondents

[BVIHCMAP2016/0014]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA 26
[5] UBS Deutschland AG/Dresdner Lateinamerika AG
[6] UBS Fund Services (Ireland) Limited
[7] UBS Zurich

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sigma Ltd)

[3] Fairfield Sigma Limited (in liquidation)

Respondents

[BVIHCMAP2016/0015]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Lambda Ltd)
[3] Fairfield Lambda Limited (in liquidation)

Respondents

[BVIHCMAP2016/0016]

ABN AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and Others

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sentry Ltd)
[3] Fairfield Sentry Limited (in liquidation)

Respondents

[BVIHCMAP2016/0023]

ABN AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and Others

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sigma Ltd)
[3] Fairfield Sigma Limited (in liquidation)

Respondents

[BVIHCMAP2016/0024]

Bank Julius Baer & Co Limited and Another

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Lambda Ltd)
[3] Fairfield Lambda Limited (in liquidation)

Respondents

[BVIHCMAP2016/0025]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA
[5] UBS Deutschland AG/Dresdner Lateinamerika AG
[6] UBS Fund Services (Cayman) Limited
[7] UBS (Grand Cayman) Limited
[8] UBS Fund Services (Ireland) Limited
[9] UBS Zurich

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sentry Ltd)
[3] Fairfield Sentry Limited (in liquidation)

Respondents

[BVIHCMAP2016/0026]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited
[4] UBS (Luxembourg) SA
[5] UBS Deutschland AG/Dresdner Lateinamerika AG
[6] UBS Fund Services (Ireland) Limited
[7] UBS Zurich

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Sigma Ltd)
[3] Fairfield Sigma Limited (in liquidation)

Respondents

[BVIHCMAP2016/0027]

[1] UBS AG New York
[2] UBS AG Zurich
[3] UBS Jersey Nominees Limited

Appellants

and

[1] Kenneth Krys
[2] Charlotte Caulfield (Joint Liquidators of Fairfield Lambda Ltd)
[3] Fairfield Lambda Limited (in liquidation)

Respondents

[BVIHCMAP2016/0028]

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Lord Falconer, QC, Mr. Stephen Rubin, QC and Mr. Pierre Plumptre of Gibson Dunn and Ms. Nadine White of O'Neal Webster for the Appellants in BVIHCMAP: 14-16, 26-28 of 2016.

Mr. Mark Hapgood, QC, Mr. Alan Roxburgh, Mr. Philip Kite and Ms. Claire Goldstein of Harney Westwood & Riegels for the Appellants in BVIHCMAP: 11-13, 23-25 of 2016.

Mr. Gabriel Moss, QC, Mr. Stephen Midwinter and Mr. Williams Hare of Forbes Hare for the Respondents.

2017: January 23, 24, 25;
October

Commercial appeal – Insolvency – Virgin Islands Insolvency Act, 2003 – Section 273 – Locus standi to apply for relief under section 273 – Whether the appellants as former shareholders are "persons aggrieved" by the liquidator's act, omission or decision – Courts jurisdiction to grant anti suit injunction – Issue estoppel – Abuse of process – Whether the Liquidators should be restrained from pursuing the US Proceedings pursuant to the jurisdiction and power of the court given under section 24 of the West Indies States Supreme Court (Virgin Islands) Ordinance – Whether the US Bankruptcy Court may grant relief pursuant to section 249 of the Insolvency Act

The appellants are former shareholders of Fairfield Sentry Limited (in liquidation) ("Sentry") which operated as a feeder fund to Bernard L. Madoff's company, BLM Investment Securities ("BLMIS"). The Liquidators are court appointed liquidators following the insolvency of Sentry and the other corporate respondents ("the Funds").

The joint liquidators of the Funds brought claims against the appellants to recover redemption monies paid out to them based on alleged mistaken calculations of the net asset value (the "NAV") of the shares occasioned, it is said, by Madoff's fraud (the "BVI Proceedings"). In the BVI Proceedings, the court considered four preliminary issues: issues 1-3 concerned the question whether certain documents recording the NAV per share or the redemption price were binding on the Fund under the Fund's Articles and issue 4 concerned whether the defendants, by surrendering their shares gave good consideration for the money that they received on redemption. The questions raised on the preliminary issues were finally determined by the Privy Council decision in Fairfield Sentry Ltd (in liquidation) v Migani and others ("Migani").

With this Court's sanction, the Liquidators are currently pursuing US Proceedings. The US Proceedings have been ongoing and the appellants are said to be a small number of the hundreds of US defendants. In the US Proceedings, the Liquidators seek the recovery of redemption monies on behalf of the Funds, albeit in respect of a different set of redemptions which were not the subject of the BVI Proceedings but are said to be based on the same subject matter raising the same issues. Additionally, the Liquidators are asking the US Court to grant as against the appellants and others, declaratory and substantive relief pursuant to section 249 of the BVI Insolvency Act (the "IA") on the basis that the redemptions constituted voidable transactions under the provisions (sections 244 -246) of the IA (the "section 249 Claims" or the "statutory avoidance Claims").

Pursuant to section 273 of the IA, the appellants moved the court to exercise its supervisory power over the Liquidators, in essence, restraining them from pursuing the US Proceedings on the basis that they are "persons aggrieved" by the Liquidators' decisions and/or actions in pursuing the US Proceedings. Alternatively, the appellants sought an anti-suit injunction to restrain the pursuit of the US Proceedings by the Liquidators on the basis that such pursuit constitutes vexatious and/or oppressive conduct on the basis that the issues in the US Proceedings were already finally decided in Migani and also on the basis that the US Court cannot grant IA, section 249 relief. The learned judge dismissed the appellants' applications.

The appellants appealed contending that the learned judge erred in his approach to determining the question of standing and that they are 'persons aggrieved' within the meaning of section 273. They argue that the US restitution claims are met by estoppel and the broader doctrine of abuse of process. The appellants

further argue that only the BVI court could grant IA section 249 relief and thus pursuit of such relief before the US Court was hopeless and therefore oppressive.

Held: dismissing the appeal and awarding costs to the respondents to be borne by the appellants at two thirds of the costs assessed on the applications in the court below in accordance with rule 65.13 of the Civil Procedure Rules 2000, that:

1. The phrase "person aggrieved" must take its meaning and colour from the context of the statute in which it appears. The question, in this case, must then be whether, having regard to the context of section 273 of the **BVI Insolvency Act** (the "IA"), and the remedy which is thereby given, namely, 'confirming, reversing or modifying the act, omission or decision of the officeholder', a person who has no proper or legitimate interest in a liquidator's decision, act or omission in respect of an insolvent company's estate may be said to be a "person aggrieved." In the context of section 273, a person cannot be considered as being "aggrieved" unless that person has a sufficient interest in the outcome of an act, omission or decision taken by a liquidator in the liquidation or shortly put, a sufficient interest in the relief sought.

   Intertrade Corporation v Windjammer Landing Co. Ltd. SLUHCVAP1996/0006 (delivered 24th November 1997, unreported) followed; **Sevenoaks Urban District Council v Twynam** [1929] 2 KB 440 applied.

2. It is important to identify, for the purpose of section 273, the capacity in which a person is praying in aid the relief being sought. In this case, the appellants do not suggest that they have any interest in the assets of Sentry or the way they are to be distributed or spent. They invoke section 273 of the IA as mere defendants in the US proceedings. In such capacity, the appellants are strangers to the liquidation and have no legitimate interest in the relief sought. Accordingly, the appellants have no standing under section 273 of the IA to apply for the restraint of the Liquidators in pursuing the US proceedings. There is therefore no reason for disturbing the learned judge's decision refusing the application to grant relief.

   Re. Edennote Ltd [1996] BCLC 389 applied; **Deloitte & Touche AG v Johnson** [2000] 1 BCLC 485 applied.

3. The US Claims are not in respect of the same redemption payments as were before the BVI Court. Although the claims arise from similar redemption payments, the factual context requires ventilation of other considerations as pleaded in those claims. The questions raised are all arguable and it would be inappropriate for this Court to seek to make a summary determination as to the merits or demerits of these issues which have been squarely placed before the US Court in the US Proceedings. The effect of **Migani** is therefore within the purview of the US Bankruptcy

Court to be decided within the context of the US Claims and this Court should not seek to preempt its consideration. Further, the appellants have already availed themselves of the foreign procedure dealing with vexation and oppression in the US Courts.

4. The word "Court" in section 249 of the IA is not an expression giving exclusive jurisdiction to the BVI Court to treat with statutory avoidance claims and for granting relief. It is a procedural or allocation provision which merely directs where a claim may be made. It is clear from the IA itself that there is full recognition of cross-border cooperation. This is encapsulated in Parts XVIII and XIX which deals with cross-border insolvency and orders which may be made in aid of foreign proceedings. These parts of the IA capture the essence of reciprocity and comity between countries in insolvency matters. In this case, there is no good reason for prohibiting the US Bankruptcy Court from rendering assistance to the BVI main insolvency which may inure to the fair and equal treatment of all the Funds' creditors. Further, the BVI Court can exercise no personal jurisdiction over the bulk of the parties in the US Proceedings. In this context, this cannot be viewed as harassment or as being vexatious and oppressive to the appellants, nor can it be perceived as an affront to the BVI Court or its processes. Accordingly, the appellants have not discharged the burden of demonstrating that the statutory avoidance claims are hopeless and that the Liquidators should be enjoined from the pursuit of them.

   In Re Hellas Telecommunications (Luxembourg) II SCA524 B.R. 488 (Bankr., S.D.N.Y., 29.1.2015) cited.

JUDGMENT

[1] **PEREIRA CJ:** These appeals arise from the judgments of Leon J dated 10th March 2016 and 30th March 2016.[1] In his judgment of 10th March 2016, the learned judge dismissed the appellants' applications for an order under section 273 of the **Virgin Islands Insolvency Act, 2003**[2] (the "IA"), or alternatively for an anti-suit injunction restraining the respondents, (the "Liquidators and the Funds") from prosecuting claims in the United States (the "US Actions") against the appellants before the Bankruptcy Court for the Southern District of New York, USA (the "US Court").

