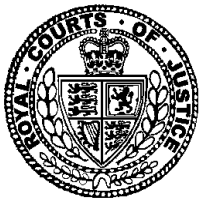

Neutral Citation Number: [2010] EWCA Civ 137

A3/2009/1565 & 1643
CAO No. 13091

IN THE COURT OF APPEAL
(Civil Division)
ON APEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION
(COMPANIES COURT)

IN THE MATTER OF STANFORD INTERNATIONAL BANK LTD

AND

IN THE MATTER OF THE *CROSS BORDER INSOLVENCY REGULATIONS 2006*

BETWEEN:

RALPH STEVEN JANVEY
(AS RECEIVER OF STANFORD INTERNATIONAL BANK LTD)

Appellant

-and-

PETER NICHOLAS WASTELL AND NIGEL JOHN HAMILTON-SMITH
(AS LIQUIDATORS OF STANFORD INTERNATIONAL
BANK, LTD)

Respondents

AND

BETWEEN:

THE SERIOUS FRAUD OFFICE

Appellant

-and-

PETER NICHOLAS WASTELL AND NIGEL JOHN HAMILTON-SMITH
(AS LIQUIDATORS OF STANFORD INTERNATIONAL
BANK, LTD)

Respondents

IN THE COURT OF APPEAL
(Criminal Division)

IN THE MATTER OF THE *PROCEEDS OF CRIME ACT 2002 (EXTERNAL REQUESTS AND ORDERS) ORDER 2005*

STANFORD INTERNATIONAL BANK (SIB) BY ITS LIQUIDATORS

Appellant

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Respondent

-and-

ROBERT ALLEN STANDFORD
JAMES DAVIS
LAURA PENDERGEST-HOLT

Other affected parties

APPROVED JUDGMENT

The Chancellor

Introduction

1. Stanford International Bank Ltd ("SIB") was incorporated in Antigua and Barbuda on 7th December 1990. At all times its registered office has been there. It is alleged that SIB was involved in a fraudulent 'Ponzi' scheme operated by Sir Allen Stanford and his associates under which some 27,000 investors, primarily from North, Central and South America, bought certificates of deposit from SIB for some $104bn. The scheme collapsed at the beginning of 2009. Thereafter the following events material to these appeals occurred:

> (1) On 16th February 2009 the United States Securities Exchange Commission ("the SEC") filed a complaint ("the SEC Complaint") in the US District Court for the Northern District of Texas Dallas Division against, among others, Sir Allen Stanford, James M. Davis, Laura Pendergest-Holt and SIB alleging fraudulent breaches of securities laws. On the same day the SEC applied for and obtained an order for the appointment of Mr Ralph S. Janvey ("the US Receiver") as receiver of the assets, wherever situate, of those defendants and interim freezing and other orders against them.
>
> (2) On 19th February 2009 the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") appointed Messrs Peter Wastell and Nigel Hamilton-Smith joint receiver-managers of SIB and an associate company and conferred on them the powers and duties previously vested in the directors of SIB. The appointment was made under the power contained in s.287 International Business Corporations Act.
>
> (3) On 26th February 2009, on the application of FSRC, the High Court of Antigua and Barbuda granted freezing and other orders against SIB and the associate company and under the power conferred by s.220 International Business Corporations Act, appointed Messrs Wastell and Hamilton-Smith to be joint receiver-managers of SIB and the associate company with such powers as the court might determine.
>
> (4) On 16th March 2009 the joint receiver-managers reported to the High Court of Antigua and Barbuda that SIB was insolvent, incapable of being reorganised via a receivership and should be put into liquidation.
>
> (5) On 24th March 2009 a petition for the compulsory winding up of SIB under s.300 International Business Corporations Act was presented to the High Court of Antigua and Barbuda by FSRC. A petition to wind-up SIB under s.220

International Corporations Act had already been presented to that court by an investor, Mr Fundora, on 9th March 2009 and was being opposed by the joint receiver-managers.

(6) On 27th March 2009 the SEC applied, without notice, to the High Court in England and obtained from Jack J orders over 6th April 2009 freezing the assets of, amongst others, SIB. The injunction was continued by Stadlen J on 6th April, Bean J on 27th April and Stadlen J on 18th May before being discharged by Jack J on 24th July 2009 (see paragraph 1(16) below).

(7) On 1st April 2009 the US Receiver applied to the High Court in Antigua and Barbuda for an order entitling him to intervene in the winding-up petitions in respect of SIB presented to that court by Mr Fundora and FSRC. That application came before the court in Antigua on 6th and 7th April 2009 and dismissed on 7th April.

(8) On 6th April 2009 the US Department of Justice (Criminal Division) ("DoJ") wrote to the Central Authority of the United Kingdom ("the Letter of Request"), pursuant to the US/UK Mutual Assistance in Criminal Matters Treaty, requesting the immediate assistance of the UK in relation to the investigation by the DoJ of alleged violations of US criminal laws involving fraud on investors committed by, amongst others, Sir Allen Stanford, James M. Davis, Laura Pendergest-Holt and SIB. The Letter of Request, to which I shall refer in detail later, sought the restraint of all assets of those defendants in the UK so that they might be secured for confiscation at a later date.

(9) On 7th April 2009 in-house counsel for the Serious Fraud Office ("the SFO") applied to HH Judge Kramer QC sitting at the Central Criminal Court for a restraint order against those named in the Letter of Request under Article 8 the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 SI 3181 ("the ERO"). The evidence in support of the application consisted of a witness statement of Mr Tanvir Tehal, a barrister employed by the SFO, to which was exhibited the Letter of Request. HH Judge Kramer QC made the orders sought until further order of that court or of the Court of Appeal. He gave to any person affected by the order leave to apply on not less than three clear days notice to vary or discharge it. The restraint order and the evidence in support of the application for its grant were not served on SIB until, respectively, 27th April and 24th July 2009.

(10) On 15th April 2009 the High Court of Antigua and Barbuda made an order on the petition of FSRC for the liquidation and dissolution of SIB under the supervision of the court and appointed Messrs Wastell and Hamilton-Smith to be joint liquidators ("the Antiguan Liquidators"). Paragraph 5 of the order vested all assets of SIB of whatever nature and wherever situated in the Antiguan Liquidators. On the same day the petition presented by Mr Fundora was dismissed for lack of standing. The applications of the US Receivers had already been dismissed on 7th April. We were told that appeals to the Court of Appeal of the East Caribbean are pending in respect of those dismissals.

(11) On 22nd April 2009 the Antiguan Liquidators applied to the High Court in England under article 15 of the UNCITRAL Model Law on Cross-Border Insolvency ("Uncitral"), given the force of law in the United Kingdom by the Cross-Border Insolvency Regulations 2006 SI No: 1030, for recognition of the Antiguan liquidation of SIB as a foreign main proceeding, as defined in Article 2(g), and for an order entrusting the distribution of the assets of SIB situate in Great Britain to them in their capacity as such liquidators.

(12) On 8th May 2009 the US Receiver also applied to the High Court in England under article 15 of Uncitral for recognition of the US Receivership of SIB (and other Stanford entities) as the foreign main proceeding and of himself as the foreign representative of SIB.

(13) On 18th June 2009 an indictment against Sir Allen Stanford, James Davis, Laura Pendergest-Holt and an employee of FSRC Leroy King, but not SIB, was laid in the US District Court for Southern Texas, Houston Division. It avers a number of offences of mail, wire and securities fraud contrary to the laws of the US.

(14) The recognition applications of the Antiguan Liquidators and the US Receiver were heard by Lewison J on 10th to 12th June. Lewison J was not then told of the restraint order, nor did he give SFO the opportunity to be heard on the applications which he should and would have done if the provisions of ERO Article 17(6) had been brought to his attention. Lewison J handed down his reserved judgment on 3rd July 2009. I shall refer to it in detail later. In summary he acceded to the application of the Antiguan Liquidators but dismissed that of the US Receiver. In addition he indicated that the Antiguan Liquidators should secure the assets of SIB within this jurisdiction and remit them to Antigua to be administered in the winding-up there. There was a subsequent hearing on 9th July to determine the form of order Lewison J should make at which he was told of the existence of the restraint order and modified his order so as to take effect subject to the restraint order.

(15) On 17th July 2009 the Antiguan Liquidators applied to HH Judge Kramer QC for a variation of the restraint order to enable the directions of Lewison J to be carried out. Immediately before the hearing of that application on 24th July the evidence before the court on 7th April when the restraint order was made was produced for the first time to those representing the Antiguan Liquidators. They then and there expanded their application to HH Judge Kramer QC so as to seek the discharge of the restraint order altogether on grounds of misrepresentation and material non-disclosure.

(16) On the same day, namely 24th July 2009, on the application of the Antiguan Liquidators Jack J discharged the freezing order he had originally made on 27th March 2009 on the grounds that given the existence of the Antiguan Liquidation, US Receivership and restraint order it was an unnecessary complication in an already complex situation.

(17) HH Judge Kramer QC gave judgment on 29th July 2009. He refused to discharge the restraint order on grounds of misrepresentation or material non-

disclosure or to vary it so as to enable the Antiguan Liquidators to implement the direction of Lewison J.
(18) Permission to appeal the order of Lewison J was given to the SFO by Lloyd LJ on 31st July 2009 and permission to appeal the order of HH Judge Kramer QC was granted to the Antiguan Liquidators by the Court of Appeal on 18th August 2009.

2. These events have now generated four appeals to this court, namely:

(1) the appeal of the US Receiver from the order of Lewison J dismissing his application,

(2) the appeal of the US Receiver from the order of Lewison J granting recognition to the Antiguan Liquidation as the foreign main proceeding,

(3) the like appeal of the SFO from that order of Lewison J, and

(4) the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC refusing to discharge or vary the restraint order.

In addition there were applications from all three parties for permission to adduce fresh evidence, all of which we granted because they were not opposed. It is our duty to decide these appeals but I share the regret expressed by Jack J, HH Judge Kramer QC and Lewison J that the dividends ultimately distributed to the investors in the CDs issued by SIB are likely to have been substantially eroded by the costs involved in these disputes between three public bodies as to which of them should be responsible for collecting and distributing the assets of SIB.

3. I shall deal first with the three appeals concerning the order of Lewison J. I shall then consider the fourth appeal from the order of HH Judge Kramer QC. Finally, having reached my conclusions on all the appeals, I shall consider what overall order I consider that this court should make.

Recognition applications under the Uncitral Model Law

4. The first three appeals depend on the proper construction and application of the Uncitral Model Law as given the force of law in the United Kingdom by the regulation to which I have referred. It is derived from the UNCITRAL Model Law adopted by the United Nations on 30th May 1997. The regulation implementing it requires, by regulation 2(2), that it be interpreted by reference to any documents of the working group of the UN which produced it and the Guide to its enactment ("the Uncitral Guide") prepared in response to the request for its preparation made by the UN Commission on International Trade in May 1997. Article 8 of Uncitral provides that:

> "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

5. The argument before us has revolved around the four definitions contained in Article 2(g) to (j) which are in the following terms:

> "(g) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
>
> (h) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of sub-paragraph (e) of this article;
>
> (i) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
>
> (j) "foreign representative" means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to

administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"

6. As the Uncitral Guide points out in paragraph 71:

> "The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting state. ....the expression "insolvency proceedings" may have a technical meaning in some legal systems but it is intended...to refer broadly to proceedings involving companies in severe financial distress."

7. Notwithstanding the large number of definitions contained in Article 2, including one of an "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services", there is no definition of the phrase "centre of its main interests". This is used in the definition of foreign main proceeding in order to differentiate a foreign proceeding which is main from those which are not. The effect of recognition as foreign main proceedings is spelled out in Article 20. The phrase is also used in the European Community Regulation on Insolvency Proceedings (Council Regulation (EC) 1346/2000) and in that context was considered by the European Court of Justice in **Re Eurofood IFSC Ltd** [2006] Ch. 508 ("**Eurofood**"). I shall refer to both the Regulation and the judgment in some detail later.

8. The broad issues which arose before Lewison J and now arise on these appeals may be described as follows:

> (1) Are either or both the Antiguan Liquidation or the US Receivership a foreign proceeding defined in Article 2(i) as being
>
> > (a) a collective judicial or administrative proceeding in a foreign state (including an interim proceeding),

(b) pursuant to a law relating to insolvency,

(c) for the purpose of reorganisation or liquidation?

And if so

(2) Is such foreign proceeding taking place in the state where SIB has its centre of main interests?

Lewison J concluded that the Antiguan Liquidation was, but the US Receivership was not, a foreign proceeding. He also concluded that the centre of SIB's main interests was Antigua so that the Antiguan Liquidation was a foreign main proceeding. I will deal with the issues relating to the first question first.

Which, if either, of the Antiguan Liquidation and the US Receivership is a foreign proceeding?

9. The Uncitral Guide noted in paragraph 23 that:

> "To fall within the scope of the foreign law, a foreign proceeding needs to possess certain attributes. These include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as part of the purpose of the proceeding."

The Antiguan Liquidation

10. In the case of the Antiguan Liquidation the petition to which I have referred in paragraph 1(5) above set out details in relation to SIB and then averred that SIB had failed to comply with its obligations to file quarterly returns, previous returns had been inaccurate, it had failed to take reasonable precautions to prevent falsification of its records and was insolvent but not able to be restructured or restored so as to

resume its business of international banking. FSRC sought an order that SIB be liquidated and dissolved pursuant to s.300 International Business Corporations Act and the appointment of the receiver-managers as liquidators under ss. 304 to 306 of that Act. That Act relates to corporations formed thereunder for the purpose of carrying on any international trade or business. It is to be distinguished from the Companies Act 1995 of Antigua and Barbuda which relates to companies generally.

11. Sections 304 to 306 International Business Corporations Act are contained in Part IV of that Act entitled Winding Up Corporations. This is to be distinguished from Part IV Companies Act 1995 which relates to winding up of companies more generally and appears to be closely modelled on the provisions of Part V Companies Act 1948. Part IV International Business Corporations Act also contains provisions for winding up, voluntarily or compulsorily (s.284), the payment of the debts due to creditors of any description before any payment to members (ss.286 and 290), for priority of claims in a winding-up (s.289), winding-up a company if it is just and equitable to do so (s.301(b)(ii)) and the powers and duties of liquidators (ss.307 and 308). S.307(g) imposes on a liquidator the duty to apply to the court for directions if he concludes the company is unable to pay its debts.

12. The order on the petition presented by FSRC was made by Harris J. In his judgment he referred not only to the breaches of obligation by SIB on which the petitioner relied but also the obvious insolvency of SIB. In his order he directed the liquidators to collect all the assets of SIB, wherever situate and provided for them to vest in the Antiguan Liquidators (paras 4 and 5). Paragraph 7 required the Antiquan Liquidators to hold all such assets for the benefit of depositors, creditors and investors in accordance with their interests under the laws of Antigua and Barbuda and in the

priority indicated. The Antiguan Liquidators were constituted as foreign representatives (para 20) and authorised to apply for recognition in other jurisdictions (para 21). All proceedings against SIB were stayed or prohibited (para 25).

13. In paragraphs 94 and 95 of his judgment Lewison J concluded:

> "94. It is, in my judgment, clear from the court's order and the judgment of Harris J that it was not basing the order on section 300 alone. It made the order because, having considered the evidence, it concluded that it was just and equitable that SIB be wound up. An important part of the evidence was that SIB was insolvent and could not be reorganised via the receivership. In my judgment at least one of the reasons why Harris J made the order that he did was that he was satisfied that SIB was insolvent.
>
> 95. I hold, therefore, that the Liquidators were appointed pursuant to a law relating to insolvency and that they are entitled to be recognised as foreign representatives of a foreign proceeding."