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[1] The judgment of 10th March ruled on the section 273 applications. The judgment of 30th March dealt with consequential costs orders following from the 10th March decision.

[2] Act No. 5 of 2003, Laws of the Virgin Islands.

The background

[2] The appellants are former shareholders of Fairfield Sentry Limited (in liquidation) ("Sentry"), which operated as a feeder fund to Bernard L. Madoff's company, BLM Investment Securities ("BLMIS"). The Liquidators are court appointed liquidators following the insolvency of Sentry and the other corporate respondents ("the Funds"). The history of the insolvency of the Funds following the unravelling of Bernard L. Madoff's multi-billion-dollar ponzi scheme facilitated by BLMIS is a matter well chronicled in the judgments of this Court (and elsewhere) culminating in the final judgment of the Privy Council (following an appeal from this Court) in its decision **Fairfield Sentry Ltd (in liquidation) v Migani and others**,[3] (the "BVI Proceedings"). No useful purpose will be served repeating it here. Suffice it to say that the BVI Proceedings concerned claims brought by the joint liquidators of the Funds against the appellants to recover redemption monies paid out to them on the basis of alleged mistaken calculations of the net asset value ("NAV") of the shares occasioned, it is said, by Madoff's fraud. The ultimate aim of the Liquidators (together with BLMIS's Trustee, Mr. Picard) being to return those redemption payments or their excess to the Funds' insolvent estates for the benefit of all the investors who suffered loss.

[3] The BVI Proceedings proceeded on the basis of the determination of the following Preliminary Issues contained in an order dated 20th April 2011 (the "PI Order"):

> (1) "Whether any (and if so, which) of the documents copies of which are exhibited at pages 2 to 17 inclusive of exhibit PRK-1 to the affidavit of Phillip Kite sworn in the proceedings the short title and first reference to which is Fairfield Sentry Limited (in liquidation –v- Bank Julius Baer & Co Limited and others BVIHC(COM) 30/2010 on 8 March 2011 (or copies of any further documents which may be exhibited to any witness statement made in connection with this issue) ("**the documents**") is a certificate within the meaning of Article 11(1) of the Articles of Association of the Claimant ("Article 11(1)", "the Articles");
>
> (2) If the answer to (1) is yes, whether any (and, if so, which) of the documents is

[3] [2014] UKPC 9.

(a) a certificate as to the Net Asset Value per share ("NAV") or
(b) a certificate as to Redemption Price

within the meaning of the Articles;

(3) If the answer to 2(a) or (b) is yes:

Whether the publication or delivery by the Claimant

(a) as a matter of information only, or
(b) in connection with a redemption request

of a document containing substantially the same items of information as a document identified as falling within (2)(a) or (b) above to a redeeming or redeemed Member of the Claimant precludes the Claimant from asserting that money paid to that redeeming or redeemed Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member.

For the purposes of this issue "document" includes emails and materials accessible on a website maintained by the Claimant or Citco Fund Services (Europe) BV or Fiarfield Greenwich Group.

(4) Whether a redeeming Member of the Claimant in surrendering its shares gave good consideration for the payment by the Claimant of the Redemption Price and, if so, whether that precludes the Claimant from asserting that the money paid to that Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member."

[4] It is also worth reciting paragraph 2 of the PI Order directing the trial of the Preliminary Issues on which the Liquidators rely as a reservation which preserves the pursuit of claims where the factual matters becoming subsequently known may render a particular appellant (then a PI Defendant) liable to repay all or any part of redemption monies to the Funds' insolvent estates. Paragraph 2 of the PI Order states:

"Determination against the Claimants of any of the questions falling to be determined in issue (1)-(3) of the Preliminary Issues shall not debar the Claimants from subsequently asserting on the basis of a fact or facts not actually known to the Liquidators of the Claimants at the time of the

hearing of Preliminary Issue (1)-(3) that notwithstanding the determination of that question a particular defendant is liable to repay to the Claimants all or some part of any redemption monies paid to that defendant."

[5] The Privy Council in **Migani** ruled in answer to Preliminary Issues 1-3. The Board in effect held that, the emails formally 'advising' the monthly NAV per share to members described in terms as the 'final figure', the contract notes formally confirming the redemption and recording its terms, and the monthly members' statements containing a formal record of each transaction during the month and the NAV per share at which it went through were 'all information ... plainly intended to be relied upon by [m]embers as a definitive record of the transaction and the values on which it was based.' The Board accordingly concluded that these documents were certificates for the purposes of article 11 of Sentry's Articles of Association. In relation to Preliminary Issue 4, the Board dismissed the Liquidators' appeal and thus must be taken to have confirmed the conclusion of the courts below that a redeeming member of Sentry in surrendering its shares gave good consideration for the payment by Sentry of the redemption price. The BVI claims were eventually dismissed[4] and the Liquidators discontinued the claims against the other defendants.

[6] I pause here to note that Preliminary Issue 4 appears, by the terms of paragraph 2 of the PI Order, to be a standalone issue as the reservation specified thereby in respect of any subsequent factual matters becoming known expressly relates to Preliminary Issues 1-3 only. This may bear on the issue whether the Liquidators ought to be allowed to pursue any of the claims made in the US Proceedings against the appellants. I will return to this question later.

[7] In the US Proceedings, the Liquidators seek the recovery of redemption monies on behalf of the Funds, albeit in respect of a different set of redemptions which were not the subject of the BVI Proceedings but are said to be based on the same factual matrix grounded in restitution for unjust enrichment, monies had and

[4] The claims were dismissed on a summary judgment application made by the appellants.

received, mistaken payment and constructive trust. The Liquidators are also asking the US Court to grant as against the appellants and others, declaratory and substantive relief pursuant to section 249 of the IA[5] on the basis that the redemptions constituted voidable transactions under the provisions (sections 244 - 246) of the IA ("the sec. 249 or statutory avoidance Claims").

[8] The appellants moved the court by way of section 273 of the IA to exercise its supervisory power over the Liquidators, in essence, restraining them from pursuing the US Proceedings on the basis that they are 'persons aggrieved' by the Liquidators' decisions and or actions in pursuing the US Proceedings. Alternatively, the appellants sought an anti-suit injunction to the same effect, namely to restrain the pursuit by the Liquidators of the US Proceedings on the basis that such pursuit constitutes vexatious and/or oppressive conduct having regard to the BVI Proceedings as they ought not to be twice vexed by what they contend is a re-litigation in the US of the issues already finally decided in the BVI Proceedings by the Privy Council in **Migani**.

Other features

[9] I must record at this juncture that the Liquidators are pursuing the US Proceedings with the sanction (obtained ex parte) of this Court[6] following an appeal heard earlier to the hearing of these appeals. The US Proceedings brought pursuant to Chapter 15 of the US Bankruptcy Law have been ongoing for a number of years and the appellants are said to be a small minority of the hundreds of US defendants. Chapter 15 of the US Bankruptcy law is an adoption of the UNCITRAL Model law which provides for bankruptcy proceedings in that country in aid of a foreign insolvency, in this case BVI. It is beyond dispute that BVI is the supervisory court for the liquidation of the Funds.[7] The Liquidators are said by

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[5] It is common ground that the bringing of claims for section 249 relief under the IA in the BVI court would now be time barred.

[6] Bannister J had refused to sanction the Liquidator's pursuit of the US Proceedings.

[7] The Liquidators sought and obtained recognition or foreign representative status before the US Court of their appointment by the BVI Court.

their actions to be achieving significant recoveries for the Funds by way of settlements already entered into by several defendants to the US claims.

[10] Apart from the applications made in this Court to reverse or restrain the Liquidators' pursuit of the US Proceedings, the appellants, along with other defendants in US Proceedings, have applied to the US Court to dismiss the US claims and directions for the dismissal applications have already been given by the US Court (the US Dismissal Applications").

[11] The Liquidators say that the arguments being made for the US Dismissal Applications mirror the arguments advanced by the appellants to this Court for restraining the Liquidators. This conduct, the Liquidators say, makes the pursuit by the appellants of these appeals an abuse of process by affording the appellants two bites of the cherry: Even if they lose on these appeals, they will still be able to raise the same arguments before the US Court in their Dismissal Applications. The appellants have not undertaken not to run the same arguments before the US Court were they to lose here. The Liquidators say that this demonstrates that the appellants are not here to abide by the orders of this Court. They say that this Court should be wary of being used by the appellants to produce some dicta which the appellants would seek to use in the US Proceedings. The Liquidators accordingly say that the appellants' conduct is vexatious and oppressive applying the well-established principles of abuse of process and that on this basis alone, the appeals should be dismissed. There is also the risk of two courts arriving at conflicting decisions, an undesirable event.[8]

[12] It has also been pointed out by Mr. Moss, QC for the Liquidators that not all the persons whose interests are being represented by the appellants were defendants in the BVI Proceedings. He also says that no injustice will be done to the appellants in dismissing the appeals because the US Proceedings have been

[8] See: Carlyle Capital Corporation Ltd. (in liquidation) et al v William Elias Conway Jr et al [2013] Lloyds Law Rep. Vol 2 179.

afoot for a very long time and in any event the appellants who are fully engaged in the US Proceedings will get their day in the US Court.

[13] The view taken in respect of these appeals will become apparent later in this judgment. I think it appropriate to follow generally the order used by the parties in addressing the issues raised on these appeals. I accordingly begin with the question of the appellants' standing under section 273 of the IA.

Standing - Are the appellants as former shareholders 'persons aggrieved'?

[14] Section 273 of the IA is in these terms:

> "A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder".

[15] The learned judge held that the appellants had no standing to apply under section 273 of the IA. He arrived at this determination by reference to the Privy Council opinion rendered in **Deloitte & Touche AG v Johnson**.[9] The learned judge's consideration of the question of standing and jurisdiction may be said to be captured between the passages in his judgment beginning at paragraph 41 to paragraph 72 where he eventually held that 'the Applications for section 273 relief should be dismissed on the basis that the Applicants do not have standing, and in any event do not have a legitimate interest, and as a result this Court does not have jurisdiction which it may exercise to grant Section 273 relief.'