14. By his appellant's notice the US Receiver appealed against the recognition of the Antiguan Liquidation as the foreign main proceeding. In the written argument of his counsel the conclusion that the Antiguan Liquidation was a foreign proceeding was not seriously challenged. Rather it was contended that if the Antiguan Liquidation came within the definition of a foreign proceeding contained in Uncitral Article 2(i) then so must the US Receivership. Similarly in its appeal from the order of Lewison J the SFO did not contend that Lewison J was wrong to have concluded that the Antiguan Liquidation was a foreign proceeding within the meaning of Article 2(i).

15. In my view Lewison J was right to conclude that the Antiguan Liquidation was a foreign proceeding as defined. Part IV of the relevant Act provided for the winding up of corporations incorporated in Antigua for the purpose of carrying on an international trade or business on just and equitable grounds, which include

insolvency, as well as infringements of regulatory requirements. The combination of that part of the Act and the order of the court made provision for the collection of all the assets of SIB and their application in satisfaction of all its obligations in the order of priority for which the law provided. That process was expressly subject to the supervision of the High Court of Antigua and Barbuda. Creditors and others were obliged to seek their remedy in the liquidation because individual proceedings were stayed or prohibited. The ultimate purpose of the process was the liquidation, in the sense of dissolution of SIB. Such a process satisfies all the conditions for the application of the definition because it is collective, judicial and pursuant to a law relating to insolvency.

The US Receivership

16. The only real issue on this part of the appeals is whether the US Receivership also possesses the characteristics needed to satisfy the definition of a foreign proceeding contained in Article 2(i). The US Receiver was appointed in the proceedings to which I have referred in paragraph 1(1) above. Paragraphs 15 to 17 of the Complaint set out the authority, jurisdiction and venue provisions on which SEC relied. They were s.20(b) Securities Act 1933, s.21(d) Securities Exchange Act 1934, s.41(d) Investment Company Act 1940 and s.209(d) Investment Advisers Act 1940. Each of those provisions entitled the SEC to bring proceedings in respect of the matters described for an injunction and a civil penalty payable to the US Treasury. In addition s.21(d)(5) Securities Exchange Act 1934 entitled the SEC to seek and the Federal Court to grant any equitable relief that might be appropriate or necessary for the benefit of investors. It was under that provision that the US Receiver was appointed.

17. In paragraphs 25 to 57 of the Complaint the SEC set out in detail the facts it alleges. In paragraphs 58 to 80 it set out in detail the six causes of action on which it relies relating to violations of the Securities Act and other laws. The relief sought extends to injunctions to restrain continued violations, freezing orders, disclosure of assets and books and records, discovery, disgorgement of illicit gains and profits and civil penalties. The claim for the appointment of a receiver is made in these terms:

> "Order the appointment of a temporary receiver for [SIB] for the benefit of investors, to marshal, conserve, protect and hold funds and assets obtained by [SIB] and [its] agents, co-conspirators, and others involved in this scheme, wherever such assets may be found, or, with the approval of the court, dispose of any wasting asset in accordance with the application and proposed order provided herewith."

18. The order appointing the US Receiver was made by the District Judge on 16th February 2009 and amended on 12th March 2009. Both orders recited that it appeared that:

> "this order is both necessary and appropriate in order to prevent waste and dissipation of the assets of [SIB] to the detriment of the investors."

By paragraph 1 the court assumed exclusive jurisdiction and took possession of the assets of whatever kind and wherever located of SIB. By paragraph 2 the US Receiver was appointed receiver of those assets with the full powers of an equity receiver under common law as well as such powers as were enumerated in the order. Paragraphs 3 and 4 set out the receiver's duties and paragraph 5 conferred on him wide ranging powers to enable him to carry them out. Paragraph 7 and 8 stayed or prohibited actions or proceedings against SIB or its assets. Paragraph 6 of the

amended order gave the US Receiver power to seek relief on behalf of SIB under the US Bankruptcy Code.

19. Both the US Receiver and the Antiguan Liquidators relied on evidence of a US lawyer in relation to the nature of a receivership under US law. They were respectively Professor Jay L. Westbrook and Professor Daniel M. Glosband. They disagreed on whether the US common law under which receivers are appointed can be categorised as a law relating to insolvency; but as the proper construction and application of the definition contained in Article 2(i) of Uncitral is a matter of law for this court it is unnecessary to explain why. They were in substantial agreement that a receiver appointed under the US common law, may, in the court's discretion, be directed by the court to distribute the property of a debtor which is vested in him or under his control pro rata amongst a specified class be they investors or creditors more generally.

20. Lewison J considered the nature of a foreign proceeding as defined (paras 37 to 42) and the terms of the order appointing the US Receiver (paras 71 to 78). He set out the submissions of counsel for the US Receiver, the Antiguan Liquidators and Sir Allen Stanford at some length (paras 79 to 83). His conclusion on whether the US Receivership is a foreign proceeding within Article 2(i) Uncitral is set out in paragraphs 84 and 85 in the following terms:

> "84. As I have said, it seems to me that the Receiver's authority derives from the terms of the order. I do not, therefore, consider that it is profitable to discuss the sorts of powers which might be conferred on receivers generally. Thus I agree with [counsel for Sir Allen Stanford] that the question is not whether an equitable receivership could generally or ever give rise to *pari passu* distribution. What matters, to my mind, is what powers and duties have been conferred or imposed on the Receiver by *this* order. I do not consider that the powers and

duties conferred or imposed on the Receiver amount to a "foreign proceeding" for the purposes of the Cross Border Insolvency Regulations, largely for the reasons given by [counsel for Sir Allen Stanford and the Antiguan Liquidators]. In short:

i) The recited purpose of the order was to prevent dissipation and waste, not to liquidate or reorganise the debtors' estates;

ii) The detriment that the court was concerned to prevent was detriment to *investors*;

iii) The underlying cause of action which led to the making of the order had nothing to do with insolvency and no allegation of insolvency featured in the SEC's complaint. Indeed there is no evidence that any of the personal Defendants (i.e. Sir Allen, Mr Davis or Ms Pendergest-Holt) is in fact insolvent, yet the appointment of the Receiver over their assets must have the same foundation as his appointment over the assets of the corporate Defendants;

iv) The powers conferred on and duties imposed on the Receiver were duties to gather in and preserve assets, not to liquidate or distribute them. (The order does not, at least on its face, confer any power on the Receiver to sell any of the Defendants' assets of which he might take possession);

v) In so far as the order mentions creditors who are not investors, they are mentioned only to allow claims to be compromised. The reference to distributions to creditors does not sanction actual distribution; it merely describes the reason why expenses are to be kept to a minimum;

vi) The order does not preclude claims from being made against the Defendants outside the receivership if either they do not relate to the underlying causes of action on which the SEC's application was based, or they are brought in the District Court for Northern Texas;

vii) Under the order the Receiver has no power to distribute assets of the Defendants. It would need a further application to the court to enable him to do so;

viii) The fact that some receiverships may be classified for some purposes as "insolvency proceedings" or be treated as acceptable alternatives to bankruptcy does not mean that this receivership satisfies the definition of foreign proceeding in the Cross-Border Insolvency Regulations 2006;

ix) The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership is not "a law relating to insolvency" since it applies in

> many different situations many (if not most) of which have nothing to do with insolvency; and many of the principles leave a good deal to discretion.
>
> 85. I do not say that any one of these factors is decisive, but cumulatively they lead to only one conclusion. I hold, therefore, that the receivership is not a "foreign proceeding". I would also hold that since the Receiver has not yet been authorised to administer the liquidation or reorganisation of SIB he is not yet a "foreign representative" as defined, even if the receivership is a "foreign proceeding". It follows that the receivership cannot be recognised under the Cross Border Insolvency Regulations 2006."

21. Counsel for the US Receiver challenges the overall conclusion of Lewison J and the individual factors on which he relied. Counsel's submissions may be summarised as follows:

> (1) The judge's consideration of the terms of the order appointing the US Receiver was incomplete because he did not refer to the power conferred by paragraph 6 of the amended order enabling the receiver to seek relief on behalf of SIB under the US Bankruptcy Code, nor did he pay sufficient regard to the extent of the powers conferred on the receiver under the US common law by paragraph 2 of the order. Such powers enable a receiver to propose to the court an appropriate plan for the distribution of the assets vested in him or under his control and that plan may extend to creditors generally.
>
> 2) The terms of the US Receivership order provide for collective redress in that it extends to all assets wherever located and stays or prohibits actions against either SIB or its assets.
>
> (3) Although the primary purpose of the US Receivership is, as the orders proclaim, to prevent waste or dissipation the powers it confers are equally consistent with the ultimate distribution of the assets.
>
> (4) Although neither the US common law nor the terms of the order appointing the US Receivership contain any provisions for the proof of claims and the distribution of assets amongst claimants the necessary details will, at its discretion, be supplied by the court in a subsequent order authorising a distribution plan proposed by the receiver.
>
> (5) The relevant law does not have to be statutory nor need it relate only to insolvency. The US Receiver is comparable to a provisional liquidator appointed under English law.

(6) The US Receivership is for the purposes of the reorganisation or liquidation of an insolvent body which has been engaged in fraudulent activities.
(7) There is no difference between the duties and functions of the US Receiver and of the Antiguan Liquidators sufficient to justify the latter being recognised as a foreign proceeding but not the former.

22. SFO did not seek permission to appeal from the part of the order of Lewison J which dismissed the application for recognition made by the US Receiver and made no submissions in respect of it. Counsel for the Antiguan Liquidators supported the decision of Lewison J for the reasons he gave. As, in substance, I agree with them I do not find it necessary to set them out at length.

23. It is clear from the origin and objective of Uncitral, Article 8 thereof and the Uncitral Guide that Uncitral should not be construed by reference to any particular national system of law. It is intended to embrace all systems of law which satisfy the conditions described in the definitions contained in Article 2(i) to (j) so as to provide for reciprocity between all the states which may incorporate Uncitral into their domestic law. Further the definition of foreign proceeding contained in Article 2(i) contains a number of factors, namely "collective...proceeding", "pursuant to a law relating to insolvency", "control or supervision" of "the assets and affairs of the debtor" by a foreign court, "for the purpose of reorganisation or liquidation". Whilst each factor has to be considered the definition must be read as a whole.

24. I would start with the phrase "pursuant to a law relating to insolvency" for this governs all the other factors. It is contended that such law does not have to be statutory. I agree. It is submitted that it does not have to relate exclusively to insolvency. I agree with that submission in broad terms too. But the first step must be to identify the relevant law. The law of England and Wales relates to insolvency in the sense that it includes the Insolvency Act but unless the proceeding in question is

taken under that Act (or some similar jurisdiction) it cannot sensibly be described as "pursuant to a law relating to insolvency". So it is necessary, in my view, to start by identifying the law, whether statutory or not, under or pursuant to which the relevant proceeding was brought and is being pursued. Having done so it is then necessary to consider whether that law relates to insolvency and whether the other factors to which the definition refers can be regarded as being brought about 'pursuant' to that law.

25. I have identified in paragraph 16 above the provisions of the US law relied on in the complaint filed by the SEC as conferring jurisdiction on the District Court for the Northern District of Texas. Those provisions relate generally to the protection of investors and confer on the SEC wide powers of investigation, prevention by injunction, criminal proceedings or civil penalty and 'disgorgement' of illicit gains. In my view it is plain, and I did not understand counsel for the US Receiver to contend otherwise, that none of these statutory provisions can be categorised as 'a law relating to insolvency'.

26. One of them, s.21(d)(5) Securities Exchange Act 1934, entitled the SEC to seek and the Federal Court to grant any equitable relief that might be appropriate or necessary for the benefit of investors. It may be that the inherent jurisdiction of the District Court would also have justified such an appointment. The appointment of a receiver is a well-known head of equitable relief. But the appointment of a receiver, whether under s.21(d)(5) Securities Exchange Act 1934 or under the inherent jurisdiction of the court, as equitable relief for the protection of investors in proceedings relating to securities fraud does not, without more, mean that the other ingredients of the definition were brought about 'pursuant to a law relating to insolvency'. The fact that the court may subsequently make orders which bring into force a process which

can be recognised as an insolvency proceeding is immaterial unless and until it is done. The principles of the common law and equity do not 'relate to insolvency' unless and until they are activated for that purpose.

27. It is because there is no such activation or order in this case that the other issues arise. Thus, whilst the US Receivership is an interim judicial proceeding in a foreign state it is not 'collective' in the relevant sense because it is for the protection of investors not the wider class of creditors generally, notwithstanding the occasional reference to claimants in the orders. Nor is it, at this stage, for the purpose of reorganisation or liquidation; it is for the protection of investors and the assets of SIB.

28. The analogy with the appointment of a provisional liquidator in England is, in my view, a false one as the appointment of a provisional liquidator is made under either the statutory law relating to insolvency or a comparable common law or equitable principle. Similarly this conclusion is not inconsistent with that in relation to the Antiguan Liquidation. In the latter case the jurisdiction under Part IV International Business Corporations Act is that under which corporations formed under Antiguan law to carry on any international trade or business are wound up. The grounds for such winding up include the just and equitable ground which, conventionally, includes insolvency. When the winding up order is made, but not before, it gives rise to a collective judicial scheme for the liquidation or reorganisation of the company.

29. For all these reasons, which are, in essence, those given by Lewison J in paragraph 84 of his judgment I conclude that the US Receivership is not a foreign proceeding within the definition contained in Article 2(i) Uncitral. It follows that the US Receiver cannot be a foreign representative within the definition contained in Article 2(j). Accordingly in my view the answer to the first question I have posed in

paragraph 8 above is that the Antiguan Liquidation is, but the US Receivership is not, a foreign proceeding within the meaning of that expression as defined in Article 2(i); similarly the Antiguan Liquidators are, but the US Receiver is not, a foreign representative of SIB within the meaning or that expression as defined in Article 2(j). I should add that before Lewison J the US Receiver also sought recognition at common law in respect of both SIB and what were called Stanford entities. Lewison granted it in relation to the Stanford entities but not in relation to SIB for the reasons he gave in paragraphs 104 and 105. The US Receiver formally contended that Lewison J was wrong in that respect too for reasons given in paragraphs 137 to 141 of counsel's written argument. Those grounds were not developed in oral argument by counsel for any party and it is not clear to me whether this part of the appeal of the US Receiver was abandoned. Suffice it to say that if it was not abandoned I would reject it for the reasons given by Lewison J.

Centre of Main Interests

30. Given that the Antiguan Liquidation is a foreign proceeding it will be a foreign main proceeding if, but only if, SIB's centre of main interests ("COMI") was in the state where, and at the time when, that proceeding was commenced, namely in Antigua, see Article 2(g) and **Re: Staubitz-Schreiber** [2006] ECR I 701. Article 16.3 of Uncitral provides that:

> "In the absence of proof to the contrary, the debtor's registered office...is presumed to be the centre of the debtor's main interests".

Lewison J considered how the court should apply that article in cases where there was a disputed question of fact but no cross-examination. His answer given in paragraph 10 of his judgment, which has not been criticised before us, was that:

> "...the court should apply the same test as it applies in deciding questions of jurisdiction under the EC Judgments Regulation 44/2001: viz. that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that the company's COMI is not in the state in which its registered office is located: cf. *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 W.L.R. 12, § 28."

31. In paragraphs 11 to 31 of his judgment Lewison J summarised the relevant facts relating to SIB and the Stanford Financial Group of which it formed part under three separate headings. The first heading related to what the judge called SIB's public face. He recorded the details of its incorporation and the situation of its registered office. He set out (para 11) details of the substantial office building in Antigua it occupied, its employees of whom 88 worked in Antigua. The remainder worked in Canada but probably reported to people in the US or the US Virgin Islands. The judge then considered (para 12) at some length the details of SIB, as reported to the public in its disclosure statement to depositors, including the composition of its board of directors, the business of SIB, the fact that it was regulated by FSRC in Antigua but in no other jurisdiction and the contact address and telephone number in Antigua. He dealt with statements made in various items of marketing materials in paragraphs 13 and 14. The judge then described how SIB obtained deposits through referral agreements with independent financial advisers (para 15), the terms on which they were invested (para 16) and where they were held (paras 17 to 20) and observed that the bulk of SIB's actual investments were outside the US (para 21). The judge

concluded with descriptions of the other banking services provided by SIB (para 22), where and how board meetings were held (para 22) and the types of management expense incurred as shown by its audited accounts (para 24). Lewison J then referred (paras 26 and 27) to the composition of the Stanford Financial Group as controlled by Sir Allen Stanford and how it was marketed as a whole (para 28).

32. The judge then considered what he described as "behind the scenes", namely that, in the light of the evidence uncovered so far, Sir Allen Stanford was at the centre of a massive and fraudulent Ponzi scheme (para 29). He found the evidence of the extent to which decisions at strategic level were taken by Sir Allen Stanford and Mr James L. Davis to be inconclusive. In paragraph 31 he recorded that Mr Davis was domiciled and resident in the US. He continued:

> "So far as Sir Allen is concerned, he is a citizen of both the USA and Antigua (where he was knighted). He has a high profile in Antigua where he has been a major investor and benefactor. He is also a frequent visitor. Amongst other things he has built the Stanford Cricket Ground and two restaurants in close proximity to SIB's building; he owns the Antigua Sun (Antigua's largest newspaper) and was the sponsor of Antiguan Sail Week. He has homes in the USA. But for tax reasons he spends much of his time (at least half the year) in St Croix in the US Virgin Islands. There is also evidence that at the relevant time he lived in part on his yacht."

33. Lewison J then considered the origins of Uncitral and the use of COMI in the EC Regulation on Insolvency Proceedings. He referred to the decision of the European Court of Justice on the meaning of COMI in the context of the EC Regulation in **Eurofood**. He recorded the submissions of counsel on the meaning of COMI. The judge held (para 70) that:

> "i) The relevant COMI is the COMI of SIB;

> ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;
>
> iii) The burden of rebutting the presumption lies on the Receiver;
>
> iv) The presumption will only be rebutted by factors that are objective;
>
> v) But objective factors will not count unless they are also ascertainable by third parties;
>
> vi) What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company."

34. The judge then left the question of COMI and considered (paras 71 to 95) whether either the US Receivership or the Antiguan Liquidation was a foreign proceeding. In paragraphs 96 to 99 he applied his interpretation of COMI to the facts of the case and concluded that they were not sufficient to rebut the presumption that the COMI of SIB was where its registered office was, namely in Antigua. This conclusion is challenged by the US Receiver on, essentially, three grounds:

> (1) the judge misdirected himself as to the facts relevant to the rebuttal of the presumption,
>
> (2) the judge wrongly concluded that on the evidence before him the presumption had not been rebutted,
>
> (3) the fresh evidence which we permitted the US Receiver to adduce on this appeal, taken together with the evidence before the judge, is sufficient to rebut the presumption.

I will deal with those submissions in that order. It is to be noted that, whatever the outcome, the Antiguan Liquidation will remain a foreign proceeding and the Antiguan

Liquidators foreign representatives. This issue will determine whether, in addition, the provisions of Uncitral Article 20 will apply. That Article imposes a stay on proceedings against SIB or its assets except criminal proceedings or proceedings brought by a body having regulatory functions in the exercise of those functions, see Article 20.4(b).

Facts relevant to the rebuttal of the presumption

35. This issue arises from the judge's conclusion in sub-paragraphs iv) – vi) of paragraph 70 of the judgment of Lewison J which I have quoted in paragraph 33 above. In addition when he returned to the subject of COMI in later paragraphs of his judgment he said (para 98):

> ".....as I have held, the presumption can only be rebutted by factors that are both objective and ascertainable by third parties...."

The judge arrived at that conclusion by applying the principle applied by the European Court of Justice in **Eurofood** because the same expression was used in the relevant EC Regulation in much the same context and he ought to follow it, whether or not bound to do so, in preference to his own earlier decision in **Re Lennox Holdings Ltd** [2009] BCC 155.

36. To understand the arguments and to explain my conclusion it is necessary to consider the evolution of both the EC Regulation and Uncitral. Both were preceded by the European Convention on Insolvency Proceedings. Its preparation began in 1960. It was open for signature by member states from 23rd November 1995. The Convention applied to proceedings which satisfied four conditions but as there might be more than one proceeding satisfying those conditions it also provided for 'main

insolvency proceedings'. They were defined as proceedings in the contracting state where the debtor had his centre of main interests. In May 1996 the UK Government refused to sign the Convention. In July 1996 there was signed what became known as the Virgós-Schmit Report on the Convention. Though never formally adopted it was and is regarded as an authoritative commentary on the Convention and the subsequent regulation derived from it. In paragraphs 75 and 76 the authors stated:

> "75. The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore, ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.
>
> .....
>
> 76. The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing up of a European norm on associated companies may affect this answer."

37. Some 11 months later on 30th May 1997 Uncitral was adopted by the United Nations. The phrase 'centre of main interests' was used so as to distinguish main from non-main foreign proceedings in Article 2(g). It is used again in the application of the presumption for which Article 16.3 provides, see Article 17.2(a), but not otherwise. The Uncitral Guide pointed out in paragraph 31 that the phrase corresponded to the formulation in article 3 of the European Convention on Insolvency Proceedings

> "...thus building on the emerging harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative."

The Uncitral Guide pointed out again in paragraph 72 that the phrase used to define a foreign main proceeding was used also in the Convention on Insolvency Proceedings. Similarly the Official Records of the UN General Assembly 52nd Session Supplement No.17 paragraph 153, which is also admissible in the interpretation of Uncitral, see regulation 2(2)(b) Cross Border Insolvency Regulation 2006, records that:

> "The view was expressed that the meaning of the term 'centre of main interests' in sub-paragraph (b) was not clear and that its use would create uncertainty. In response, it was stated that the term was used in the European Union Convention on Insolvency Proceedings and that the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions."

We were told that the Uncitral Model Law has been adopted by 17 states including the US in 2005, the UK and New Zealand in 2006 and Australia in 2008.

38. The EC Regulation on Insolvency Proceedings (EC) No: 1346/2000 was promulgated on 29th May 2000 and came into force on 31st May 2002. It superseded the Convention which the UK had refused to sign but included for the first time a number of additional recitals including recital (13) which states:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Article 3, headed "International jurisdiction" provides:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open the insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Provision was made by Article 3(2) for secondary insolvency proceedings to be opened in the Member State in which the debtor possessed an establishment but confined to the assets of the debtor situated in that Member State.

39. Thus there is a clear correlation between the words used and the purpose to which they are applied in both Uncitral and the EC Regulation. In both there is a rebuttable presumption that the COMI is the state in which the registered office of the company is situated. We were referred to a number of decisions of courts in the US, the UK and the European Court of Justice in relation to the material required to rebut the presumption. It is convenient to refer to them in chronological order whether they are dealing with Uncitral or the EC Regulation. They are **Eurofood**; **In re SPhinX Ltd** (2006) 351 B.R.103; **Tricontinental Exchange Ltd** (2006) B.R. 627; **Bear Stearns High Grade Structured Strategies Master Fund Ltd** (2008) 389 B.R. 325; **Basis Yield Alpha Fund** (2008) 381 B.R.37; **Re Ernst & Young** (2008) 383 B.R. 773; **Re Innua Canada Ltd** (2009) WL 1025090 and **Re Lennox Holdings Ltd** [2009] BCC 155.

40. **Eurofood** concerned a subsidiary company with its registered office in the Republic of Ireland of an Italian holding company. The Italian parent was confronting a financial crisis and was in extraordinary administration proceedings in Italy. A creditor presented a petition for the winding up of the Irish subsidiary in Ireland and a provisional liquidator was appointed. The court in Italy then determined that the

centre of main interests of the subsidiary was in Italy so that under the EC Regulation the Italian court, not the Irish court, had jurisdiction to wind it up. The Supreme Court of the Republic of Ireland referred to the European Court of Justice a number of questions designed to ascertain which court had jurisdiction to wind up the Irish subsidiary. The fourth question sought guidance on the governing factors to be regarded in determining the centre of a debtor's main interests.

41. The fourth question was considered by Advocate-General Jacobs in paragraphs 106 to 126 of his opinion. He concluded in paragraph 126:

> "I accordingly conclude that, where the debtor is a subsidiary company and where its registered office and that of its parent company are in two different member states and the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state in which its registered office is situated, the presumption that the centre of the subsidiary's main interests is in the member state of its registered office is not rebutted merely because the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control, and does in fact control, the policy of the subsidiary and the fact of such control is not ascertainable by third parties."

42. That question was considered by the European Court of Justice in paragraphs 26 to 37 of its judgment. The court concluded, so far as now material, in paragraphs 29 to 34:

> "29. Article 3(1) of the Regulation provides that, in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
>
> 30. It follows that, in the system established by the Regulation for determining the competence of the courts of the member states, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.
>
> 31. The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must

> therefore be interpreted in a uniform way, independently of national legislation.
>
> 32. The scope of that concept is highlighted by the thirteenth recital in the Preamble to the Regulation, which states : "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."
>
> 33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
>
> 34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."

43. **In re SPhinX Ltd** (2006) 351 B.R.103 concerned a company incorporated in the Cayman Islands carrying on business as a hedge fund. Its registered office was in the Cayman Islands but it had no physical offices, employees or assets there. It carried on no trade or business in the Cayman Islands and, as an offshore company, was prohibited from doing so. Its business was conducted under a discretionary investment management agreement by a company incorporated in Delaware and located in New York. The company was put into voluntary liquidation subject to the supervision of the court in the Cayman Islands. The voluntary liquidators sought recognition of the Cayman Islands liquidation under Chapter 15 of the US Bankruptcy

Code as a foreign main proceeding. Recognition was opposed by certain US Creditors.

44. Chapter 15 was inserted into the US Bankruptcy Code for the express purpose of incorporating Uncitral. The court noted that there were, at that stage, no decisions of US courts dealing with COMI and referred to the "recent" ruling of the European Court of Justice in **Eurofood.** In the light of the facts of the instant case the court concluded that the presumption in favour of the registered office was rebutted. It recognised the Cayman Island Liquidation as a foreign non-main proceeding. The joint liquidators appealed contending that the Cayman Island liquidation should be recognised as a foreign main proceeding. The appeal was dismissed on the ground that the court below had been right to conclude that

> "...objective factors ascertainable to third parties pointed to the SPhinX Funds' COMI not being located within the Cayman Islands thereby sufficiently rebutting the statutory presumption."

45. **Tricontinental Exchange Ltd** (2006) B.R. 627 was not concerned with the evidence required to rebut the presumption because the registered office of the company was in the state in and from which the alleged fraudulent scheme had been managed. **Eurofood** was not referred to or considered.

46. **Bear Stearns High Grade Structured Strategies Master Fund Ltd** (2008) 389 B.R. 325 was factually very similar to **Tricontinental Exchange Ltd** and the same conclusion was reached both at first instance and on appeal. The principle in **Eurofood** was recognised as consistent with that of Chapter 15. **Basis Yield Alpha Fund** (2008) 381 B.R.37 was concerned only with the question whether a company

incorporated under the laws of the Cayman Islands and having its registered office there, so that the presumption applied, was entitled to summary judgment to the effect that its COMI was in the Cayman Islands notwithstanding that, as it was registered as an offshore company, it was precluded from carrying on any business in the Cayman Islands. It was held that there was a genuine issue of material fact sufficient to preclude a summary judgment.

47. In **Re Ernst & Young** (2008) 383 B.R. 773 the status of foreign main proceeding was accorded to the receivers appointed by the court in respect of a company formed under the law of Canada. It had carried on business in fraud of investors in conjunction with a company incorporated in Colorado. The regulatory body for Colorado contended that the COMI of both companies was in Colorado because that was where the fraud occurred. The court concluded, in effect, that those facts were not sufficient to rebut the presumption. In **Re Innua Canada Ltd** (2009) WL 1025090 a receiver appointed by the court in Canada succeeded in obtaining recognition of the receivership in New Jersey in respect of the parent company registered in the Turks and Caicos Islands and its subsidiary incorporated in Canada. The registered offices were in the respective states of incorporation. The court concluded that the presumption applied in the case of the Canadian subsidiary and was rebutted in the case of the parent incorporated in the Turks and Caicos Islands.

48. Finally I should refer shortly to the decision of Lewison J in **Re Lennox Holdings Ltd** [2009] BCC 155. In that case an application had been made for administration orders in respect of a group of companies two of which had their registered offices in Spain. The question was whether the court in England had jurisdiction in the case of the two companies with registered offices in Spain. Lewison J considered that he had

jurisdiction on the basis that to rebut the presumption it was necessary to show that the head office functions were performed in a state other than that in which its registered office was situate. He reached that conclusion on the basis of the advice of the Advocate-General in **Eurofood** who, he considered, had gone into the matter rather more fully than the court itself. Having had the benefit of adversarial argument in this case he concluded that the head office function test was wrong in law. In paragraph 61 of his judgment under appeal he said:

> "Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in *Lennox Holdings* on the basis accepted by Jacobs A-G in § 114, I now consider that I was wrong to do so. Pre-*Eurofood* decisions by English courts should no longer be followed in this respect. I accept [counsel for the Antiguan Liquidators] submission that COMI must be identified by reference to factors that are both objective and ascertainable by third parties. This, I think, coincides with the view expressed by Chadwick LJ (before the decision in *Eurofood*) in *Shierson v Vlieland-Boddy* [2005] 1 W.L.R. 3966 (§ 55):
>
> "In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be *perceived* to be doing by an objective observer." (Emphasis added)

49. Lewison J then considered what was meant by "ascertainable" and concluded in paragraph 62 that:

> "...one of the important features is the *perception* of the objective observer. One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. It would impose a quite unrealistic burden on them

> if every transaction had to be preceded by a set of inquiries before contract to establish where the underlying reality differed from the apparent facts."

He rejected the submissions that either of the US cases to which I have referred led to a different conclusion or that if a company had been used as an engine of fraud some other test should be applied.

50. I have already quoted in paragraph 33 above the conclusion of Lewison J summarised in paragraph 70 of his judgment. He summarised the effect of those conclusions when returning to this issue in paragraph 98 quoted in paragraph 35 above. In their written argument counsel for the US Receiver submitted that Lewison J should have applied the head office functions test he had recognised in **Re Lennox Holdings Ltd** and not the objective and ascertainable test he applied in this case**.** They submit that though there are obvious similarities between Uncitral and the EC Regulation both in the definitions and the rebuttable presumptions there are differences too. They rely on the fact that the definition of foreign main proceeding in Uncitral is wider than that of 'insolvency proceedings' in the EC Regulation in that the former comprehends at least some types of receivership but the latter does not. They suggest that the EC Regulation is based on mutual trust between Member States, as indicated in recital 22, but Uncitral does not in that it does not depend on reciprocity. This is demonstrated by the fact that Uncitral is part of the law of England and Wales but not of Antigua and Barbuda. They point out that there is nothing in Uncitral comparable to recital 13 of the EC Regulation.