Arguments of the Appellants

[16] Lord Falconer on behalf of the appellants contends that the learned judge erred in his approach to determining the question of standing. He says that the learned judge has apparently confused and seemingly conflated the two questions which are separate and must be kept distinct: first, are the appellants 'persons aggrieved'; and second, if they are, should the court grant relief. He also says that the learned judge was wrong to import into this consideration the question of 'a

[9] [2000] 1 BCLC 485.

legitimate interest' transported from **Deloitte.** He submitted that **Deloitte** has nothing to do with a determination under section 273. He relies on a passage in the English case of **Re. Edennote Ltd.**[10] in guiding the Court on the construction to be placed on the words 'person aggrieved'. In **Edennote**, creditors sought to set aside an assignment made by Edennote's liquidator and for removal of the liquidator. Sir John Vinelott considered sections 167 and 168 of the **English Insolvency Act, 1986**. Section 168(5) of that Act states that 'if any person is aggrieved by an act or decision of the liquidator, that person may apply to the court...'. He traced the origin of those sections to section 20 of the **Bankruptcy Act 1869**, the penultimate paragraph of which read as follows:

> " A bankrupt or any creditor, debtor or other person aggrieved by any act of a trustee may apply to the court and the court may confirm, reverse or modify the act complained of and make such order in the premises as it thinks just."

He then opined that 'the words 'persons aggrieved' in section 168(5) are no more than shorthand for the longer description, 'any creditor, debtor or other person aggrieved'.

[17] The appellants also place reliance on **Mahomed v Morris**[11] and the dictum of Peter Gibson LJ at paragraphs 24 to 26. At paragraph 24 he stated:

> ' [t]he words 'any person aggrieved' are very wide at first sight and are not on their face limited to creditors and contributories. The provision goes back a long way... [w]ith a solitary exception no authority has been cited to us where a person not being a creditor or contributory has been allowed to apply under the subsection. That exception is *Re. Hans Place ltd. In that case a landlord* was held able to challenge under s 168(5) the exercise by the liquidator of the power ... to disclaim onerous property such as a lease. But there must be some limit to the class of persons who can complain under s168(5). An example is provided in Re. Edennote Ltd. Nourse LJ (with whom Millett LJ agreed) said of applicants under s 168(5) ... who were both unsecured creditors **and persons denied an opportunity to purchase** an asset of a company in compulsory liquidation sold by the liquidators:

[10] [1996]BCLC 389.
[11] [2000] BCLC 536.

> 'In the latter capacity alone, like any other outsider to the liquidation, they would not have had the locus standi to apply under s 168(5).' (my emphasis)

At paragraph 26 Peter Gibson LJ continued thus:

> "In general, I respectfully agree with the sentence which I have cited from *Re Edennote* [1996] 2 BCLC 389. It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator could attack that act or decision by the special procedure of s 168(5). However, I would accept that someone like the landlord in *Hans Place Ltd* [1993] BCLC 768, who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power, can utilise s168(5). It may be that other persons can properly bring themselves within the subsection."

[18] The appellants contend that applying the language of Peter Gibson LJ, the redeemed shareholders would fall within the category of "persons aggrieved" on the assertion that they are creditors; that they are shareholders as well as debtors; that they are insiders to the liquidation in any event and are not mere busybodies; that it is plain that they are directly affected by the decision of the liquidator to bring proceedings in the US and that they have no other recourse in relation to it other than section 273 and the anti-suit injunction and that they are being harassed by the Liquidators and should not be facing the US Proceedings at all.

[19] The appellants additionally say that **Deloitte** is distinguishable on the basis that the section of the Companies Law of the Cayman Islands under consideration there is not in the same language as section 273. Under the Caymanian provision, no category of the persons was specified whereas under section 273 the category is limited to a "person aggrieved". It is not proper, they say, to import from **Deloitte** an additional qualifier of a "legitimate interest" as section 273 does not in effect require it. They urge that the test under section 273 is a broad test confined only by excluding mere busy bodies. On the authorities, the appellants say it includes an "alleged debtor".

[20] They also say that in **Deloitte** the Court was dealing with standing in relation to an application to remove a liquidator whereas here this is not the case and the dictum of Lord Millett is to be understood in that context.

[21] Mr. Moss, QC, on behalf of the Liquidators, says that the learned judge was right to conclude as he did. He agrees that creditors would have standing under section 273. He submits that **Re. Hans Place Ltd** referred to by Peter Gibson LJ as an exception to the class of persons who would be considered as a "person aggrieved" is not a true exception as the landlord there would have had a right to rents and therefore on the liquidator's exercise of the power to disclaim the lease as onerous, would have been in the capacity of a creditor. He submits that the appellants do not complain in the capacity of creditors but as outsiders asserting a right to challenge the exercise of a power of the liquidator namely the power to continue the US Proceedings. The Liquidators contend that the exception relates to someone who would have no remedy otherwise against the exercise of that power for example, as would have been the case of the landlord in **Re. Hans Place Ltd**. Here however, the Liquidators contend that the appellants have a right to challenge the exercise of the Liquidator's power and this is precisely what they are doing in the US Dismissal Applications. The Liquidators say that here the challenge is being made merely in the capacity of defendants having been sued in the US Proceedings. Being a mere defendant does not give one standing under section 273. They say that such an approach could not be correct nor just, as it would be open to any defendant to seek to interfere with the exercise of a liquidator's power merely because a liquidator has brought proceedings against him. Mr. Moss, QC says that not a single precedent for this kind of use of section 273 or its equivalent has been put forward that suggest that a person in the appellants' position as here, has been given standing. This is so, he says, because every defendant has a right to challenge the exercise of the power by applying to dismiss the proceedings. This approach, Queen's Counsel contends, is borne out by the judgment of Lord Millett in **Deloitte**.

[22] In **Deloitte,** a Caymanian company commenced voluntary liquidation which was subsequently ordered to continue subject to the supervision of the court. The joint liquidators caused the company to institute proceedings for negligence in relation to the audit of the company's financial statements. The plaintiff which was one of the defendants to the negligence claim, but not a creditor or contributory of the company applied under section 106(1) of the **Companies Law (1995 rev)** for an order removing the liquidators or alternatively restraining them from continuing the action against that plaintiff on the ground that the liquidators had a conflict of interest. The liquidators applied for the application to be struck out on the grounds that the plaintiff had no locus standi to make the application or real interest in seeking such relief. The judge dismissed the liquidators summons but the Court of Appeal allowed the liquidators appeal and struck out the plaintiff's section106 (1) application. The decision of the Court of Appeal was affirmed by the Privy Council. Section 106 (1) was in these terms: 'Any official liquidator may resign or be removed by the Court on due cause shown; and any vacancy in the office of an official liquidator...shall be filled by the Court.'

One of the arguments put forward by the plaintiff, while conceding that not everyone is a proper person to make the application, was that any person who has an interest in making the application or who may be affected by its outcome is a proper person to make it. The plaintiff argued that it is such a person since it is critically affected by the decisions which the liquidators will make in the conduct of proceedings which the company has brought against it. In reference to the authorities relied on by the plaintiff, Lord Millett observed that those authorities: 'show that the court has consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application, being the only persons interested in the liquidation. Their Lordships have not been shown any case in which the court has removed a liquidator ... on the application of anyone who is not a creditor or contributory as the case may be".[12]

[12] At p. 460.

[23] The Liquidators accordingly argue that the complaint being made by the appellants here mirrors the arguments put forward by the plaintiff in **Deloitte.** In respect of the anti- suit injunction sought by the plaintiff against the liquidators in **Deloitte,** Lord Millett had this to say at page 492:

> "the appellants complain of the manner in which the respondents have conducted the proceedings against them .... Thus they make the application as defendants to existing proceedings. They do not allege that those proceedings disclose no cause of action or are an abuse of the process of the court. If such were the case, the appellant would have an obvious remedy."

[24] By parity of reasoning, here the Liquidators say that, as in **Deloitte:**

(a) the appellants' position is adverse to the creditors of the Funds;

(b) they do not have a proper interest in whether the claims are pursued or not and are therefore strangers to the liquidation; and

(c) if the Liquidators' conduct is an abuse then the appellants have an obvious remedy: apply to dismiss or strike out the US actions (which they have now done). It matters not that the proceedings are in the US, the same principle would apply as there is no allegation that the US Court is not a court of fairness with adequate remedies.

[25] As to the assertions that the appellants are shareholders, the Liquidators say that they are no longer shareholders, but in any event the claims are not in the appellants' capacity as shareholders. Neither are they creditors. The liquidators say they no longer fit that category having fully received redemption payments, notwithstanding that it is claimed by the Liquidators that some of the appellants are knowing recipients. Thus, the Liquidators contend that the appellants are neither creditors nor shareholders. They have no interest in the assets of Sentry or how funds in the estate should be spent. The Liquidators say that as 'alleged debtors' only (which allegation is denied by the appellants) they have no standing. The appellants are mere defendants and therefore cannot come within the category of "persons aggrieved."

[26] The Liquidators make the further point that even if the appellants may be said to have 'technical standing" they can have no "substantial standing" as they have no proper interest in the relief they are seeking. This is an allusion to Lord Millett's discourse in **Deliotte** in which he spoke of the two kinds of cases which must be distinguished when considering the question of a party's standing to make an application to the Court. At page 491 of his judgment he had this to say:

> "... two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint...."

[27] Reliance is also placed on the decision of Hariprashad-Charles J in **Gold & Appel Transfer SA Iceberg Transport SA et al v Meade Malone (In his capacity as Liquidator of Gold & Appel Transfer SA).**[13] There, the liquidator was pursuing avoidance actions in the US and the defendants applied under section 273 of the IA to stop the proceedings. Although one of the defendants was a creditor and another a member, it was held that they were not seeking the section 273 remedy in those capacities and were thus held to be "outsiders to the liquidation". Thus, they had no standing in seeking section 273 relief.