51. The US Receiver also contends that Lewison J was wrong in applying the ascertainability test to limit the facts which might be considered to those which are in the public domain or apparent to a typical third party doing business with the

company. He contends that they should include those which would be ascertained on investigation. Finally he contends that the existence of fraud perpetrated by a group of companies or individuals means that the COMI of each individual or company involved is that of the fraudulent entity as a whole. As SIB was concerned in a massive Ponzi scheme managed and directed from the US the COMI of SIB and all the other companies and individuals involved should be recognised to be in the US wherever their registered offices or habitual residence might be. In oral argument counsel for the US Receiver accepted that ascertainability of a particular fact is a relevant consideration but not, he submitted, a necessary precondition. Likewise he explained that he did not contend that the existence of fraud constituted an exception to the general rule or changed the relevant test.

52. Counsel for the SFO did not enter into this controversy. His concern was that whichever proceeding was recognised and on whatever basis the restraint order originally granted on 7th April 2009 should take priority over them. Counsel for the Antiguan Liquidators supported the decision of Lewison J for the reasons he gave. In particular counsel contended that the judge was right to follow the decision of the ECJ in **Eurofood** and to apply the ascertainability test in preference to that of the head office functions test he had applied in **Re Lennox Holdings Ltd**.

53. The appropriate starting point for consideration of these submissions is the question whether Lewison J was right to follow **Eurofood**. In my view he was. The COMI test was first adopted in the European Convention on Insolvency Proceedings. In that context it was plain from the Virgós-Schmit Report para 75, quoted in paragraph 36 above, that the appropriate test depended on ascertainability by those who dealt with the debtor so that they should know which law would govern the debtor's insolvency.

There can be little doubt but that recital 13 of the EC Regulation was intended to reflect that rationale. The derivation of COMI in Uncitral and the various guides to its interpretation in that context show that it was intended that it should bear at least a similar meaning. Thus both the UN Session paper and the Uncitral Guide, both quoted in paragraph 37 above, expressly refer to the corresponding use of the phrase in the EC Convention. The EC Regulation is the successor of the European Convention.

54. The same expression used in different documents may bear different meanings because of their respective contexts. I can see nothing in the respective contexts of Uncitral and the EC Regulation to require different meanings to be given to the phrase COMI. In both of them the phrase is used to identify the proceeding which should take priority, in one form or another, over other similar proceedings taken in other jurisdictions. In both of them the concern is that persons dealing with the debtor should be able to know before insolvency intervenes which system of law would govern the eventual insolvency of their counterparty. Further as both Uncitral and the EC Regulation apply in England and Wales it is essential that each should be interpreted in a manner consistent with the other. It would be absurd if the COMI of a company with its registered office in, say, Spain which is being wound up both there and in the US should differ according to whether the court in England was applying Uncitral on an application by the US liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company here. It follows that if there is any difference in the test promulgated by the ECJ in **Eurofood** and that applied by the courts in the US then it is right that the court in England should apply the **Eurofood** test.

55. It is not strictly necessary to consider whether the US cases to which I have referred indicate any different test to that propounded in **Eurofood**. Lewison J considered that they did, see paragraph 67 of his judgment, but decided to follow **Eurofood** whether or not, strictly, it was binding on him. But the test, as formulated by the appellate court in **re SPhinX Ltd,** referred in terms to "objective factors ascertainable to third parties", see quotation in paragraph 44 above. That is the same test. Whether or not it was correctly applied in the later cases to which I have referred is not for me to say. Accordingly I see nothing in the US cases to suggest any different conclusion to that dictated by **Eurofood**.

56. I have quoted the relevant passages from the judgment of ECJ in **Eurofood** in paragraphs 40 to 42 above. In my view it clearly established the following propositions:

> (1) It is apparent from paragraph 30 of the judgment of the ECJ that each company or individual has its own COMI. Under Uncitral, as applied in England and Wales, it is not possible to have a COMI of some loose aggregation of companies and individuals. It follows that there can be no COMI by reference to an entity comprising all those involved in the fraudulent Ponzi scheme. The COMI of SIB depends on the application of the presumption to SIB.
>
> (2) It is clear from paragraph 34 of the judgment of the ECJ that the presumption "can be rebutted only [by] factors which are both objective and ascertainable". That this test is not the same as the head office functions test adopted by Lewison J in **Re Lennox Holdings Ltd** and Lawrence Collins J in **Re Collins & Aikman Corp Group** [2006] BCC 606 para 16 is plain. Moreover the specific criticism of paragraph 98 of the judgment of Lewison J, quoted in paragraph 35 above, that he wrongly elevated the ascertainability test into a pre-condition for consideration is not correct. The judge was there accurately paraphrasing the effect of the ECJ's judgment in **Eurofood**.
>
> (3) Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. The good

sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, **Baden v Societe Generale S.A** [1993] 1 WLR 509, 575 paras 250-274. To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty.

(4) Whether or not factors, not already in the public domain or so apparent, ascertainable on reasonable enquiry are relevant to a rebuttal of the presumption that cannot extend the range of ascertainable factors to the fraudulent Ponzi scheme. That, inevitably, is neither a matter of general knowledge nor ascertainable on reasonable enquiry. It was suggested that after the fraudulent scheme had been uncovered the facts as to its previous existence had become public knowledge and should be relevant to the rebuttal of the presumption. No doubt the COMI of a company may change as the situation of its registered office may change, but it can only do so by reference to main interests which it still has and facts within the public domain or so apparent at the time of their occurrence. The allegations of fraud have not yet been proved before a court of competent jurisdiction (but Mr James Davis has pleaded guilty to three counts in relation to the fraud), SIB's interests main or otherwise ceased on discovery of the alleged fraudulent scheme and the activities now said to rebut the presumption were not in the public domain or so apparent when they occurred.

(5) If and insofar as the ECJ in its judgment may have formulated a test different from that suggested by the Advocate-General (having regard to the references to ascertainability in paragraph 126 of his opinion quoted in paragraph 41 above I do not believe he did) the definitive test has to be that to which the court referred.

For all these reasons I would reject the submission that Lewison J applied the wrong test.

57. I turn then to the second submission to which I referred in paragraph 34 above, namely, that on the basis of the evidence before him, Lewison J should have concluded that the presumption was rebutted. The judge's conclusion was based on the facts he summarised in paragraphs 1, 11 to 31 and 97 of his judgment. He considered each of the 8 matters that counsel for the US Receiver drew specifically to his attention. He held in paragraph 99 that those matters even when taken together were not sufficient to rebut the presumption "reinforced as it is by other objective facts ascertainable to third parties". Counsel for the US Receiver submitted that the

judge reached a wrong conclusion and set out in an appendix to their written argument details of a number of areas in which it was alleged that the judge had given no or insufficient weight to certain facts. Counsel for the Antiguan Liquidators contended that the summary given in the appendix to the written argument of counsel for the US Receiver misstated the relevant evidence and that when correctly stated it did not support the submission made.

58. I have no hesitation in rejecting the US Receiver's submission. Provided that he applied the right test, and for the reasons already given I believe that he did, the conclusion of the judge was a matter of fact for him. Moreover it was a multi-factorial conclusion of fact, such as was referred to by Lord Hoffmann in **Designers Guild Ltd v Russell Williams (Textiles) Ltd** [2003] 1 WLR 2416, 2423H-2424B. (see also **Assicurazioni Generali SpA v Arab Insurance Group** [2003] 1 WLR 577 para 16.) It is not suggested that there was no evidence to justify the conclusion of the judge or that his conclusion is plainly wrong. It follows that it is not open to this court to contradict the judge's conclusion on the same evidence as was before him.

59. Accordingly I turn to the third submission summarised in paragraph 34 above, namely that the fresh evidence we permitted the US Receiver to adduce when taken together with the evidence before the judge does lead to the conclusion that the presumption has been rebutted. The fresh evidence is contained in or is exhibited to the witness statement of Robert Preston-Jones, the solicitor acting for the US Receiver, and comprises (1) the third witness statement of Karyl van Tassel made on 2nd July 2009, (2) the Willis Class Action and (3) the Davis Plea Agreement. I will deal with each in turn.

60. The witness statement of Karyl van Tassel was sent to Lewison J after he had sent a draft of his judgment to the legal representatives for the parties and just before he handed it down. There is exhibited to it what has been called 'the Audit evidence' and 'the FSRC evidence'. The Audit evidence is to the effect that the auditor of SIB, C.A.S.Hewlett, was regularly paid bribes by or on behalf of Sir Allen Stanford. It is suggested that this fact undermines any reliance put upon the place where the accounts of SIB were audited. I can see that it might undermine any reliance placed on the accuracy of the audited accounts. It has no effect on the location where they were audited. Further the judge did not rely on the location of the audit otherwise than as reinforcing the presumption, see paragraph 97, arising from the location of the registered office of SIB. And even if he had this factor could not have been relevant to the rebuttal of the presumption because, obviously, it was not in the public domain or apparent to a typical third party doing business with SIB at any relevant time. In my view this evidence is plainly irrelevant to the question of the COMI of SIB.

61. Also annexed to the third witness statement of Karyl van Tassel is evidence indicating that the chief executive office of FSRC and the individual responsible for the appointment of the Antiguan Liquidators as receivers and for presenting the winding up petition in Antigua, Mr Leroy King, was also bribed by or on behalf of Sir Allen Stanford in order to give SIB 'a clean bill of health'. This fact is said to undermine the reliance placed by Lewison J on the regulation in Antigua to which SIB was subject as an indication of the COMI of SIB. It seems to me that this evidence is also irrelevant. It does not establish that SIB was subject to regulation anywhere else, such bribes were secret and unascertainable and, in any event, the judge did not rely on the place of regulation otherwise than as supportive of the presumption.

62. The Willis Class action is one brought on 2nd July 2009 in the US courts by a group of holders of CDs issued by SIB against an insurer broker alleged to have given false assurances as to the safety and soundness of the Stanford group generally and of SIB's CDs in particular. It is alleged, for example in paragraph 86 of the complaint, that SIB was held out to be a US based business guaranteed and insured at Lloyd's. Accordingly it is suggested that the 'public face' of SIB to which Lewison referred was not that of an Antiguan bank. But none of the five exhibits attached to the complaint supports the allegation. None of them states that SIB was based in the US. By contrast one of them states that SIB was based in Antigua and another that it "is not a US bank [and so] not covered by the [Federal Deposit Insurance Company]". In my view this evidence is of no assistance.

63. The Davis Plea Agreement is dated 27th August 2009 and sets out facts relevant to the fraud which James M. Davis admitted. It is relied on to support the Audit Evidence and the FSRC evidence and to demonstrate that SIB was a small part of a larger, fraudulent entity based in the US. But there is nothing in it to suggest that the COMI of SIB alone was not in Antigua. This evidence is irrelevant too.

64. I should also refer to three other documents exhibited to the witness statement of Mr Preston-Jones. The first is the indictment against Sir Allen Stanford and others on 18th June 2009 laid in the US District Court for the Southern District of Texas, Houston Division. This demonstrates the allegations made against the various defendants but does not prove them. The second is the second amended complaint made by the SEC against Sir Allen Stanford and others, but not SIB, in the US District Court for Northern Texas. I do not understand that this is said to do more

than keep this court up to date. The third contains papers relating to proceedings for recognition brought by the Antiguan Liquidators and the US Receiver in Canada.

65. On 11th September 2009 Auclair J recognised the US Receiver but not the Antiguan Liquidators. There appear to have been two basic reasons. First, the judge looked for "the real and important connection" with SIB rather than the rebuttal in accordance with the **Eurofood** test of any presumption arising from the location of its registered office. Second, the court considered the conduct of the Antiguan Liquidators in removing the data on SIB's server in Canada without the approval of the court to be such as to render them unsuitable for recognition in Canada. We were told that the order of Auclair J is under appeal. But the two reasons for the judge's conclusions have no bearing on the proceedings here.

66. For all these reasons I conclude that none of the fresh evidence relied on by the US Receiver is of any relevance on this appeal. Indeed had its adduction been opposed I consider that it is obvious that we would not have given permission for it.

Summary of conclusions on the appeals from the orders of Lewison J

67. For all these reasons I conclude, in agreement with Lewison J, that:

> (1) The US Receivership is not a foreign proceeding within the meaning of that expression as defined in Article 2(i) of Uncitral.
>
> (2) The Antiguan Liquidation is a foreign proceeding within the meaning of that expression so defined and the Antiguan Liquidators are foreign representatives of those proceedings.
>
> (3) The presumption as to the centre of main interests of SIB contained in Article 16.3 Uncitral has not been rebutted.
>
> (4) Accordingly the Antiguan Liquidation is the foreign main proceeding within the meaning of that expression as defined in Article 2(g) of Uncitral.

Whether Lewison J should have made the order he did both as to recognition and otherwise I leave until after my consideration of the appeal from the order of HH Judge Kramer QC made on 29th July 2009 refusing to set aside the restraint order he had made on 7th April 2009.

Appeal from the order of HH Judge Kramer QC made on 29th July 2009

68. The Proceeds of Crime Act 2002 makes provision in Part 2 for the Crown Court in England and Wales to make an order confiscating the proceeds of crime. That jurisdiction is supported by the jurisdiction conferred by ss 40 to 47 to make restraint orders to prevent dealings with certain property. Such a restraint order has the effects specified in s.58. The circumstances in which either type of order may be made and the persons against whom and the nature of the property which may be subjected to such orders are set out in detail. S.444 enables the provisions of the Act to be extended to deal with external requests or orders. An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request (s.447(1)). A relevant order may be for the recovery of specified property or a specified sum of money (s.447(2)). Property is "relevant" if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made (s.447(7)).

69. The power conferred by s.444 was exercised by The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 SI No: 3181, to which I shall refer as 'ERO'. Part 2 of ERO, comprising articles 6 to 55, gives effect to such orders in England and Wales. By Article 6 the Secretary of State to whom the external request is directed may refer it to, as in this case, the Director of the SFO. Article 6(5)

entitles the relevant director to ask for further information from the overseas authority. Article 7 sets out the conditions to be satisfied if the Crown Court is to give effect to the external request. In this case it was the first condition set out in Article 7(2) namely that a criminal investigation had been started in the country from which the external request came and there was reasonable cause to believe that the alleged offender, i.e. SIB, had benefited from its criminal conduct. In that event Article 8 provides that the Crown Court:

> "may make an order ("a restraint order") prohibiting any specified person from dealing with relevant property which is identified in the external request and specified in the order."

Such order may be subject to exceptions and cannot affect property subject to charges under five specified provisions.

70. Article 9 provides that an application for a restraint order may only be made by the Director of the SFO or other relevant prosecutor and may be made on an ex parte application to a judge in chambers. Article 10 entitles any person affected by the restraint order to apply to the Crown Court for the variation or discharge of that order and to appeal to the Court of Appeal from a refusal to do so. On such an appeal the Court of Appeal "may make such order as it believes is appropriate". Article 11 makes hearsay evidence of any degree admissible in restraint proceedings.

71. Article 17 provides, so far as material to these appeals:

> "(5) If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit.
>
> (6) Before exercising any power conferred by paragraph (5), the court must give an opportunity to be heard to—

(a) the relevant Director, and

(b) any receiver appointed in respect of the property under article 15, 27 or 30."

It is these provisions which should have been, but were not, brought to the attention of Lewison J.

72. Much of the argument before us revolved around the provisions of Article 46(1)-(3), which effectively reproduce s.69(1)-(3) of the Act containing what is conventionally described as 'the legislative steer'. They provide, so far as material to these appeals:

(1) This article applies to -

(a) the powers conferred on a court by this Part;

[(b)...]

(2) The powers—

(a) must be exercised with a view to the value for the time being of realisable property or specified property being made available (by the property's realisation) for satisfying an external order that has been or may be made against the defendant;

(b) must be exercised, in a case where an external order has not been made, with a view to securing that there is no diminution in the value of the property identified in the external request;

[(c)....

(d)...]

(3) Paragraph (2) has effect subject to the following rules—

(a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;

[(b)....

(c).....]

73. Article 49(2) incorporates the definition of "free property" contained in s.82 of the Act. Article 49(3) incorporates the provisions in relation to property contained in s.84(2)(a) and (c) to (g) and s447(4) to (6) of the Act. Those provisions are in the following terms:

> "82. Free property
>
> Property is free unless an order is in force in respect of it under any of these provisions–
>
> (a) section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders);
>
> (b) Article 11 of the Criminal Justice (Northern Ireland) Order 1994 (S.I. 1994/2795 (N.I. 15)) (deprivation orders);
>
> (c) Part 2 of the Proceeds of Crime (Scotland) Act 1995 (c. 43) (forfeiture of property used in crime);
>
> (d) section 143 of the Sentencing Act (deprivation orders);
>
> (e) section 23 or 111 of the Terrorism Act 2000 (c. 11) (forfeiture orders);
>
> (f) section 246, 266, 295(2) or 298(2) of this Act."

> "84 Property: General Provisions
>
> [(1)....]
>
> (2) The following rules apply in relation to property–
>
> (a) property is held by a person if he holds an interest in it;
>
> [(b)...]
>
> (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
>
> (d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985 (c. 66)) or liquidator;

(e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;

(f) references to an interest, in relation to land in England and Wales or Northern Ireland, are to any legal estate or equitable interest or power;

(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;"

"447 Interpretation

[(1)....

(2)...

(3)...]

(4) Property is all property wherever situated and includes–

(a) money;

(b) all forms of property, real or personal, heritable or moveable;

(c) things in action and other intangible or incorporeal property.

(5) Property is obtained by a person if he obtains an interest in it.

(6) References to an interest, in relation to property other than land, include references to a right (including a right to possession).

[(7)-(12)]

74. I should also refer to Article 54(a) which provides:

"54. In this Part "defendant"—

(a) in relation to a restraint order means—

(i) in a case in which the first condition in article 7 is satisfied, the alleged offender;

(ii) in a case in which the second condition in article 7 is satisfied, the person against whom proceedings for an offence have been started in a country outside the United Kingdom (whether or not he has been convicted);"

There was not incorporated into ERO the provisions of Part 9 of the Act which modify the provisions of the Insolvency Act 1986 in the case of a person adjudicated bankrupt in England and Wales or of a company being wound up under that Act. In such cases a pre-existing bankruptcy or winding-up takes priority over a restraint order.

75. As I indicated in paragraph 1(8) and (9) above the restraint order in this case was sought pursuant to the Letter of Request dated 6th April 2009 sent by the US Department of Justice to the Central Authority of the United Kingdom and duly referred to the SFO. The Letter of Request stated that SIB amongst others was being investigated by various US Federal law enforcement agencies for violations of US Criminal laws that prohibit wire, mail and securities fraud and money laundering. It stated that the evidence collected to date indicated that SIB amongst others had transferred the proceeds of such violations to bank accounts in the UK and elsewhere and were liable to confiscation. The letter went on to indicate that SIB had been used as an instrument of fraud by the individuals being investigated, that the fraud had generated $7.2bn of investments and that some $110m had been transferred to accounts in the UK. The Letter of Request then asked the UK authorities to freeze and restrain all proceeds of the alleged crimes so that the US authorities might provide restitution to the world-wide victims of the crimes. It gave notice that further requests might be made later. It continued:

> "**Time Constraints**
>
> US authorities request the UK authorities file an application to freeze or restrain the identified criminal assets requested by close of business on Tuesday 7th April 2009. Details of such need will be provided on request."

The Letter of Request also sought confidentiality so as not to prejudice the ongoing enquiries in the US.

76. The letter continues with a summary of the facts relied on for the allegation that the individuals "acting through SIB (an off-shore bank domiciled in Antigua) and through a network of...financial advisers" executed the massive fraud alleged. It describes the US proceedings to date including the appointment of the US Receiver and the injunction granted by the District Court for the Northern District of Texas. It sets out the tracing attempts made by the US authorities and the discovery of three accounts in the name of SIB held with Credit Suisse, four with HSBC and one with Longley Asset Management UK in London. After setting out the offences alleged to have been committed, details of the persons and entities alleged to have been involved, including SIB, the letter concludes with a request to freeze any and all assets located in the UK except those held in the names of Stanford Bank of Panama and Bank of Antigua with Credit Suisse or HSBC in London because:

> "The United States needs this particular freeze or restraint in order to ensure that these assets are legally secured for criminal or quasi-criminal confiscation efforts and to protect those assets from potential dissipation by other persons to the possible prejudice of the real victims of the Stanford fraud and money laundering conspiracies."

The letter continues with details of five accounts in the name of SIB with Credit Suisse in London and four at HSBC and the likelihood of further requests for confiscation and other orders. It concluded with the statement:

> "Ultimately, all the confiscated proceeds will be returned to all the world-wide victims on a pro rata pursuant to US law, and for these assets, the relevant UK laws."

77. The Letter of Request was dealt with in the SFO by an employed barrister, Mr Tanvir Tehal. He made a witness statement to which he exhibited the Letter of Request. In paragraph 3 he stated:

> "I do not have personal knowledge of this case and rely entirely on information contained in [the Letter of Request]".

He then dealt with the formal requirements for the making of a restraint order on the incorrect basis that criminal proceedings in the US had been commenced against SIB. In paragraph 8 he said:

> "To the best of my knowledge there is a civil freezing order made by the High Court in London on 6th April 2009 against those assets which are the subject of this witness statement and the restraint order sought. The reason for this restraint order is that it is believed that the civil freezing order will be discharged shortly."

He then referred to the risk of dissipation, the orders sought and who the orders should be served on and how.

78. As recorded in paragraph 1(9) above the restraint order was made by HH Judge Kramer QC on an ex parte application made on 7th April 2009. The transcript of the proceedings indicates that the judge was told that there was an ongoing investigation in the US into SIB and the Stanford Group, that the restraint order was needed in order to preserve assets to answer a confiscation order in due course and that the US authorities did not wish the contents of the witness statement to be disclosed. The order and the evidence in support of it were served on SIB as described in paragraph 1(9) above. On 17th July 2009 the application for its variation was made as indicated in paragraph 1(15) above and was disposed of by HH Judge Kramer QC on 29th July 2009 as stated in paragraph 1(17) above. Two days before Judge Kramer gave

judgment Mr Addy J. de Kluiver, a senior trial attorney in the US Department of Justice, made a further witness statement in answer to questions put to him by counsel for the SFO.

79. The first question was why the SFO was not informed in the Letter of Request of the appointment of the Antiguan Liquidators. The answer is in these terms:

> "The existence *vel non* of an Antiguan receiver at the time of the letter of request had no relevance to our criminal case, so we are not sure why we would be under any obligation to disclose that fact. Moreover at the time we sent out the letter of request, the Antiguan receiver, while appointed by the FSRC, had not been legally recognised as such by any court. At the time, the only receiver that had been recognised by any court was the US Receiver, and the only orders obtained regarding assets were the US orders of restraint obtained by the SEC that are referenced in the Letter of Request."

80. The second and third questions sought information as to when Mr de Kluiver first knew that SIB was not to be a defendant to the criminal proceedings in the US and whether the assets of SIB in London were liable to forfeiture or confiscation by the US authorities. He replied that by 6th April 2009 no final decision whether to prosecute SIB had been taken but that SIB could be added to the indictment at any time. Further SIB's assets in London were liable to forfeiture because SIB was the alter ego of the individual defendants and an instrumentality in money laundering.

81. By the fourth question the deponent was asked to comment on the allegation made in court that:

> "The US authorities have knowingly attempted to frustrate the work of the Antiguan Liquidator by not disclosing the appointment of the liquidator in the Letter of request on which the SFO acted and obtained the Restraint Order?"

The response was as follows:

> "See first response to question (a). The US Receiver who has been vigorously opposing the Antiguan receiver is not acting in concert with the Department of Justice. The US Receiver has an obligation to protect the victims' interests that arise under US laws separate and apart from our criminal powers and he answers only to the judge who appoints him. The Department of Justice does not control the actions of the Judge the US Receiver reports to. The criminal powers that the Department of Justice exercises are completely unrelated to the US Receiver's actions. At no time did lawyers for the Antiguan receiver contact the criminal prosecutors and inform us of their plans of going after all assets in all countries regardless of the costs and duplication of effort. They still have not contacted us and the criminal indictment identifying which assets we intend to forfeit has been in the public domain for over one month now."

82. In his judgment delivered on 29th July 2009 HH Judge Kramer QC set out the facts and described the application before him as one to discharge the order he had made on the 7th April for material misrepresentation or non-disclosure and alternatively for its variation. The material misrepresentations or non-disclosure alleged related to

> (1) the fact that SIB was and is not a defendant to the criminal proceedings in the US.
>
> (2) the fact that the alleged urgency would have been undermined had SFO disclosed, as it should have done,
>
> > (a) the proceedings in Antigua,
> >
> > (b) the appointment of the US Receiver,
> >
> > (c) the communications of the US Receiver and the Antiguan Liquidators with the UK banks holding the deposits sought to be frozen,
> >
> > (d) the freezing order made by Jack J on 27th March 2009 and
> >
> > (e) the world-wide coverage of the frauds allegedly perpetrated by SIB.
>
> 3) the statement made to the court on 7th April 2009 that the freezing order made by Jack J was shortly to be discharged was made without any evidence to support it.
>
> (4) the failure of SFO to serve on SIB the evidence relied on before HH Judge Kramer QC on 7th April 2009 until 24th July 2009 delayed the application to set it aside.

83. The judge then set out the relevant provisions of ERO and posed four questions, namely was there material (1) misrepresentation or (2) non-disclosure as a result of which the order was obtained? Even if there was (3) should the order be discharged? In any event (4) should the order be varied as requested? I pause to observe that the first two questions posed by the judge were the wrong ones. The question is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms, see e.g. **Dormeuil Freres SA v Nicolian Ltd** [1988] 1 WLR 1362, 1368.

84. The judge then answered each of the four questions he had posed for himself. With regard to the first question he concluded:

> "It is true that in paragraph 5 of his witness statement Mr Tehal misrepresented the position [sc. SIB was a defendant to the criminal proceedings] but I accept the submission that that was an innocent error made in haste and not a material one."

Given that the judge had asked himself the wrong question the conclusion that the misrepresentation was not material cannot be correct.

85. In relation to question 2 the judge concluded that there was non-disclosure of the Antiguan Liquidators (which must have been a reference to the Antiguan receiver-managers and the liquidation proceedings) as at that date but he accepted the argument set out in the skeleton argument of counsel for SFO that, in effect, such non-disclosure made no difference to the result. But that submission specifically accepted that the existence of the Antiguan Liquidators was material to the exercise of the court's discretion. In fact, of course, on 7th April 2009 the individuals who were

subsequently appointed liquidators were in office as court appointed receiver-managers and the winding-up proceedings had been commenced. Thus, not only did the judge not ask himself the right question but his answer to the wrong question demonstrates that the answer to the right question was affirmative. The judge did not deal at all with the remaining allegations of non-disclosure I have summarised in paragraph 82(2) and (3) above.

86. The judge then considered the third question. He reminded himself of the purpose of a restraint order and the duty of the court to act fairly. He referred to ERO Article 46(2)(b) and adopted the reasoning of Laws and Longmore LJJ in **Jennings v Crown Prosecution Service** [2005] EWCA Civ 746 at paras 52 to 56 and 64 as to the balance to be struck between the public interest and the requirement that a party, including an emanation of the State, must act in strict compliance with the rules and standards as to disclosure to be made on an ex parte application. In the context of the instant case he saw no reason to discharge the restraint order. For similar reasons he declined to vary the order. In conclusion he added:

> "Even if I am wrong in my answers to the four questions, are there now grounds for making the order sought by SFO? I am satisfied that as of today's date, there being no freezing order in place in the Queen's Bench Division, the order can and should still be made by this court. The position is that the funds in question were transferred to this jurisdiction by the individual defendants in the name of SIB, prima facie, fraudulently. Accordingly, it is, in my judgment, in the public interest to make the order and, were it necessary for me to do so, I would."

87. In these circumstances counsel for the Antiguan Liquidators submits that the restraint order should be set aside for the following summary reasons:

> (1) Material facts were misrepresented or not disclosed by DoJ/SFO when they applied ex parte for the restraint order granted on 7th April 2009 such that the order then made should be set aside.

(2) On the making of the winding-up order in Antigua on 15th April 2009 title to all the moveable assets of SIB of vested in the Antiguan Liquidators.

(3) On 29th July 2009 HH Judge Kramer QC should have recognised that Article 46(3)(a) then required him to withhold a restraint order in order that the Antiguan Liquidators might retain or recover the property vested in them by the Antiguan Liquidation.

I will deal with those submissions in that order.

88. I have no doubt that there was substantial misrepresentation and non-disclosure of material matters when the ex parte application was made to HH Judge Kramer QC. First, he was not told of the position in Antigua. By 7th April 2009 the receiver-managers had been confirmed in office by the High Court of Antigua and Barbuda (paragraph 1(3) above), they had reported to the court that SIB was insolvent and should be put into liquidation (paragraph 1(4) above) and two petitions to wind up SIB had been presented to the High Court in Antigua and Barbuda (paragraphs 1(3)-1(5) above) and were about to be heard. That these facts were known to the DoJ or would have been if the most elementary enquiries had been made of the High Court in Antigua is clearly established by the witness statement of Addy J. de Kluiver quoted in paragraph 79 above.

89. Second, the judge was not told about the actions of the SEC in obtaining a freezing order over the assets of SIB from Jack J on 27th March 2009. It is curious that Mr Tehal stated in paragraph 3 of his witness statement that he had no knowledge of the case except what the Letter of Request had informed him yet in paragraph 8 of the same witness statement he mentioned the High Court freezing order notwithstanding that the Letter of Request does not. So it would appear that Mr Tehal must have been told of the freezing order by someone; but what was the basis for his statement in paragraph 8 that "it is believed that the civil freezing order is about to be discharged"?

Although it was initially granted on 27th March 2009 until 6th April 2009 there was every likelihood that it would be continued from time to time until a full inter partes hearing could be held, as indeed it was. Had proper enquiries been made the judge would have been told, as the fact was, that the freezing order had, on 6th April, been continued over 27th April 2009.

90. Third, although the Letter of Request referred to the appointment of a receiver in respect of SIB and the grant of temporary injunctions by the US District Court for the Northern District of Texas, such appointment was not referred to in the body of Mr Tehal's witness statement as it should have been, see **National Bank of Sharjah v Dellbourg** [1993] 2 Bank L.R. 109. No reference was made to the extensive powers granted to the US Receiver or of the fact that under the order appointing him the US court had assumed exclusive jurisdiction and taken possession of all the assets of SIB wherever located. It may be that the DoJ was not acting in concert with the SEC or the US Receiver, as Mr de Kluiver states in his witness statement made on 27th July 2009, but there is no suggestion that information available to the SEC or US Receiver would not have been made freely available to the DoJ had they asked.