Discussion

[28] In **Intertrade Corporation v Windjammer Landing Co. Ltd.**[14] the court opined that

> "Locus standi is a threshold requirement to the institution of legal proceedings. The person bringing such proceedings must be a person aggrieved and must have a sufficient interest ... Judicial definitions of 'person aggrieved' have varied over the years. The present approach is to give a generous interpretation to the phrase. The approach should be not to give it a rigid or inflexible meaning but to take its meaning and colour

[13] BVIHCV2004/0130 (delivered 23rd March 2006, unreported).
[14] SLUHCVAP1996/0001 (delivered 24th November 1997, unreported).

from its content (sic). ... There is no standing if the applicant is no more than a 'meddlesome busybody.' The test of 'sufficient interest' has become an extremely flexible rule and pragmatic requirement in ascertaining locus standi..."

[29] In **Sevenoaks Urban District Council v Twynam**[15] the English court considered the meaning of "person aggrieved" under the **Public Health Act, 1925**. It had this to say:

> "... those words, ' a person aggrieved' have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decisions of contradictory import. But as has been said again and again there is often little utility in seeking to interpret particular expressions is one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen of other statutes, but what is its meaning in this part of this statute?"[16]

[30] In my view, the dicta of these two decisions are to the same effect. The phrase must take its meaning and colour from the context of the particular statute in which the words appear. The question must then be whether, having regard to the context of section 273 of the IA, and the remedy which is thereby given namely 'confirming, reversing or modifying the act, omission or decision of the officeholder',[17] a person who has no proper or legitimate interest in a liquidator's decision, act or omission in respect of an insolvent company's estate may be said to be "a person aggrieved".

[31] It seems to me that section 273 bears its closest resemblance to section 168 of the **English Insolvency Act** which was under consideration in **Re. Edennote** and **Mohamed** both in context and purpose. They are provisions concerned with the administration of an estate either in the process of liquidation (solvent or insolvent) or bankruptcy as the case may be, by a person tasked with the function of ultimate

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[15] [1929] 2 KB 440.
[16] At p. 443.
[17] Section 273 is contained in Part XI of the IA which is headed "General provisions with regard to companies that are insolvent or in liquidation. "Officeholder" in respect of a company means inter alia, its administrator, or its liquidator.

distribution. The person who would be concerned with this process or have a proper interest in it and thus who would be a "person aggrieved" by an act, omission or decision of the officer engaged in this process would be a creditor in the case of an insolvent company and a contributory in the case of a solvent company. A debtor would also fall into this category as well as a person who is directly affected by the exercise of a power given specifically to that officeholder, and who would not otherwise have any right to challenge the exercise of that power.

[32] It is important to identify for the purpose of section 273, the capacity in which a person is praying in aid the relief being sought. Merely because a person may have "technical capacity" (if I may characterise it that way) as a creditor or shareholder/contributory, this alone would not suffice if the circumstances demonstrate that the relief is sought not in that capacity but in some other. This was recognised by Nourse LJ in **Re. Edennote**. I agree with and adopt those principles in deciding this question.

[33] The appellants say they are alleged debtors thus they fall within the classification of being "persons aggrieved". However, the Court was not referred to one single authority in which an "alleged debtor" (where the debt is denied) was so treated. It is quite difficult to see the basis on which an "alleged debtor" as distinct from "a debtor" of an insolvent estate would be concerned or affected by the ultimate distribution of an estate in liquidation. Such a person would be a complete outsider to the liquidation.

[34] I am not at all persuaded that the case of **Deloitte** is distinguishable on any substantive basis from the position here. In any event the language of section 273 is not as wide as the language under the provision of the Cayman Islands statute. I agree with Mr. Moss, QC that this works against rather than in favour of the appellants as even with the breadth of language which could encompass anyone, the plaintiff was unable to qualify as having standing as it could not show that it

had any legitimate interest in the relief sought. In the context of Part XI of the IA and specifically section 273, it seems to me that a person cannot be considered as being "aggrieved" unless that person has a sufficient interest in the outcome of an act, omission or decision taken by a liquidator in the liquidation or shortly put, a sufficient interest in the relief sought.

[35] Additionally, I can see no good reason for treating the dictum of Lord Millett in **Deloitte** as case specific. I consider it to be of more general import in a consideration of the issue of locus standi where equivalent relief is being sought. I find the following passage from Lord Millett's judgment in **Deloitte** particularly useful in analysing how the question of standing is to be approached:

> "Where the court is asked to exercise a statutory power, ... the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean... that he 'has an interest in making the application or may be affected by its outcome'. It means that he has a legitimate interest in the relief sought. Thus, even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an **insolvent company** on the application of **a contributory who is not also a creditor** .... The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. ...
>
> The company is insolvent ... The only persons who could have any legitimate interest of their own in having the liquidators removed ... are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. ... The appellants are not merely strangers to the liquidations; their interests are adverse to the liquidation and the interests of the creditors."[18]

[36] The appellants here do not suggest that they have any interest in the assets of Sentry or the manner in which they are to be distributed or spent. Their sole complaint is that of being sued by the Liquidators and are seeking to either prevent or restrain the pursuit of the US Proceedings against them mainly on the basis that the pursuit of such proceedings are vexatious and oppressive or otherwise an

[18] At pp. 491-492.

abuse of process. Thus, they invoke section 273 not as a creditor of Funds which are insolvent but in essence as a defendant in those proceedings. In this capacity, they are strangers to the liquidation. Further, as in **Deloitte,** their interests are adverse to the liquidation and the interest of the creditors.

[37] I do not accept that the necessity for showing a legitimate interest in the relief sought is an additional or inappropriate qualification in the determination of a "person aggrieved" as submitted by the appellants. To the contrary, such a consideration in my view is central to the question, whether a person qualifies as a "person aggrieved" for the purpose of seeking the relief sought. The dictum of Lord Millett is quite apposite to this case and I would apply and reiterate here: 'the standing of an applicant cannot...be considered separately and without regard to the nature of the relief for which the application is made.'

[38] I also do not consider that the appellants fall within an exception or are otherwise able to bring themselves within the category of "persons aggrieved" in the circumstances of this case. Here, they are alleging that the Liquidators are behaving in a vexatious and oppressive manner or their conduct in the pursuit of the US Proceedings is an abuse. In this regard, they have an obvious remedy which is actively being pursued by them in the US Proceedings. Thus, it cannot be said that they have no other recourse save for section 273. It matters not where the remedy is being or may be invoked. What matters is that there is a remedy otherwise available to the appellants. They are now actively engaged in the pursuit of it in the US Proceedings[19] and there is no assertion that the appellants will not receive equivalently fair treatment in the US.

[39] For the above reasons, I conclude that the appellants have not shown that they qualify as "persons aggrieved" for the purpose of the relief sought under section

[19] The appellants have applied in the US Proceedings to dismiss on substantially the same bases advanced before this Court for abuse of process as well as the ability to grant IA section 249 relief.

273. They apply in their capacity as mere defendants in the US Proceedings. In such capacity, they have no legitimate interest in the relief sought.

[40] Although the learned judge may have conflated the approach to the question of standing by seemingly incorporating the exercise of the discretion with the threshold question of standing and his reasoning may be somewhat difficult to follow he nevertheless came ultimately to the right conclusion. The appellants' complaints on this issue are not well founded and I would dismiss them. For the reasons given above, I would not disturb the learned judge's decision dismissing the application for the appellants' lack of standing.

[41] Having concluded that the appellants do not qualify as "persons aggrieved" they have failed on the gateway requirement for the grant of relief under section 273. Accordingly, I do not consider it necessary to delve into the question of the basis warranting the exercise of the discretion for granting relief on the assumption that the qualification has been met. Rather, I propose to consider the questions of issue estoppel, abuse of process and the viability of the section 249 claims in my consideration of the question whether the Liquidators should be restrained from pursuing the US Proceedings as a free-standing basis pursuant to the jurisdiction and power of the court given under section 24 of the Supreme Court Act.

Anti-suit injunction - the Court's broader jurisdiction

[42] The appellants argue that even if they fail on the section 273 threshold issue of standing, the Court must nevertheless consider their free-standing application for anti -suit relief in the exercise of the court's powers under section 24 of the **West Indies States Supreme Court (Virgin Islands) Ordinance**[20] to grant injunctions where the court considers it just and convenient to do so.

[43] Apart from reliance generally on the well-established principles guiding the court on the exercise of its discretion in granting an anti-suit injunction, the appellants

[20] Cap. 80, Laws of the Virgin Islands, Revised Edition 1991.

address the issue of abuse of process, vexation and/ or oppression on two main fronts:

Firstly, they say that the restitution claims should not be pursued in the US because as a matter of BVI law, the decision of the Privy Council in **Migani** creates an issue estoppel and, even if that were not so, the broader doctrine of abuse of process founded on **Henderson v Henderson**[21] would preclude any of the Funds from pursuing mistake-based restitutionary claims against any of the appellants (or any former shareholders) whether by attempting to re-argue the points decided against them or by seeking to raise new points that could and should have been raised in the trial of the preliminary issues and the subsequent appeals: **Johnson v Gore Wood & Co (a firm)**.[22] In support they point to the US District Court's decision in **Pasha S. et al Anwar v Fairfield Greenwich Limited et al** [23] in which there were allegations of recklessness on the part of the Funds' Administrators and which the court found to be sufficient to support such an inference. Accordingly, the appellants say that the judge was wrong to hold as he did (at paragraph 87), that it was for the US Court to decide whether the restitution claims should be pursued; that it was for this Court, acting to protect the integrity of its own judgment and processes to decide whether the effect of the BVI Proceedings is that the Liquidators cannot now pursue any further restitutionary claims.

Secondly, they say that the IA statutory avoidance claims ("section 249 Claims") should not be permitted to be pursued in the US Court; that if they were to be brought anywhere they should have been brought in BVI. This, they say, is primarily because section 249 on its own terms cannot be operated by any court other than the High Court of BVI. They accordingly contend that the learned judge was wrong to hold that it was for the US Court to determine the method for adjudicating the section 249 Claims.