91. Fourth, HH Judge Kramer QC was not told of the correspondence between the English solicitors for the Antiguan receiver-managers and the various financial institutions holding assets of SIB. For instance on 27th February 2009 the solicitors notified HSBC, Credit Suisse, Marex Financial and Longley Asset Management of the appointment of both the Antiguan receiver-managers and the US Receiver. In practical terms none of those financial institutions would have accepted instructions on behalf of SIB from any of the former officers of SIB. This correspondence was known to the US Receiver and should have been known to the DoJ. The judge was

not told of the substantial publicity given to the troubled Stanford Group either but it is clear from the transcript of the hearing before him on 7th April 2009 that he was well aware of it.

92. Fifth, the affidavit of Mr Tehal was misleading and incorrect in stating in paragraph 5 that proceedings had been commenced in the US thereby satisfying the second condition specified in ERO Article 7(3). In its context that must have been a reference to criminal proceedings but none had been commenced by 7th April 2009. This mistake is not of itself of great significance because the condition specified in Article 7(2) to the effect that there was an ongoing criminal investigation was satisfied and the judge was told that this was the basis of the application before him.

93. Taken together the matters which should have been disclosed but were not undermined the allegation made in both the Letter of Request and the witness statement of Mr Tehal that there was an immediate risk of dissipation of the assets of SIB such as to warrant the grant of a restraint order unlimited in point of time on an ex parte application. The judge could not have been criticised had these matters been disclosed, as they should have been, and he had declined to make any order on an ex parte application. The obvious course would have been to see if the application for the restraint order could be heard by the same judge as would hear the application for the renewal of the freezing order on 27th April. At the most he might have granted a restraint order for a limited period so as to hold the position until a proper inter partes hearing could be arranged. For these reasons I conclude that not only did HH Judge Kramer QC ask himself the wrong questions but he gave the wrong answer to them. The effect or result of the non-disclosure was the grant of an order unlimited in point of time which, on proper disclosure, could not have been justified.

94. In these circumstances the public interest to which Laws LJ referred in **Jennings v CPS** [2006] 1 WLR 182, 198 para 56 did not require the court to make the order HH Judge Kramer QC made on 7th April 2009 and this court is entitled in its discretion to set aside the restraint order so that the SFO may be deprived of any advantage it obtained by means of the non-disclosure, see **Brinks Mat Ltd v Elcombe** [1988] 1 WLR 1350, 1357 and to mark its disapproval of the conduct of SFO/DoJ [**ibid** p.1359]. In addition it has the power conferred by ERO Article 10(3) to make such order as it believes is appropriate. What advantage may have been obtained and what is appropriate now depends on the other contentions of the Antiguan Liquidators summarised in paragraph 87 above. I approach them on the assumption that no restraint order had been made on 7th April 2009.

95. As recorded in paragraph 1(10) above the order for the winding up of SIB in Antigua also appointed the then receiver-managers as joint liquidators and vested all SIB's property of whatever nature and wherever situated in them. As the law of Antigua and Barbuda was the law of both the place of incorporation of SIB and of its COMI the winding up order had the effect under the law of England and Wales of vesting the moveables of SIB in the Antiguan Liquidators even before recognition under Uncitral of the Antiguan Liquidation as the foreign main proceeding, see Dicey, Morris and Collins 14th Ed. rules 195(2) and 197. Given my assumption as stated in paragraph 94 above it is unnecessary to consider the application or effect of **Galbraith v Grimshaw** [1910] AC 508.

96. On 29th July 2009 Judge Kramer decided that even if the restraint order were then set aside the proper exercise of the discretion of the court would have been to grant it afresh. Counsel for the Antiguan Liquidators submits that the judge was wrong.

They submit that as at 29th July and on the assumption the restraint order had been set aside the proper exercise of the court's discretion would have been to refuse to grant a restraint order. They contend that because of the terms and effect of the winding up order made in Antigua Article 46(3)(a) applied and required the refusal of a restraint order so that the Antiguan Liquidators might retain or recover the assets of SIB vested in them.

97. It was accepted that as at 29th July 2009 at least one of the conditions imposed by ERO Article 7 was satisfied. The evidence indicated that the property sought to be restrained was relevant property within the definition contained in s.447(7). Proceedings for an offence had been commenced in the US against, amongst others, Sir Allen Stanford and there was reasonable cause to believe that he had benefited from his criminal conduct. In any event the investigation as against SIB had not, so far as I am aware, been concluded.

98. On an application for a restraint order made on 29th July the court would have to exercise the discretion given by Article 8(1) in accordance with the legislative steers given in Article 46(1)-(3). The submission summarised in paragraph 96 above rests on the proposition that the Antiguan Liquidators have an interest in the bank deposits referred to in the Letter of Request and are "persons other than the defendant" for the purposes of Article 46(3)(a). For the reasons already given I would accept that they have an interest in those deposits but I do not accept that they are persons other than the defendant. S.84(2)(d), quoted in paragraph 73 above, is applicable in accordance with ERO Article 49(3). Given that it is made applicable to external orders and requests the word "liquidator" must, in my view, extend to a liquidator appointed under the law of the place of the company's incorporation or COMI. The effect is

that references to property held by SIB include references to property vested in the Antiguan Liquidators.

99. Arden LJ has raised the possibility that the unsecured creditors of SIB, both individually and collectively, hold interests in the assets of SIB for the purposes of Article 46, that the court should have those interests in mind when exercising its discretion whether or not to grant a restraint order and should insert a proviso to any such order such that those interests are preserved. As Hughes LJ points out no party before us and no unsecured creditor contended that the unsecured creditors held such an interest. Accordingly it is not a point which arises for decision on this appeal. My provisional view is the same as that of Hughes LJ. Further, I agree with him that even if unsecured creditors might have such an interest it would not be either necessary or appropriate to insert any proviso into any restraint order we may make. If an unsecured creditor seeks to establish such an interest then he must do so in the Crown Court, not in the Court of Appeal on the final disposition of these appeals.

100. It follows that Article 46(3)(a) would not have applied to an application for a restraint order made on 29th July 2009 so the discretion afforded by Article 8(1) would have to be exercised in accordance with the legislative steer given in Article 46(2)(b), namely "with a view to securing that there is no diminution in the value of the property". In my view this consideration would require the grant of a restraint order on 29th July 2009 because by then the freezing order originally obtained by the SEC had been discharged by Jack J but also to stop for the time being the risk of the diminution in the value of the deposits held with the specified banks in the name of SIB in paying the costs of either the Antiguan Liquidation or the US Receivership.

101. But the question remains whether to ensure that the advantage obtained by the grant of the restraint order on 7th April 2009 without full disclosure requires merely an order that SFO pay the costs to date or an order discharging the original restraint order with costs and granting it afresh as of 29th July 2009. I find it hard to imagine what advantage there could have been. Nevertheless it seems to me that in principle this court should make the latter order so that any advantage which might have arisen is denied to SFO/DoJ. I would reserve for further argument the question whether those costs should be assessed on an indemnity basis or only on the standard basis.

102. I summarise my conclusions on the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC made on 29th July 2009 as follows:

> (1) There was material misrepresentation and non-disclosure by SFO/DoJ on the ex parte application on which the restraint order was made on 7th April 2009.
>
> (2) The order then made should be set aside with an order for payment by the SFO of the costs of and occasioned by the original application and of the application to set it aside.
>
> (3) The question whether such costs should be assessed on an indemnity basis, if not agreed, should be reserved for further argument.
>
> (4) The restraint order originally sought should be re-granted with effect from 29th July 2009.

Conclusions on both appeals

103. As I indicated in paragraph 3 above it is necessary to have regard to the conclusions on each appeal and the effect they may have on each other. Only then can the terms of the final orders to be made on each of them be determined. Each of the Antiguan Liquidators, the US Receiver and the SFO/DoJ contended that it was better placed than either of the other two to administer the world-wide assets of SIB and recompense the victims of the frauds perpetrated by the individuals charged in the US

through the instrumentality of SIB. The Antiguan Liquidators contend that they are the representatives of SIB duly appointed under the law of the place of its incorporation or its COMI and well able to collect and administer all the assets of SIB and distribute them amongst all the creditors. The US Receiver contends that he is better able to do so amongst all the victims of the fraud and not only those who are creditors of SIB. The SFO/DoJ submit that they can carry out the same functions as the US Receiver but at public expense rather than at the expense of the victims or creditors.

104. None of these solutions is ideal in that the US Receiver and the SFO/DoJ would not, seemingly, compensate creditors of SIB who are not victims of the frauds but the Antiguan Liquidators would not directly compensate victims of the frauds who were not also creditors of SIB. On the other hand there will be a good deal more for the victims if the administration of the assets and their distribution is entrusted to the SFO/DoJ for that should avoid most of the very substantial costs being incurred by both the Antiguan Liquidators and the US Receiver. Further the court is, in my view, entitled to place reliance on the passage in the Letter of Request I have quoted at the end of paragraph 76 above confirmed by the statements in the witness statement of Mr Addy J.de Kluiver made on 29th October 2009 to the effect that the assets of SIB in England will be distributed to the victims pro rata and pursuant to the relevant UK laws. In principle, therefore, I see no reason not to make the restraint order as of 29th July 2009 so as to confer administrative priority on the SFO/DoJ.

105. But it does not follow from this conclusion that the order recognising the Antiguan Liquidation as the foreign main proceeding should be withheld pursuant to ERO Article 17(4). Not only is Uncitral Article 17 mandatory but the exercise of the

jurisdiction conferred by ERO for making forfeiture and other orders requires a representative of SIB authorised to consider and, if thought fit, oppose subsequent applications of SFO/DoJ for confiscation or other orders. Prima facie the jurisdiction conferred by Article 20(2)-(6) of Uncitral is wide enough to enable this court to tailor the effect of the recognition order and the powers of the Antiguan Liquidators so as to confer priority of administration of the assets of SIB on SFO/DoJ. Further it is for consideration whether the provisions of Article 22 of Uncitral can be used so as to provide some protection for creditors of SIB who are not also victims of the fraud. I understood it to have been agreed at the hearing that we should allow further argument on what powers should be conferred on the Antiguan Liquidators in the light of all our conclusions. Accordingly I would, in addition to the specific matters to which I have already referred:

(1) Make a restraint order with effect from 29th July 2009 on the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC made on that day.

(2) Recognise the Antiguan Liquidation and the Antiguan Liquidators as the foreign main proceeding and the foreign representatives respectively in relation to SIB.

(3) Adjourn for agreement or further argument the question whether and if so to what extent the powers conferred by Article 20(2) Uncitral should be exercised so as to avoid inconsistency between those two orders or their consequences.

Lady Justice Arden :

Introduction

106. Were it not for the making of a winding up against SIB on 15 April 2009, I would have no hesitation about agreeing with the Chancellor that the order of HHJ Kramer QC dated 7 April 2009, and continued by him on 29 July 2009, should be (a) discharged by this Court by reason of material non-disclosure and (b) re-imposed with

effect from 29 July 2009. However, I respectfully differ from him over the interests which a restraint order may affect. The unsecured creditors of SIB arguably became interested in the assets of SIB when the order for its winding up was made, and arguably any restraint order must be made subject to their interests. The parties should be given the opportunity to make submissions on these questions as they have not yet been fully argued, and their resolution may affect the issue whether the restraint order of 7 April 2009 should be discharged and whether, and, if so, on what terms, it should be re-imposed. If either of the parties wishes to argue them, they cannot simply be left "for another day".

107. The issues arising out of the making of the restraint order on 7 April 2009 are the correct starting point for resolving these appeals. However, on the issues arising out of the matters heard by Lewison J, in substantial agreement with the Chancellor, I consider that Lewison J came to the right conclusion on the questions that were decided by him in his careful judgment dated 3 July 2009.

108. I am indebted to the Chancellor for his clear and comprehensive judgment, which will greatly shorten my task. I also adopt his description of the background and the definitions contained in his judgment.

109. The points which I make in this judgment will be organised under the following headings:

> *A. The materiality of the non-disclosure by the SFO prior to the making by HHJ Kramer QC of the restraint order dated 7 April 2009*
>
> *B. The effect on the restraint order dated 7 April 2009 of the non-disclosure by the DoJ/SFO: should the order have been discharged by HHJ Kramer QC? Should this court now make a new restraint order?*
>
> *C. Effect for the purposes of Article 46(3)(a) ERO of the winding up on SIB on 15 April 2009*

D. Recognition of the Antiguan Liquidators -- appeal against the order of Lewison J dated 3 July 2009

E. Guidance as to the practice for future cases

F. Conclusions

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A. THE MATERIALITY OF THE NON-DISCLOSURE BY THE SFO PRIOR TO THE MAKING BY HHJ KRAMER QC OF THE RESTRAINT ORDER DATED 7 APRIL 2009

110. I agree with the judgment of the Chancellor on this issue (paragraphs 88 to 94). In my judgment, there has, even now, been no frank explanation of exactly how much the DoJ knew as at 6 April 2009 (when the LOR was issued) about the appointment of the Antiguan receivers on 26 February 2009, or the presentation by the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") of a petition for the winding up of SIB or of the other winding up petition mentioned by the Chancellor. These petitions were both relevant at 7 April 2009, though the latter, which was presented by a creditor, was opposed, and was dismissed by the Antiguan court on 15 April 2009. Nor has there been any satisfactory explanation of the reasons why HHJ Kramer QC was told that the application was required to be made so urgently. It is said by Mr Mitchell QC that there was a risk of flight by individual defendants but Mr Kovalevsky QC threw doubt on this in fact and in any event this was really a reason for confidentiality. Even now there is no explanation why more accurate information about the freezing orders obtained in the High Court in London was not available for the application to HHJ Kramer QC. I note that the hearing in Antigua of the winding up petition of the FSRC took place in the same week as the application was first made to HHJ Kramer QC in London.

111. In my judgment, the petitions for the winding up of SIB ought to have been disclosed to HHJ Kramer QC because, if an order was made, a liquidator would be appointed with power to collect the assets, thus reducing the risk of dissipation, and also because it was reasonably arguable that on the making of a winding up order the unsecured creditors would acquire interests for the purposes of Article 46(3)(a) ERO. The petitions, it may be noted, had been presented on 9 and 24 March 2009 and so were clearly not presented to pre-empt the restraint order.

112. In my judgment, had there been proper disclosure of in particular the Antiguan proceedings and those before Jack J, there would have been no need to make a restraint order on 7 April 2009, and such an order should not then have been made. Even a temporary order was unnecessary, though it could have been made on strict terms as to immediate service on SIB and with liberty for SIB to apply to discharge it on very short notice. Mr Mitchell sought to meet these difficulties by submitting both orally and in writing that, if told of the winding up petition, HHJ Kramer QC might have regarded the threat of the appointment of the liquidators as a threat of dissipation in itself in view of the enormous costs which their appointment would generate. That would not by itself have justified the making of a restraint order without notice. It would have been a wholly innovative and unprecedented application on which the court would need submissions from both parties. There would be no risk of dissipation in the meantime; thus the reason suggested by Mr Mitchell for making the application would without more be an attempt to use the court's processes to steal a march on the prospective liquidators by removing assets which they would on appointment be entitled to control. The right course would be to obtain an order for short service on SIB.

113. The only point of difference between the Chancellor and Hughes LJ on non-disclosure is on the *Dellbourg* point, by which I mean the point that information about the US Receiver should have been in the witness statement placed before HHJ Kramer QC on the application for a restraint order, rather than simply in the letter of request (LOR). I agree with the Chancellor for the reasons he gives. As the Chancellor explains, the information in the LOR about the US Receiver was inadequate. There was no reference to his power to take possession of the assets of SIB. If the exercise of putting the material information into the witness statement had been performed, it is more likely that proper thought would have been given to why information about the US Receiver was material to the application for a restraint order and what then had to be disclosed. That supports the wisdom of requiring disclosure to be made in the statement.

B. THE EFFECT ON THE RESTRAINT ORDER DATED 7 APRIL 2009 OF THE NON-DISCLOSURE BY THE SFO: SHOULD THE ORDER HAVE BEEN DISCHARGED BY HHJ KRAMER QC? SHOULD THIS COURT NOW MAKE A NEW RESTRAINT ORDER?

114. For the reasons given by the Chancellor, I agree that, certainly had there been no winding up order on 15 April 2009, the restraint order made on 7 April 2009 should have been discharged in July 2009. I agree with the Chancellor that, because of the seriousness of the non-disclosure, the restraint order has to be discharged. As explained, I consider that there is a continuing failure to make proper disclosure of the DoJ/SFO's knowledge as at 7 April 2009 of the events and proceedings then unfolding in Antigua and of the reason for urgency. I bear in mind, in accordance

with what this Court said in *Jennings v CPS* [2005] EWCA Civ 746 at [55] to [57], the fact that the application was made in the public interest. However, there was in fact no real risk of dissipation on 7 April 2009. Mr Mitchell did not suggest that the sanction of discharge of a restraint order was excluded by Article 46 or any other article of ERO and in the light of *Jennings* such an argument may not be open to him in this court in any event.

115. I also agree that this Court should in principle impose a new restraint order. Article 46(2)(b) ERO (set out below) specifically requires the court to exercise its powers to make a restraint order. This particular provision is more than a mere steer. It is, in effect, a direction that a restraint order should be made and maintained in force at all times. *Webber v Webber* [2007] 2 FLR 116 at [42], on which the Antiguan Liquidators relied, does not assist as that was concerned with two apparently conflicting domestic statutory schemes for dealing with the assets sought to be restrained. There is no reason why a new restraint order, if imposed, should not take effect from 29 July 2009 in replacement for that discharged for material non-disclosure. There would be no point in discharging the original restraint order and re-imposing it with effect from 7 April 2009.

116. If some third party had acquired an interest in the property restrained after the date of the restraint order imposed on that date, then, in agreement with Hughes LJ, I consider that that is a factor that would have had to be considered in deciding whether the restraint order should be discharged. It follows that it is reasonably arguable that, if the creditors of SIB now have an interest in the assets of SIB which would be overridden by a restraint order, or which they can assert under Article 46(3)(a) ERO, the court, when deciding whether to discharge or re-impose a restraint order, have to

determine whether such interest existed in law and, if it did, take it into account in its decision whether to discharge the restraint order on the grounds of non-disclosure.

117. I note, though it is a separate matter, that, even if the creditors have an interest in the assets of SIB, it is still possible that some pre-existing interest of individual victims of the fraud will trump them, but no such interest has yet been asserted by them.

118. If the issue of the nature of the creditors' interest, if any, in SIB's assets is not resolved before any final decision is taken on whether to discharge the restraint order the following situation may arise. Suppose that the restraint order dated 7 April 2009 is discharged and that this court makes a new restraint order with effect from 29 July 2009. Suppose further that at a later date it is determined that the creditors have an interest in the assets the subject to the restraint order for the purposes of Article 46(3)(a) by virtue of only of the order for the winding up of SIB on 15 April 2009. Suppose further that in that event the SFO wishes to argue that, notwithstanding the material non-disclosure found by this court, the restraint order dated 7 April 2009 should not to be discharged because the interest of the creditors would then take precedence and that interest only arose after the original restraint order was made. Such an argument might be founded upon the terms of Article 46 (2). (I would add that if they wish to take this course they might well be required to give fuller information about the application for that order than they have done to date). They will not be able to advance that argument if by then the order of 7 April 2009 has already been discharged. The clock cannot then be turned back. Put another way, the question whether the creditors have any interest in the assets of SIB for the purposes of article 46(3)(a) is a logically prior issue which should, if it is reasonably arguable and the point is one which the parties wish to argue, be decided first. To

hear more argument would also enable the Antiguan Liquidators to amplify the argument foreshadowed in their skeleton argument (as explained below) and, if successful, to achieve the release of substantial liquid funds which they say are urgently needed for the purposes of the liquidation. If the parties decide not to argue the point, they will have to accept any consequences that flow from such waiver.

119. The restraint order dated 7 April 2009 was not served on SIB until 27 April 2009. I infer from this that the liquidators did not know about it until then. The winding up order was therefore made in ignorance of the restraint order and not to pre-empt it.

C. EFFECT FOR THE PURPOSES OF ARTICLE 46(3)(A) ERO OF THE WINDING UP ON SIB ON 15 APRIL 2009

120. It is clear that ERO does not protect any interest of the defendant. But it does clearly require protection to be given to the interests of other persons: see Article 46(3)(a) ERO, which is considered in more detail below.

121. As a matter of law, the liquidators have two capacities. First, they are the agents of SIB. Secondly they are trustees for the unsecured creditors (see below and in the **Annex** to this judgment). However, their only interest in the assets of SIB (subject to any lien for their costs and remuneration, which has not been raised) is as trustees: they have no other interest as unsecured creditors.

122. In their written argument, the liquidators stated that the position in the winding up of SIB in Antigua is comparable to that in English law, namely that on winding up a trust arises over the company's assets for the benefit of all creditors pursuant to the statutory winding up scheme. At paragraph [68] of their skeleton argument, they submitted that the legislative steer in Article 46 (3)(a) requires the court to exercise its

powers with a view to allowing certain persons, who have an interest in the assets, other than the defendants and the recipient of tainted gifts, to retain the value of their interests. A footnote states that those persons in this case are the liquidators in whom SIB's assets are vested and the creditors on whose behalf liquidators hold SIB's assets on trust. Again, at paragraph [88] of their skeleton argument under a cross heading "*Article 46 (3)(*a)", the liquidators submitted that:

> "In this case the legislative steer must in any event give way to the Liquidators (and SIB's creditors') interest in the restrained assets:
>
> …
>
> (2) Article 46 (3)(a) is operative because neither the liquidator nor SIB's creditors are defendants or the recipients of a tainted gift within the meaning of article 46 (3)(a).
>
> (3) The assets within this jurisdiction have since their appointment on 15 April 2009 vested in, and been held for SIB's creditors on trust by, the Liquidators…"

123. However, no submissions in amplification of these written submissions were made orally, and accordingly the SFO and US Receiver did not make submissions thereon. According to my notes of the hearing, in the course of argument by Mr Kovalevsky, I interposed to suggest that the winding up of SIB might have divested SIB of the beneficial interest of its assets, but this point was not taken up. The argument of the liquidators was that the assets were vested in the liquidators and that the liquidators were different persons from SIB. But Mr Kovalevsky had no real answer to the s 84(2)(d) point on this.

124. The position of the liquidators is confirmed in a recent email to the court in which counsel for the liquidators observe: "It is not strictly accurate, however, to say that the creditors' interest is separate from the interest of the Liquidators, but rather that their interest arises under the same statutory trust of SIB's assets of which the Liquidators

are the trustees." Thus the liquidators have not focused on the interests of the creditors as such.

125. In all the circumstances, this Court cannot resolve the question whether unsecured creditors have any interest which this Court should protect under Article 46(3)(a). Counsel for the SFO in a recent e-mail to the court described the argument that "unsecured creditors hold any interest in the assets of SIB separate and additional to any interest therein held by the liquidators" as "untenable". In my judgment, for the reasons given below, that submission is wrong, and the question whether they have such an interest is properly arguable, and in the events which have happened that question can be raised even though it was not raised before HHJ Kramer QC or fully argued on this appeal. As it has not been fully argued, I have reached no concluded view on it.

126. I propose to deal with this point in these stages: (a) the basic statutory scheme for domestic restraint orders; (b) whether the scheme is different in its effect in relation to external restraint orders; (c) the significance of s 84(2)(d) POCA, and (d) the effect of this conclusion on the obligation imposed by the court under Article 46(3)(a) ERO.

127. This interaction of insolvency law and the proceeds of crime legislation is a matter of some difficulty and importance. Of course, in some legislation, Parliament treats a company as if it were no more than its shareholders. The statutory duties of auditors, for instance, are owed to the company in the interests only of its shareholders and not those of its creditors: *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] UKHL 39. But POCA contains express provisions dealing with the position of a company in liquidation, and contemplates that the order may affect the course of the

liquidation. When I refer to an "insolvency proceeding", I mean either a bankruptcy or a liquidation, whether voluntary or compulsory.

(a) The basic statutory scheme for domestic restraint orders

128. I start with the provisions of POCA where the related criminal proceedings are within England and Wales and the insolvency is governed by the Insolvency Act 1986. The interaction between insolvency law and POCA is described thus in the explanatory notes for POCA:

> "Section 417: Modifications of the 1986 Act
>
> 559. The purpose of Part 9 is to explain what happens when the same property is subject both to criminal confiscation legislation and to insolvency legislation. The Part is United Kingdom-wide and much of it is based on earlier legislation. *Sections 417-419* deal with the interaction of the insolvency legislation of England and Wales with the confiscation legislation of England and Wales, Scotland and Northern Ireland ("the 1986 Act" means the Insolvency Act 1986 in this context). This is necessary because both the criminal confiscation legislation and the insolvency legislation throughout the United Kingdom affect property in other jurisdictions.
>
> 560. The basic rule expressed by *section 417* is that, if at the time a person is adjudged bankrupt under the 1986 Act a restraint order has previously been made or a receiver or administrator has previously been appointed in respect of any of his property, that property is excluded from his estate for the purpose of the bankruptcy. So any of that property first goes to satisfy the confiscation order, rather than being dispersed to creditors. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.
>
> 561. *Schedule 11* makes some related consequential amendments to the Insolvency Act 1986. They deal with the problem that property can only be included in a bankrupt's estate at the time the bankruptcy order is made. If restraint or receivership action is underway when the bankruptcy order is made, any unconfiscated property cannot be given to the creditors at a later date. The amendments provide that property not required for confiscation can subsequently be included in the bankrupt's estate. See also the note on *Schedule 11, paragraph 16*, amendments to the Insolvency Act 1986.
>
> Section 418: Restriction of powers

562. This section, on the other hand, explains the circumstances under which the bankruptcy legislation takes priority. If a person is adjudged bankrupt before a restraint order is made or a receiver or administrator is appointed, no property that is for the time being comprised in the bankrupt's estate may then be placed under restraint or subject to realisation under the confiscation legislation. However, once the creditors have been satisfied, any remaining property may be used to satisfy the confiscation order.

563. Further to the problem described under the previous section and dealt with in *Schedule 11, paragraph 16*, *subsections (3)(d) and (e)* prevent the confiscation court from exercising its powers in relation to property left over after a confiscation order has been satisfied. This will ensure that, where a bankruptcy order has been made, any surplus sums will go into the bankrupt's estate for distribution to creditors, rather than being distributed by the Crown Court to the defendant and others under the confiscation legislation…

Winding up in England & Wales and Scotland

Section 426: Winding up under the 1986 Act

568. *Section 426* deals with the situation where an insolvent company rather than an individual holds realisable property. Broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency. The provision is thus analogous to that which applies to personal bankruptcy in England and Wales or Northern Ireland, and sequestration in Scotland. This section covers the company insolvency legislation of both England and Wales and Scotland. The same legislation, the Insolvency Act 1986, applies to company insolvency in the two jurisdictions."

129. It is not necessary for me to set out the statutory provisions themselves for the purposes of this judgment. The effect of these parts of the statutory scheme with respect to the assets on which it is intended to fasten may be summarised as follows: once subject to a restraint order, always subject to a restraint order. Likewise once subject to insolvency proceeding governed by domestic law, always subject to that insolvency proceeding. The result is entirely logical: a restraint order is simply a freezing order: it cannot of itself effect changes in the ownership of assets though it may prevent certain new interests from arising. The policy would appear from the

explanatory notes to be to prevent a defendant using an insolvency proceeding commenced *after* a restraint order as a means of defeating a restraint order. There is no mention of extending this policy to insolvency proceedings commenced *before* a restraint order is made. The explanatory notes make it clear that there are circumstances (*viz.* the prior commencement of an insolvency proceeding) when the insolvency proceeding has priority over the public interest in restraint and confiscation.

130. In his judgment, Hughes LJ contemplates that a restraint order may be made against a company in liquidation only if the liquidation post-dates the restraint order (judgment of Hughes LJ, paragraph 181 (i)). He also canvasses the possibility that a confiscation order may be made against a company in liquidation whether the liquidation commences before or post-dates the making of the restraint order (judgment of Hughes LJ, paragraph 181 (ii) and (iii)). This is not consistent with the passage from the explanatory notes set out above, and in my respectful judgment it does not represent the effect of POCA. Moreover, one would not expect the position to be different as between confiscation and restraint. If the assets were in existence at all material times, one would not expect them to be within the restraint order and then not capable of being subject to confiscation, or vice-versa. If the position were otherwise, the result would be neither fair nor logical. The liquidator or trustee in bankruptcy would continue to conduct the realisation of assets and act as the officeholder but if a conviction occurs and the confiscation order ensues, it will turn out that the officeholder will not have exercised the powers following the restraint order for the benefit of creditors but will have conducted himself for the benefit of those entitled under the confiscation order. In my judgment, it would be very odd if the special statutory powers in the Insolvency Act 1986 intended to benefit creditors, such as the

power to avoid earlier transactions and to examine officers on oath, could be used to boost the assets available for confiscation. Moreover, it would follow that if the liquidator or trustee happens to have distributed to creditors after the restraint order before conviction occurs, those assets would fall entirely outside the confiscation order. That would create a perverse incentive to deal with the liquidation as quickly as possible. In my judgment such an interpretation would be unlikely to be correct.

131. Where the law of some other jurisdiction governs the insolvency proceeding, i.e. the winding up takes place outside England and Wales, then questions would arise as to whether that proceeding was recognised in England and Wales. If it was, and the rights of creditors were in substance the same as those in an insolvency proceeding governed by the Insolvency Act 1986, one would in the first instance expect the interaction of the insolvency proceeding and the proceeds of crime legislation to be the same.

132. It is to be noted that a domestic restraint order may be made against a company incorporated in the United Kingdom or a company incorporated elsewhere. Moreover, companies that may be wound up under the Insolvency Act 1986 include companies registered in other jurisdictions. Likewise, an external restraint order may be made either against a company incorporated outside the United Kingdom or indeed against a company incorporated within the United Kingdom. S 426 POCA (referred to in the explanatory notes set out above) applies to any company which may be wound up under the Insolvency Act 1986. However, the insolvency proceeding must be one governed by the law of England and Wales or the law of Scotland. S 426 does not therefore apply where a restraint order is made against a defendant which is, or becomes, subject to an insolvency proceeding commenced in, say, Antigua.

133. The position of unsecured creditors in a liquidation commenced outside England and Wales, if a domestic restraint order is to be made, is under the statutory scheme left to be governed by s 69(3)(a) POCA, which is in the same terms as Article 46(3)(a) ERO, considered below.

(b) Is the scheme different in its effect in relation to external restraint orders?