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[21] (1843) 67 ER 313.
[22] [2002] AC 1 at pg.31 paras. A-E.
[23] 728 Federal Supplement, p.2d Series p. 372 (delivered 18th august 2010).

Developments in the US Proceedings

[44] Before serially addressing these issues, I observe that the US Claims have undergone amendments with other amendments proposed. Quite apart from alleging mistaken payments based on a mistaken view of the NAV of the Funds, the Liquidators allege that the Funds' Administrators (Citco Fund Services (Europe) BV and Citco (Canada) Inc.) did not give the article 11 certificates describing the NAV in good faith; that payment to some recipients of redemption monies were made via US accounts; and that some of the redeemers (some of the appellants here) received redemption monies knowing that the sums were not reflective of the NAV of the shares at the time of the redemptions.

The restitutionary claims – issue estoppel

[45] Queen's counsel, Mr. Hapgood asserts that apart from the Liquidators persisting with the same common law restitution claims in the US Proceedings, they have now sought to additionally allege in those proceedings that its agent, Citco (accepted as such in the PI proceedings), acted in bad faith and further allege recipient bad faith by asserting that some redeemers received payment either knowing or being reckless as to Madoff's Ponzi scheme. He says that the Liquidators are estopped on the principle in **Johnson** from making that complaint as they have known for years of Citco's behavior and further that as a matter of construction of article 11 of Sentry's articles Citco's bad faith is irrelevant. He contends that the Liquidators are acting inconsistently – on the one hand alleging mistake - on the other, alleging bad faith, and thus no mistake.

[46] Additionally, Queen's Counsel points to the fact one of the Preliminary Issues was the question whether good consideration had been given. This, he says, was a stand-alone issue, and all the courts of the BVI answered this question in the affirmative. Yet, the Liquidators seek to assert in the US Proceedings that no good consideration was given. He says that the whole point of ordering Preliminary Issues was to isolate the legal issues from the factual issues which legal issues, if determined in the appellants' favour would bring the litigation to an

end. Accordingly, if a party had a point which could and should have been taken this ought to have been put forward at that time for determination. Accordingly, he says, the Liquidators now seek to raise these points in the US Proceedings when they ought to have been raised in the BVI proceedings and are estopped from so doing. On these bases, Queen's Counsel says that the entirety of the US restitution claims is met by cause of action estoppel as the causes of action are the same. The claims are also met by issue estoppel as the same matters pleaded in the US Proceedings are the same as was pleaded in the BVI proceedings – the subject matter is the same, namely, the recovery of money (albeit in respect of particular or a different set of redemption payments) paid to redeeming shareholders, the issues are the same. If the Liquidators are not precluded from making these same claims then it is abusive and the court should step in and stop it. To Sentry's position that there was a reservation or "carve out" in the Preliminary Issues as to allow for bad faith to be pleaded, the appellants point to what Sentry accepted in respect of Preliminary Issue 3 before the Privy Council. In Sentry's case, after stating the third issue as being 'whether Sentry is precluded from recovering money paid to members of the company who received such 'certificates' on the grounds that the amount paid exceeded the true Redemption Price' Sentry stated as follows:

> "There is no longer any dispute over the third issue. Fairfield [Sentry] accepts that if (contrary to its main case any of the Documents is a 'certificate' within Article 11, then the Company cannot maintain a cause of action based on restitution for the purpose of recovering any overpayment so certified."

This was recorded by Lord Sumption in his advice on behalf of the Board at paragraph 6 in which he stated:

> " It is now accepted, and rightly accepted, by the Fund [Sentry] that if they [referring to the 'certificates'] were binding the present claims must fail. The fourth issue was whether the [d]efendants have a defence on the ground that by their surrendering their shares they gave good consideration for the money that they received on redemption."[24]

[24] Fairfield Sentry Ltd (in liquidation).-v-Migani and others [2014] UKPC 9.

The Board held that the transaction documents (save for the information posted on the Citco website) were certificates and thus the Fund was bound by the redemption terms to make payments per the NAV per share determined by the directors at the time of redemption such that the shares having been surrendered in exchange for the amount properly due under the articles the redemption payments are irrecoverable. In conclusion, the Board dismissed the Fund's appeal on Issue 4 - in effect upholding the good consideration defence. This finding, the appellants say, is binding on all the parties and covers all the redemption claims in the US and is therefore not one which it is more "logical" to leave to be determined by the US court as reasoned by the trial judge. The appellants say further that even though Sentry has further amended its pleading in the US action to suggest that the restitution claims are governed by US law having regard to the subscription agreements, the Privy Council has already ruled that New York law was irrelevant as none of the issues raised depended on the terms of the subscription agreements but depended wholly on the construction of the articles which is governed by BVI law. The contractual claims were accordingly adjudicated on by the Privy Council and equity cannot be prayed in aid to wipe out contractual claims. For these reasons, the appellants say the US claims are all caught by cause of action estoppel and on the principle in **Henderson** (issue estoppel) and are therefore an abuse. The appellants complain that the learned judge did not grapple with the issues of vexation and oppression nor did he mention the considerations of comity or the multiplicity of proceedings. They say that on this application (sought as an alternative to section 273 relief) the learned judge merely held that it was "more orderly and logical" for the US Court to decide which claims to entertain. This approach, they say. was a misdirection of law as to the test for granting anti-suit relief and was thus plainly wrong such that this Court should consider the matter afresh.

[47] He further submits that it is not open to Sentry to contest the validity of the certificates in light of section 31 of the **BVI Business Companies Act, 2004**[25] (the "BCA"). Section 31 of the BCA says in part:

> " A company ... may not assert against a person dealing with the company ... that ...
>
> (e) a document issued on behalf of a company by a director, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine."

Additionally, he argues that BVI is plainly the appropriate forum for dealing with BVI law governed claims and as those claims are bound to fail in a BVI court, the Liquidators are seeking to obtain a ruling in the US Court which is not best positioned to properly apply BVI law. He states that it is possible that the US court will apply US law estoppel and not estoppel per BVI law which would be unjust to the appellants.

[48] The appellants also argue that quite apart from the fact that Citco's bad faith is a point which should have been taken much earlier in the proceedings, the assertion of Citco's bad faith which arguably may be attributable[26] to Sentry gets Sentry no further as it is trite principle that a party is not allowed to take advantage of its own wrong.[27] Further, it defeats the restitution claims premised on mistake. The appellants make reference to the decision of the Court of Appeal of the Cayman Islands which goes further than the Privy Council's decision as that Court opined that it was not permissible to reopen an NAV retrospectively on the ground of fraud, whether or not the company was complicit in it.

Respondents' case

[49] Queen's counsel Mr. Moss, on behalf of the Liquidators, argue that the US claims are not only common law claims but are also based on the contract contained in the subscription agreements which provide for New York jurisdiction in respect of

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[25] Act No. 16 of 2004, amended by Act No. 26 of 2005, Laws of the Virgin Islands.
[26] See: Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No. 2) [2016] AC 1.
[27] See: Alghussein Establishment v Eton College[1991] 1 All ER 267.

redemption payments which were not the subject of the BVI restitution claims. Further, they assert that the Privy Council decision in **Migani** bars those claims unless Sentry can show that statements of the NAV were either not issued or not received in good faith. They have now asserted in their amended case in the US Proceedings, bad faith against Citco and recipient bad faith in respect of some of the appellants. They also say that the US claims also include statutory avoidance claims and the Privy Council decision has no effect on those claims.

[50] They say that New York is an appropriate forum because:

(a) the appellants entered into the subscription agreements which are governed by New York law and in respect of which they expressly waived any objection to the US jurisdiction New York;

(b) New York is the only forum in respect of which Sentry's claims against all defendants can be tried in a single forum and in relation to most defendants (including the appellants) now represents the only forum in which any claim can be pursued at all;[28]

(c) All the same merits based and proper forum points sought to be made here are currently being run in the US Proceedings together with hundreds of other defendants save that these appellants are additionally pursuing this appeal, thus having two bites at the cherry and creating the risk of having conflicting decisions on points of law which include US law;

(d) The US Bankruptcy Court in New York is intimately familiar with the facts of the Madoff fraud having addressed numerous cases and matters relating to it. The New York courts have a long experience of dealing with the legal consequences of Ponzi frauds unlike UK and BVI where that experience is limited;

(e) The Bankruptcy court in New York is familiar with applying English common law principles and foreign insolvency laws such as that of the UK

[28] Claims in BVI would now generally be time barred.

which is virtually identical to BVI insolvency law and regularly apply similar US bankruptcy law provisions.

[51] The Liquidators say that the arguments put forward by the appellants for restraining the Liquidator's pursuit of the US Proceedings are unmeritorious because:

(a) as it relates to the statutory avoidance claims, it is for the US Bankruptcy Court to decide whether it will be able to apply BVI law. Further, they assert that they produced uncontradicted expert evidence from their US lawyers (unlike the appellants) to the effect that the US courts can apply BVI law insolvency avoidance remedies in the present US claims;

(b) the questions of US law are already before an expert judge of the US Bankruptcy Court who administers US insolvency law on a daily basis and should be decided by him and not prejudged by the BVI courts;

(c) if the appellants consider that the US claims lack merit they can, as they have done along with hundreds of other defendants, apply to the US court to dismiss them. If the US court dismisses the US claims then the Liquidators will not be able to further pursue them but if it rules that the claims are arguable then the Liquidators' decision to pursue them cannot be criticised.

In short, the Liquidators say that the contentions raised by the appellants to prevent them from pursuing the US Proceedings are defences that can and should be properly raised before the New York Court where an order has already been made for scheduling all such arguments to be heard by that Court. The Liquidators say that there are no exceptional grounds which warrant the BVI Court making the decision as to whether the New York actions should or should not proceed as the New York Bankruptcy Court is well placed to so decide in respect of the actions before it.

[52] Additionally, the Liquidators contend that the issue as to whether the US claims are barred by issue estoppel or abuse of process (the appellants contending that the certificates were issued by Citco in bad faith because it could and should have been raised in the Preliminary Issues hearing before the Privy Council in **Migani)** is one for the US court to decide according to the law which it decides to apply to that question and further that under BVI/ English law, the question of whether a claim presents an abuse of process would be a matter for the law of the forum – in this case New York law.

[53] The Liquidators also make the point that all issues of fact were carved out of the Preliminary Issues hearing for precisely that purpose. The Funds had not as yet had disclosure of the underlying documents from various parties including Citco; that issue 3 – (i.e whether as a matter of law (including the construction of article 11) the fact that a certificate had been issued by Citco in good faith would preclude the Funds from bringing a restitution claim) was conceded by the Funds before the Privy Council; but that left open the issue as to whether the certificates were in fact issued by Citco in good faith which required a review of the underlying disclosure). In essence, the Funds say it was this express reservation or 'carve out' from Preliminary Issues 1-3 which permitted them to later be able to assert facts (Citco's bad faith, as well as recipient bad faith) that took the matter outside of the decision of the Preliminary Issues as ordered. These factual issues, the liquidators say, are the very sort of matters that the trial judge wished to ensure was kept open should such facts subsequently become known. Thus, based on facts now asserted, it cannot be that the Funds are still precluded from bringing restitution claims against the appellants.

[54] To the appellants' contention that the Liquidators were aware of such facts at least during the later stages of the BVI Proceedings, the Liquidators say that the evidence of Citco's possible lack of good faith had only become available about the time of the Privy Council decision and was not available to argue points in relation to lack of good faith at the time of the summary judgment application and is now open to them

to make arguments on that basis in the US Proceedings. As such, the US Proceedings are not caught by the **Henderson** and **Johnson** principles of abuse of process.

[55] In countering the appellants' argument to the effect that Citco's bad faith would in any event be attributable to the Funds thus precluding recovery in reliance on the decision of the UK Supreme Court in **Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No. 2)**,[29] the Liquidators say that the rules of attribution depend on the relevant context and that here the Funds in seeking to recover payments caused by Citco's bad faith are not "taking advantage of their own wrong" but rather seeking to restore to the Funds the loss they have suffered as a result of their agent's wrong and their own mistake and that the good faith requirement in Article 11 should be interpreted so as to protect not only the redeeming members but those remaining. This point, they say, makes out an arguable case to be put before the US Court. If the appellants wish to argue that the common law claims before the US Court are bound to fail, they must make that argument before that court which has been seised of the actions for years and not seek to have this Court in essence prejudge the matter by enjoining them.

[56] The Liquidators argue that the appellants' contention that the US Proceedings are vexatious and oppressive is wrong because:

(a) it cannot be right for the appellants to require a satellite mini trial in BVI without discovery or cross-examination or expert evidence in BVI of matters in issue in the US actions in order to show that the Funds are wrong and therefore there is vexation or oppression;

(b) the appellants expressly consented to the non-exclusive jurisdiction of New York in respect of disputes arising in connection with their investment in the Funds. Thus, there can be no question of oppression or vexation in the bringing of proceedings against the appellants there;

[29] [2016] AC 1.

(c) New York is the most appropriate forum for trial of the claims and is perhaps the only forum in which the Funds can bring claims against all of the many defendants (of which the appellants are but a small number);

(d) the appellants have previously argued that New York law governs the restitution claims;

(e) if the appellants consider the claims to be ill founded then they can press their arguments for dismissal before the New York Court as ordered by that court and no sensible reason has been put forward as to why this would not be an adequate remedy and that the concern for the protecting the integrity of this court's processes is not justified as courts are routinely called upon to apply foreign insolvency law as is recognised by section 467(5) of the IA and as under section 426 of the **English Insolvency Act 1986** in relation to disputes between parties before it.

[57] The Liquidators say it is not the case that the common law claims are caught by the Privy Council decision in **Migani** as urged by the appellants because:

(a) the claims related only to certain redemption payments made in 2003 and 2004 which payments are not the subject of the US Proceedings. The Claims in the US Bankruptcy court relate to payments which have not been the subject of the BVI Proceedings but which have at all times been the subject of proceedings before the US courts only;

(b) nothing in **Migani** addresses the question whether Citco acted in bad faith and if it did whether the Funds are precluded from recovery on the basis that Citco's bad faith is to be attributed to the Funds;

(c) the Funds are not seeking to go behind **Migani** but rather is seeking to apply it to the facts as pleaded before the US Court to lead to the conclusion that the Funds are entitled to recover;

(d) in any event the effect of **Migani** on those US claims is a matter for the US Bankruptcy Court to decide.

Discussion

A timely reminder of the principles guiding the approach to the grant of anti-suit injunction is helpful. In **Deutsche Bank AG and another -v- Highland Crusader Offshore Partners LLP and others,**[30] the English Court of Appeal summarised the principles thus:

> " 1. Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do. 2. It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. 3. The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there. 4. If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity. 5. An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal polices may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention. 6. The prosecution of parallel proceedings

[30] [2010] 1 WLR 1023.

in different jurisdictions is undesirable but not necessarily vexatious or oppressive. 7. A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement. It does not follow that an alternative forum is necessarily inappropriate or inferior. (I will come to the question whether there is a presumption that parallel proceedings in an alternative jurisdiction are vexatious or oppressive). 8. The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."[31]

[58] **In Barclays Bank Plc v Homan & others**[32] Hoffman J (as he then was) in the context of insolvency law, had this to say:

> "Today the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and in particular, that both comity and commonsense suggest that the foreign judge is usually the best person to decide whether in his court he should accept or decline jurisdiction, stay proceedings or allow them to continue. The principle, as Lord Scarman said in *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39 at 57, [1985] AC 58 at 95, is that:
>
> > '[The] equitable right not to be sued abroad arises only if the inequity is such that the *English* court must intervene to prevent injustice...'
>
> In other words, there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court. So the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressivein the domestic sense, will not ordinarily in itself justify the grant of an injunction to restrain their prosecution in a foreign court. The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression: *Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526 at 534, [1986] QB 689 at 700, per Lawton LJ."

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[31] At p. 1036.
[32] [1993] BCLC 680.

[59] These principles have been approved and applied in several decisions of this Court.[33] Hariprashad-Charles J applied the same principle as Hoffman J in the context of insolvency in **Re Gold & Appel Transfer SA**.

[60] It is worthwhile being reminded also that ultimately this is an appeal from the exercise of a discretion by the trial judge. The principles on which an appellate court will interfere is trite. In **Hadmor Productions Ltd and others v Hamilton and another**[34] Lord Diplock stated thus:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."[35]

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[33] See: Kenneth M. Krys and Joanna Lau (as Joint Liquidators of Fairfield Sentry Limited) v Stitchting Shell Pensioenfonds et al BVHIC (COM) 2009/0136 (delivered 17th March 2011, unreported), Andrey Adamovsky et al v Andriy Malitskiy BVIHCVAP2014/0031 (delivered 3rd February 2017, unreported).

[34] [1983]1 AC 191

[35] At p. 220.

An application of this principle by our Court may be found in the dictum of Floissac CJ in **DuFour and others v Helenair Corporation ltd and others.**[36]

[61] Having considered the arguments put forward by both sides, I am more persuaded by those put forward on behalf of the Liquidators. The US Proceedings have been ongoing for a considerable amount of time not only as against the appellants here, but hundreds of other defendants of which the appellants are but a small fraction. There is no complaint nor can there be that New York is not an appropriate forum in which to try the claims in respect of all the parties and that at as matters now stand it may be the only forum in which to try them since limitation periods in BVI may operate as a bar. More importantly however, I am not satisfied that the US claims are hopeless or are doomed to fail for these reasons:

i. The US Claims are not in respect of the same redemption payments as were before the BVI courts. Although the claims arise from similar redemption payments which give rise to similar legal issues they are now encased within a factual context which require ventilation of other considerations based on the facts as pleaded in those claims. The questions as to whether certificates were issued in bad faith, and if so whether such bad faith is attributable to the Funds and thus precluding recovery as well as the question whether there was recipient bad faith in respect of some of the redeemers seem to me to raise questions which are all arguable. In my view, it would be wrong for this Court to seek to make a summary determination as to the merits or demerits of these issues which have been squarely placed before the US Court in the US Proceedings.

ii. It seems to me to be at least arguable that **Migani** was decided strictly on the Preliminary questions of law as framed by the court and likewise answered in that context. This lends credence to the purpose of the express carve out contained on paragraph 2 of the trial judge's order which clearly contemplated that facts may become known at a later date

[36] (1996) 52 WIR 188.

which may give rise to different considerations for determination on the basis of those facts which may be established. Those factual assertions are before the US Bankruptcy Court for determination. The Preliminary Issues in **Migani** did not address the issues of bad faith whether on the part of the giver or receiver of a certificate pursuant to Article 11 of Sentry's articles or indeed any question as to attribution of Citco's alleged bad faith as agent of the Funds. In any event, in my view, a judge of the US Bankruptcy Court is quite able to decide if and to what extent **Migani** has determined any of the issues in dispute before it in the context of the claims as there pleaded.

iii. I am aware that Queen's Counsel Mr. Hapgood has urged that while there may be said to have been a 'carve out' in respect of Preliminary Issues 1 to 3, the same cannot be said of Issue 4 -(i.e. the "good consideration" defence) which was upheld in **Migani**. He contends that determination of this issue finally and conclusively in **Migani** provides a complete answer to the Liquidators' US claims. Here again, it is my respectful view that the question whether this is the effect of **Migani**, is aptly one within the purview of the US Bankruptcy court to decide within the context of the US claims and this court should not seek to preempt its consideration of it. It seems to me quite arguable that Issue 4 in **Migani** was answered strictly in the context of the construction to be placed on what constituted a certificate for the purpose of article 11 of the Fund and proceeded on that basis to determine the question of good consideration. Nothing whatsoever was addressed in respect of lack of good faith nor could there be, as no evidential or pleaded basis for such consideration was before the Board. For these and those explained in the preceding sub paragraphs, I am not prepared to hold that the conclusion on Issue 4 in **Migani** provides a complete answer to the US claims.

[62] Additionally, the appellants are fully engaged in the US Proceedings and have moved along with other US defendants to dismiss the US Proceedings in essence

on the same grounds of cause of action estoppel, issue estoppel and **Henderson** type abuse and oppression as deployed before this Court. I can do no better than borrow from the dictum of Hoffman J in **Barclays Bank plc** in repeating that 'comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction ...'. I can see no good reason for making the decision here to stop the US Proceedings when the US Court is quite seised and has been so seised for some time of all the issues in the proceedings and is quite able to make a determination there as to whether the proceedings before it are vexatious and oppressive. Further, it cannot be said that the appellants will not be treated to a similar quality of justice there as here. The appellants have availed themselves of the foreign procedure for dealing with vexation and oppression there and the US Court has made orders scheduling the hearing and determination of such challenges. If they are successful on their motion to dismiss the US claims then the Liquidators will be able to proceed further. A refusal by this Court to restrain the Liquidators from the pursuit of the US claims does not however operate to prevent the appellants from pursuit of their Dismissal Applications which leaves open the possibility of obtaining a decision there to the opposite effect. Commonsense and the interests of comity require that such a result ought to be avoided.

[63] I am not convinced of the need to embark on a determination of similar issues of abuse of process or vexation and oppression when the same issues are being fully argued before the US Court where the claims are made. The running of parallel arguments before two different courts in respect of the same issues strikes me as a most undesirable way of addressing these matters. In this regard, I am inclined to agree with Mr. Moss, QC that the pursuit of this appeal in these circumstances may be viewed as an abuse of process. This, to my mind, is a factor which would weigh in favour of not exercising the discretion to restrain the pursuit of the US Proceedings were it open to this Court to exercise an original discretion.

[64] The matter however does not end here, as the appellants argue that the US Court cannot grant IA section 249 relief as only the BVI Court has jurisdiction and power to grant such relief. That being so, they argue that the section 249 (statutory avoidance) claims are doomed to fail and the Liquidators ought therefore to be restrained or prevented from dragging the appellants into having to defend such a hopeless course. I now turn to a consideration of this issue.

Section 249 claims – (statutory avoidance)

[65] The Funds' claims in the US seek relief under Part VIII of the IA in respect of alleged unfair preferences and undervalue transactions and seek 'judgment pursuant to section 249 of the BVI Insolvency Act.' Section 249 of the IA provides for an office holder to apply to the High Court to set aside a transaction which qualifies as a voidable transaction.[37] The only right of action given where a transaction qualifies as a voidable transaction is to an office holder to apply to the High Court under section 249 to set aside such transaction and for making other consequential orders such as restoration and revesting etc.

[66] The appellants' primary argument in respect of these claims is that section 249 of the IA on its own terms cannot be operated by any other court other than the High Court of BVI.[38] They say that the US Bankruptcy Code (USC Title 11) does not confer on the US Court an ability to exercise the statutory power of the High Court under section 249 of the IA. Additionally, the appellants say that the US District Court has held that because there are no assets within the US to which the Funds can make a claim the US Bankruptcy Code does not grant the US Court power to grant relief under section 249 of the IA and that even if it is finally determined that the claims are a "non-core matter'[39] there is still nothing to confer on the US Court power to grant BVI - IA section 249 relief. Thus, they argue that only the BVI High Court can make such an order. No foreign court can do so. Accordingly, they say that since section 249 confers no power on the US Court to grant such relief there

[37] Either because it is considered to be an unfair preference or a transaction at an undervalue.
[38] "Court" is defined under section 2 of the IA as " the High Court".
[39] That is in principle falling within the subject matter jurisdiction of the US Court because they are related to a case under the US Bankruptcy Code.

is no basis on which the Liquidators can advance the statutory avoidance claims in the US since they will be of no effect and thus the court should not allow its officers to harass the appellants with misconceived and hopeless claims.

[67] The appellants further point to a ruling by the US District Court which has held that the Funds' statutory avoidance claims do not arise under the US Bankruptcy Code. They are not brought pursuant to any substantive avoidance provisions of US bankruptcy law and the US Bankruptcy Code does not confer any power on the US court to exercise the powers of the BVI High Court under the Act. The appellants rely on the decision of Chief Judge Preska in **Re Fairfield Sentry Ltd.**[40] in relation to the Fairfield litigation. Chief Judge Preska opined that:

> "there being no assets within the US to which the Funds laid claim in the US Proceedings, Chapter 15 did not allow them to bring proceedings in the US to recover assets not located within the territorial jurisdiction of the US;
>
> Chapter 15 did not create a power to grant the relief sought by the Funds;
>
> The US Court would not have subject matter jurisdiction and no power under Part VIII of the IA unless the proceedings are claims arising under or related to a case under Title 11;
> The Remand Actions were not proceedings 'under' or arising in a case under Title 11 (called "core proceedings") and thus the claims were not 'core proceedings.' That having subject matter jurisdiction but not core jurisdiction did not give power to the US Court to grant the requested avoidance relief."

Put shortly, no power is contained in Chapter 15 of the US Bankruptcy Code to grant such relief and secondly section 249 of the IA is a power residing only in the BVI High Court and no other.

[68] The appellants contend that the Funds' reliance on two US cases namely **Re Atlas Shipping A/S**[41] and **Re Condor Insurance Ltd**[42] as supporting the notion that there might be some power in the US to grant relief is misplaced and are in any event distinguishable from the present case as:

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[40] 458 B.R.665.
[41] 404 B.R. 726.
[42] 601 f. 3D 319 (5th Cir., 17.3.2010)

(i) they do not deal with section 249 claims or the like;

(ii) there were assets in the US to which the Liquidators laid claim; and

(iii) the US Court was not purporting to exercise the statutory powers of a foreign court.

By contrast, the appellants say the claims here are not in respect of assets in the US, and are claims solely for discretionary statutory relief under the **BVI Insolvency Act**. The claims are not for an entitlement or recovery of assets in the US.

[69] In **Atlas** the order was made under specific provisions of Chapter 15. It involved neither the determination of a cause of action arising under foreign law nor the exercise of a statutory power of a foreign court. In **Condor,** a decision of the US Court of Appeals of the Fifth Circuit, a claim was being made to assets in the US on the basis that they belonged to the insolvent Nevis company and not on the basis that the US Court could apply the statutory powers of a foreign court. The orders simply reflected the legal position as to title under Nevis law in light of the Nevis statute.

[70] The appellants say that the Funds have not identified one single case on the point they must meet, namely that section 249 of the IA confers power only on the BVI High Court, there are no assets in the US and no provision of Chapter 15 of the US Code which empowers the US Court to exercise the statutory power given to a foreign court even if it be established that the statutory avoidance claims fall within the US Court's non-core jurisdiction.

[71] The Funds say that the provision in the IA referencing the making of an application to the Court is a procedural provision rather than substantive. They posit that where the foreign law contains a restriction on the ability to bring a claim, the question whether that affects the ability of the foreign court to grant relief depends on whether the provision is regarded as substantive or procedural. If procedural then the court goes on to apply the substantive foreign law in accordance with its

own procedural rules. They contend that rules governing or regulating the mode or conduct of proceedings such as provisions stating the identity of a particular court has been regarded throughout the common law world as the classic example of rules of procedure that are to be disregarded when applying foreign law. They cite **Harding v Wealands**.[43] In support of this contention.

[72] The Funds say that it is common place for the courts of one country to apply the law of another including statute law to resolve a dispute between parties before them. In the area of insolvency law, this is quite common given the long-recognised need for cross-border cooperation between courts and point by way of example to section 467 of the IA which expressly provides for the BVI court to apply BVI law or foreign law when providing relief in connection with insolvency proceedings in BVI that are ancillary to the main proceedings taking place in another forum. In similar vein is section 426(5) of the **UK Insolvency Act** which has been used for this purpose in **England v Smith**[44] where the English Court of Appeal applied an Australian law discretion which was expressly addressed to and given to Australian courts by the Australian Corporations law. Queen's Counsel Mr. Moss says this is not surprising because if a foreign court empowered by its own law to apply foreign law such as foreign insolvency law much of which powers are discretionary and could not exercise a discretion addressed to a foreign court, there could rarely be any useful application of foreign insolvency law. He contends that a US Bankruptcy Court can apply foreign insolvency statutes including avoidance provisions arising under a foreign statute to a dispute before it. Apart from the cases of **Atlas Shipping** and **Condor** he refers to the case of **In Re Hellas Telecommunications (Luxembourg) II SCA**[45] in which Judge Glenn of the Bankruptcy Court for Southern District New York (where the present claims are proceeding) cited with approval the case of **Condor** and opined that, '[t]his court has previously recognised and the Fifth Circuit has held that section

[43] [2007] AC 1.
[44] [2001] Ch.419 (CA).
[45] 524 B.R. 488 (Bankr., S.D.N.Y., 29.1.2015).

1521(a)(7)'s restrictions...do not necessarily bar a foreign representative from asserting an avoidance claim under the applicable foreign law.'[46]

[73] More recent authoritative pronouncement by the US Bankruptcy Court is found in **In Re Hellas Telecommunications II (Luxembourg) II SCA ("Hellas II").**[47] There the liquidators sought to bring an avoidance claim under section 423 of the UK Act (equivalent to section 246 of the IA) in the US Bankruptcy Court in New York. The defendants argued that the US Bankruptcy Court lacked the power to grant relief under section 423 because: (i) that provision was directed at the English High Court and (ii) the provision was framed in terms that required the exercise of a discretion – 'the court may make ... such orders as it thinks fit...' In essence, the defendants in **Hellas II** put forward the same arguments being put forward by the appellants here. Judge Glenn concluded that the court had subject matter jurisdiction over the section 423 claim and that conclusion he said, was bolstered by these observations:

> " First, section 423 (4) of the Insolvency Act appears to be a procedural venue provision clarifying where a section 423 claim may be brought in the UK ... While the Court is bound to apply the substantive law of the UK to adjudicate the Section 423 Claim, it is not bound to follow UK procedural law... Second, neither Isaacs nor Moss has identified any English decision indicating that section 423(4) is an exclusive jurisdiction provision. However, even if section 423(4) were an exclusive jurisdiction provision, this Court is not bound to enforce it. ... Consequently the Section 423 Claim is not futile on the basis that the court lacks subject matter jurisdiction over such claim."

He also rejected the submission that the US Bankruptcy Court could not grant section 423 relief observing that if that position was right then Liquidators would be unable to avoid undervalue transactions unless personal jurisdiction could be established against the debtor in the UK which approach would run counter to the fostering of international cooperation in insolvency matters.[48]

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[46] At p. 523, footnote 37.
[47] 535 B.R 543 (BKRTCY.s.d.n.y. 2015). This had not yet been decided at the time of the first instance decision.
[48] 535 B.R 543 (BKRTCY.s.d.n.y. 2015) at p. 569.

[74] On the basis of **Hellas II**, the Funds accordingly contend that in the BVI or UK nothing turns on whether the law is procedural or substantive and that the US Court was not there deciding that the UK Court must first decide whether the section conferred exclusive jurisdiction. Rather, the US court was pointing out that no decision had been identified which showed that the provision conferred exclusive jurisdiction. They say that there is nothing in the IA which prohibits or restricts application by a foreign court and there is no decision emanating either from the UK or BVI on this point; that on the analysis of **Hellas II** the US Court can clearly grant relief in aid of and assisting BVI liquidations and accordingly it is clearly arguable that the US Court can grant section 249 relief. The appellants have therefore not discharged the burden of showing vexation or oppression.

[75] In any event, the Funds say that the reference to 'High Court' is procedural and that the appellants were unable to cite any UK authority where the similar provision was treated as being substantive. They say that as in the UK, the BVI provision is merely an allocation provision - in essence providing where you may bring your claim and that the IA shows a consciousness of other courts.[49] This, they say, supports the position that reference to 'Court' is procedural. They also argue that the fact that the section provides for a discretion makes no difference to a foreign court applying the law and that if a discretion was a bar then the English Court could not use the provision as they did in **England v Smith** and that there is no distinction to be made by the fact that UK law allowed the UK to use or apply foreign law.

[76] The Funds further contend that the cases of **Carlyle Capital Corporation Ltd. v Conway**[50] **(Carlyle I and Carlyle II)**, decisions of the Guernsey Court of Appeal relied on by the appellants as supporting their proposition that the BVI High Court is the only court capable of granting section 249 relief are distinguishable. Firstly, they point to the fact that it involved a normal claim of wrongful trading under a

[49] Section 2 of the IA also carries the definition" Virgin Islands Court" as meaning ' any court having jurisdiction in the Virgin Islands' and makes reference to a Virgin Islands Court in sections 8, 52 and 174.
[50] Guernsey Court of Appeal – judgment 11/2012, 23.3.2012; Carlyle II [2013] 2 Lloyd's Rep.179.

provision of the Guernsey law and did not engage insolvency law coming by way of Chapter 15 of the **US Bankruptcy Code** and that there, on the experts' evidence, it was tacitly accepted that the Delaware Court did not have jurisdiction to consider all the claims. This is unlike the case here where Mr. Moulton, a lawyer in New York has put forward evidence (without objection) on New York law and who has opined that the US Bankruptcy Court is capable to granting section 249 IA type relief in the US Proceedings.[51] Also, the Liquidators here have been granted recognition under Chapter 15 of the **US Bankruptcy Code** and the US Proceedings are pursuant to that recognition whereby the US Court is rendering assistance to the BVI Court which supervises the main insolvency proceedings of the Funds. In **Carlyle I** the Guernsey Court of Appeal held that '[a]s far as wrongful trading is concerned, the Royal Court under the 1994 law is the only court which has jurisdiction: see the references to the Court in the 1994 Law...'. In **Carlyle II** it held that 'Guernsey was the only jurisdiction in which all causes of action, common law and statutory could be pursued and the statutory insolvency remedies were freighted with public interest considerations." Mr. Moss says however, that there is no dictum suggesting that the Guernsey statute bars any other court from exercising the remedies and if this is the effect of the **Carlyle** it would be inconsistent with the English decision in **England v Smith**.

[77] The Funds also distinguish the case of **Zi Corp v Steinberg,**[52] a Canadian court decision cited by the Appellants in relation to a dispute arising under the Alberta Business Corporations Law in respect of internal corporate governance. In that case ***Zi*** sought to restrict the Receiver's ability to vote ***Zi's*** shares pursuant to section 180 of the Act. The Court opined by reference to a series of other decisions dealing with oppression remedies that '... the domicile of the corporation is the proper jurisdiction to deal with matters of internal corporate governance and the status of the corporation: the language of the governing statute and considerations of comity and perhaps more generally, public policy.' The Court

[51] No evidence of US foreign law was led by the appellants.
[52] 2006 ABQB 92 (Alb QB).

then opined that the wording of the section designating the court coupled with the authorities cited led to the conclusion that the intent of the legislature was to provide that court with exclusive jurisdiction in relation to the relief available under section 180 of Act. It was also found that the matters related to matters of internal governance and thus should be dealt with within the jurisdiction of the corporation's domicile. The Funds point out that **Zi Corp,** was not a case about insolvency but rather one about internal corporate governance and that all the Canadian cases dealing with internal corporate governance are not on point at all in respect of the instant proceedings.

[78] In summary, the Funds say that the US Proceedings do not attract the principle in **Masri v Consolidated Contractors International (UK) Ltd and others (No 3)**[53] as the Funds are not seeking to re-litigate claims already made and decided because the US Proceedings:

(i) are in respect of different redemptions albeit against the same parties based on lack of binding certificates due to lack of good faith;

(ii) they include statutory avoidance claims;

(iii) additional claims in restitution due to knowing recipient bad faith; and

(iv) these issues were never pleaded, argued or decided by the Privy Council in **Migani**.

Discussion

[79] Having considered the arguments put forward by both sides I find the arguments put forward by the Funds to be more persuasive. It would be most unusual for the domestic legislature to expressly confer powers on a foreign court, but it has never been the understanding that a domestic court is unable to apply foreign law in relation to a dispute between parties before it. It is commonplace where international trade and international business disputes are the order of the day. The focus of international business companies such as the Funds is for the conduct of offshore or international business. This is all the more so in relation to

[53] [2008] EWCA Civ 625.

matters of insolvency as it is well recognised that cross-border cooperation between courts is essential to the fair and effective operation of liquidation schemes for the fair and equal benefit of all creditors. It is now widely accepted and consistent with the universality principle that all creditors should be treated equally under the same law. I am inclined to agree with Mr. Moss that as a policy reason it could not be appropriate for BVI to provide for international business companies to conduct international business outside of BVI and not expect a foreign court to be able to apply BVI law to matters in dispute involving them before their courts. But it is clear from the IA itself that there is full recognition of cross-border cooperation. This is encapsulated in Parts XVIII and XIX of the IA which deals with cross-border insolvency and orders which may be made in aid of foreign proceedings. These parts of the IA capture the essence of reciprocity and comity between countries in insolvency matters. It would be absurd indeed were the BVI court able to grant relief in aid of foreign proceedings but a foreign court could not grant relief in aid of BVI insolvency proceedings.

[80] I am satisfied that the use of the word "Court" in section 249 of the IA is not a an expression giving exclusive jurisdiction to the BVI Court to treat with statutory avoidance claims and for granting relief. Rather, it seems to me to be simply an allocation provision having regard to the recognition by the makers of the IA of other Virgin Islands Courts. In my view, it is a procedural provision which merely directs where a claim may be made. The Canadian decisions relied on by the appellants are clearly distinguishable. Treating with insolvency matters is quite a different thing from dealing with matters affecting the internal management or governance of a company which must clearly be subject to the law of its domicile. Additionally, here the BVI Court can exercise no personal jurisdiction over the bulk of the defendant parties in the US Proceedings.

[81] In any event, were I in doubt as to the viability of the statutory avoidance claims before the US Bankruptcy Court, that Court's decision in **Hellas II** provides a clear signal as to their viability. These claims were not before the BVI court and now

cannot be, owing to time limitations. I can see no good reason for prohibiting the US Bankruptcy Court from rendering assistance to the BVI main insolvency and which may inure to the fair and equal treatment of all of the Funds' creditors. In this context, this cannot be viewed as harassment or as being vexatious and oppressive to the appellants, nor can it be perceived as an affront to the BVI Court or its processes. Accordingly, I would hold that the appellants have not been able to discharge the burden of demonstrating that the statutory avoidance claims are hopeless and that the Liquidators should be enjoined from pursuit of them.

Conclusion

[82] For the reasons explained above, I am of the view that the appellants do not have standing under section 273 of the IA to apply for the restraint of the Liquidators in pursuing the US Proceedings. There is therefore no reason for disturbing the decision of the trial judge refusing the application to grant such relief. I am also of the view that the appellants have not demonstrated that the US Proceedings are to be restrained as being vexatious, oppressive, an abuse of process or are otherwise hopeless. Accordingly, there was no error by the trial judge in generally dismissing the applications. Accordingly, for all the reasons given, I would dismiss the appellants' appeals in their entirety.

Costs

[83] The respondents' costs on the appeals shall be borne by the appellants and shall be fixed at two thirds of the costs assessed on the applications in the court below in accordance with rule 65.13 of the Civil Procedure Rules 2000.

Note

[84] Finally, I express my gratitude to all counsel for their detailed written and oral submissions which were of much assistance. I do hope I may be forgiven for the

delay encountered in completing this judgment. This was due to an exceedingly heavy court calendar over the law year as well as personal intervening circumstances beyond my control.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the court

Chief Registrar