134. One would also expect that the domestic scheme would in general be replicated in relation to the interaction of an external restraint order or an order enforcing the same (an external order). There is no reason on the face of it to make the position of the creditors in a liquidation of a defendant any worse simply because the restraint order is an external restraint order rather than a domestic one. Indeed, it might be argued that such a result would offend Article 14 of the European Convention on Human Rights ("the Convention"), taken with Article 1 of the First Protocol to the Convention ("FPC").

135. The Chancellor has observed in his judgment:

> "There was not incorporated into ERO the provisions of Part 9 of the Act which modify the provisions of the Insolvency Act 1986 in the case of a person adjudicated bankrupt in England and Wales or of a company being wound up under that Act. In such cases a pre-existing bankruptcy or winding-up takes priority over a restraint order."

136. The silence of ERO on this point means that the answer has to be found in ERO read against the background of the general law.

137. For the reasons given above, the only issue with which I have to deal is whether the point is reasonably arguable. In my judgment, it is reasonably arguable that the unsecured creditors of SIB have an interest for the purposes of Article 46(3)(a). In

summary, my reasons, which are amplified in the **Annex** to this judgment, are as follows:

i) It is reasonably arguable that, for the purposes of Article 46(3), (referred to by the Chancellor as "the legislative steer"), the creditors of SIB are "persons other than the defendant".

ii) The question whether the creditors have an "interest" for the purposes of Article 46(3) is a question governed in the first instance by the law of the liquidation of SIB. However, there is no evidence as to the law of Antigua, which accordingly this court should treat as the same as the law of England and Wales.

iii) Under the law of England and Wales, a winding up order divests a company of the beneficial ownership of its assets, and the creditors have (at least) the right to ensure that the assets are duly distributed. It is therefore reasonably arguable that they have an "interest" for the purposes of Article 46(3)(a).

(c) Significance of s 84(2)(d) POCA

138. It is said that s 84(2)(d) POCA produces an effect contrary to that stated in the explanatory notes (see for example the judgment of Hughes LJ at paragraph 181 (iii)). S 84 has been applied in part to orders under ERO (Article 49), and it is convenient to set out s 84 as it applies under ERO and to assets in England and Wales:

> 84 Property: general provisions
>
> (1) Property is all property wherever situated and includes—
>
> (a) money;
>
> (b) …
>
> (c) things in action and other intangible or incorporeal property.
>
> (2) The following rules apply in relation to property—
>
> (a) property is held by a person if he holds an interest in it;
>
> (b) property is obtained by a person if he obtains an interest in it;
>
> (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
>
> (d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim

> trustee (within the meaning of the Bankruptcy (Scotland) Act 1985) or liquidator;
>
> (e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;"

139. In my judgment, the effect of s 84(2)(d) is to make it clear that, where the following two conditions are fulfilled, references to property held by a company include references to property held by its liquidator. The two conditions are: (i) that the company is in liquidation; and (ii) that an order has been made that its assets vest in its liquidator. Both those conditions are fulfilled in the case of the Antiguan Liquidators so that the property of SIB now vested in them is treated as "held" by SIB for the purposes of ERO. In a liquidation conducted in England and Wales, an order of the court is required to vest the property of a company in liquidation in its liquidator, and such an order is now not normally made. But, even if that is not the position in Antigua, s 84(2)(d) can only apply in those cases where a vesting order is made or that is the effect of the law governing the liquidation. Thus, s 84(2)(d) does not lay down some universal rule applying to all liquidations, and, because of that, it would be unlikely to have the effect of depriving unsecured creditors of any interest in the property of the company in liquidation which they would otherwise have just because a vesting order has been made. This is all the more likely when it is borne in mind that a vesting order need not relate to all the assets of the company. If the creditors have an interest in the assets of the company (a point which I consider below), those assets are (to that extent) treated as "held" by the creditors: see s 84(2)(a). In any event, s 84(2)(d) cannot displace the statutory scheme as set out in ss 417, 418 and 426 POCA and summarised in the explanatory notes set out above. S 9 POCA (dealing with the amount that may be confiscated under a domestic

confiscation order) does not alter this conclusion because it only empowers the court to make an order over free "property" "held" by the defendant. The meaning of "property" is subject to s 84, to which I have already referred. Where a company is the registered owner of property but is also a trustee of it for someone else, the beneficial interest in the property is treated as held by that other person: see s 84(2)(a).

140. I agree with Chancellor that the Antiguan Liquidators, who are appointed under the law of Antigua and Bermuda, are on the evidence capable of being treated as "liquidators" for the purposes of s 84(2)(d).

141. When a confiscation order is made pursuant to POCA, it is made by reference to property held by the defendant, which does not include property in which another person has an interest (s 84(2)(a)). Where action is taken to enforce a restraint order made under ERO, the court must decide whether to give effect to it. It would not be able to give effect to it if to do so would be incompatible with the Convention rights of any person affected by it (Human Rights Act 1998 ("HRA"), s 6; Article 21 ERO). Convention rights include the right of property guaranteed under Article 1 FPC.

(d) Effect of this conclusion on the obligation imposed by Article 46(3)(a) ERO

142. What should the court do in this situation? It is convenient to set out the material parts of Article 46 ERO again:

> "46 Powers of court and receiver
> (1) This article applies to—
> (a) the powers conferred on a court by this Part;

(b) …

(2) The powers—

(a) must be exercised with a view to the value for the time being of realisable property or specified property being made available (by the property's realisation) for satisfying an external order that has been or may be made against the defendant;

(b) must be exercised, in a case where an external order has not been made, with a view to securing that there is no diminution in the value of the property identified in the external request;

(c) must be exercised without taking account of any obligation of a defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any external order against the defendant that has been or may be registered under article 22;

(d) may be exercised in respect of a debt owed by the Crown.

(3) Paragraph (2) has effect subject to the following rules—

(a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;…"

143. Article 46(3)(a) uses the phrase "person other than the defendant". For the reasons given by the Chancellor in paragraph 92 of his judgment, SIB is the defendant. SIB, therefore, is not a "person other than the defendant". It is unnecessary to ask whether the liquidator constitutes a "person other than the defendant" since s 84 (2)(d) POCA (see above) states that "references to property held by a person include references to property vested in his…liquidator" and the liquidators accordingly cannot show that any property is "held" by them for the purposes of POCA or ERO (except perhaps, which was not argued, if the liquidators' claim was purely in their capacity as trustee). In any event the liquidators, in their capacity as agents, of SIB must be treated as in the same position as SIB itself by virtue of the application of the maxim *qui facit per alium facit per se*.

144. That leaves the question whether the unsecured creditors of SIB in its liquidation could be persons "other than the defendant": they derive their title from SIB, but then

so would any purchaser of an asset from SIB or the recipient of a gift. The reference to the "defendant" cannot cover every successor in title by means of gift or, it would follow, a purchase, since recipients of tainted gifts are separately mentioned and excluded. Moreover, if a recipient of a tainted gift is excluded, a recipient of other gifts must be included, and if they, being volunteers, are included it is difficult to see why creditors, who gave value for their debts, should not be included too if they have an interest in the assets. In those circumstances, in my judgment, if creditors could show an interest in the assets of SIB it is at least reasonably arguable that they are persons "other than the defendant" and I need not consider the matter further as the matter has not yet been fully argued. There is certainly no express statutory provision which states that, for the purpose of Article 46(3)(a), an unsecured creditor should be considered as one and the same as his debtor in liquidation.

145. By Article 46(3)(a) Parliament has laid a duty upon the courts to allow a person other than the defendant to retain or recover the value of any interest held by him.

146. In my judgment, Article 46(3)(a) imposes a duty on the court of its own motion. However, Parliament would have imposed that duty with the knowledge of our adversarial system, and accordingly, in my judgment, the duty imposes no obligation on the court actually to investigate whether a person has in fact got an interest: it is up to that person to pursue it, and the court must of course give him an appropriate opportunity to be heard.

147. If the court on which the Article 46(3)(a) duty is imposed is aware that a person may be entitled to claim an interest, in my judgment, it would be better to make this known to the world by including in the order a reservation about that person's possible interest. I accept that such a reservation is not necessary, but, in my judgment, it is

desirable, especially in a case such as this where the point has already been put in issue. It does no harm, and I would not regard it as inappropriate.

148. It may turn out that neither the SFO nor the liquidators wants the question of whether the unsecured creditors of SIB has an "interest" in the assets the subject of the restraint order to be determined. If so, so be it. But, if not, my provisional view is that that issue could most efficiently be determined by this court or under its directions, thus minimising any delay. Consideration could be given at the same time to the question whether a representative creditor should be joined for this purpose. I need hardly add that the point is of importance not just in the liquidation of SIB but also to others concerned with the proceeds of crime legislation.

D. RECOGNITION OF THE ANTIGUAN LIQUIDATORS – APPEAL AGAINST THE ORDER OF LEWISON J DATED 3 JULY 2009

149. I agree with the judgment of the Chancellor, with the following amplifications.

150. Importantly, I agree with the Chancellor that Lewison J was correct to apply the decision in *Eurofood* to the interpretation of the UNCITRAL model code. I agree with the Chancellor that this is likely to lead to fewer conflicts between the decisions of courts of the member states of the European Union. However, it does not entirely eliminate the risk of conflict since the question of where the COMI is situated depends in part on the facts, and the evidence placed before different national courts may be different.

151. In my judgment, it should be noted that the position of the US Receiver must depend on his powers as they presently stand. In other words, if he acquires more powers, he

may be entitled to be recognised as a foreign representative if such a course were to serve any purpose.

152. In determining the location of the COMI, the key question appears to be where the head office functions are based. The COMI must be determined on an objective basis and be ascertainable by third parties. It does not appear to be a question of where the principal place of business is conducted since this would give rise to uncertainty. There can in principle only be one place where head office functions are carried out, and that makes it easier to identify the COMI. The test is designed to achieve speed and ease of recognition. There are, however, difficulties in the test and some of them are described by Gerald McCormack in *Reconstructing European Insolvency Law* (2010) 30 *Legal Studies* 126 at 129-133, and in articles listed in the footnotes to those pages. The difficulties do not have to be considered in this case.

153. I respectfully differ from the Chancellor to a small extent on the test to be applied to review the first instance decision on where the COMI is situated. What the judge has to do is make findings as to what activities were conducted in each potential COMI, and then ask whether they amounted to the carrying on of head office functions and then quantitatively and qualitatively whether they were more significant than those conducted at the registered office. Where the judge's findings as to where particular activities were carried on are challenged, the appropriate test for the appellate court will be that laid down in *Assuricazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 at [17], where it was said that "Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role

of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence." (That passage, which quoted a passage from the earlier case in this Court of *Todd v Adam*, together with [16] cited by the Chancellor, was approved by the House of Lords in *Datec Electronic Holdings v United Parcels Service* [2007] UKHL 23 at [46]). It is where the challenge on appeal, as here, is to the assessment made by the judge as to whether the presumption that the COMI was at the registered office was rebutted, that the separate test in *Designers' Guild v Russell Williams (Textiles)* [2000] 1 WLR 2416 and *Assuricazione* at [16] applies.

154. That still leaves the question what order Lewison J should have made if informed of the making of a restraint order (and assuming that the same had not been then discharged). It is not meaningful to ask this question because of subsequent developments in this case. There is an outstanding application for relief in connection with the declaration that the Antiguan proceedings is the foreign main proceeding for the purposes of Article 2(g) of UNCITRAL. That application may show that it was important to determine that questions determined by Lewison J irrespective of the making of the restraint order. However, it is also possible that the unsecured creditors of SIB have a sufficient interest in the assets sought to be restrained and it is possible that it would have been sufficient for that claim to be made without the time and expense involved in establishing the status of SIB's liquidators under UNCITRAL. In those circumstances, the appropriate course might well have been simply to adjourn the proceedings in the Chancery Division and await the outcome of the proceedings for a restraint order.

E. GUIDANCE AS TO THE PRACTICE FOR FUTURE CASES

155. In 199 to 208 of his judgment, Hughes LJ gives guidance as to the practice for the future. I respectfully agree with what he says. This guidance will no doubt prove a most useful beacon for Crown Court judges to steer their course by.

F. CONCLUSIONS

156. For the reasons given above, I would make the orders which the Chancellor proposes with two qualifications.

157. The first qualification is this. In my judgment, for the reasons given above, the restraint order should not be discharged and a new restraint order imposed before the parties have had an opportunity of arguing, if they wish to do so, whether the unsecured creditors of SIB have any interest in its assets for the purposes of Article 46 (3)(a). If the opportunity is declined, or, if taken up, leads to no different result, the restraint order dated 7 April 2009 should be discharged and a new order re-imposed with effect from 29 July 2009. Even if these parties do not wish to argue this point, it is likely to be open to a creditor to argue that there is such an interest at any time before an external order is made and effect is given to it by taking possession of the property the subject of the restraint order. It is open to this court to give directions forthwith for the purposes of the hearing of such an application.

158. My second qualification is this. All the matters in paragraph 105 of the judgment of the Chancellor are yet to be argued, and the adjournment for further argument should in my judgment be an occasion for working out any consequences of this Court's decision on the main issues, in addition to dealing with the outstanding application of the liquidators referred to above.

ANNEX to judgment of Arden LJ

Reasons why unsecured creditors arguably have an interest in the assets of SIB (in liquidation) for the purposes of Article 46(3)(a) of The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

1. In paragraph 137 of my judgment I have given reasons for holding that it is reasonably arguable that the creditors have an interest in SIB for the purposes of Article 46(3)(a) ERO. In this Annex I amplify those reasons.

(i) It is reasonably arguable that, for the purposes of Article 46(3), (referred to by the Chancellor as "the legislative steer"), the creditors of SIB are "persons other than the defendant"

2. See paragraph 143 of my judgment. This proposition does not require further elaboration. For the reasons given by the Chancellor in paragraph 92 of his judgment, SIB is a "defendant".

(ii) The question whether the creditors have an "interest" for the purposes of Article 46(3) is a question governed by the law of the liquidation of SIB. However, there is no evidence as to the law of Antigua, which accordingly the court should treat as the same as English law

3. The law governing the rights of creditors in relation to the assets of the company in liquidation is a matter for the *lex fori* of the liquidation, which creates such rights, if any. Here, SIB was wound up by an order of the court in Antigua. Accordingly the law of Antigua governs the question whether creditors have any interest with respect to the assets of SIB. There is no evidence on this point about the law of Antigua. Accordingly this court would apply English law.

(iii) Under the law of England and Wales, a winding up order divests a company of the beneficial ownership of its assets, and the creditors have (at least) the right to ensure that the assets are duly distributed. It is therefore reasonably arguable that they have an "interest" for the purposes of Article 46(3)(a)

4. When a company is wound up, a liquidator will be appointed. He will have power to control the assets of the company. Sometimes, as in this case, the assets are vested in the liquidator. However, that vesting does not affect the status of the liquidators. This is conveniently described in a recent edition of *Palmer's Company Law* at 15-323 as follows:

> "[The] status [of a liquidator] is as follows:
>
> (a) He is an officer of the court. This means that the liquidator must act in an honest and impartial manner and is responsible to the court for the performance of his duties.
>
> (b) He is agent for the company.[2] Thus he can bind the company without incurring personal liability.
>
> (c) In certain respects he is a trustee for the creditors as a general body.[3] However, as mentioned above the property does not vest in him without an order; he is chosen and remunerated on a commercial basis for his professional skills; he is not protected from liability for breach of trust under section 30 of the Trustee Act 1925[4] and the right of tracing property which passes through his hands is more limited than in the case of an ordinary trustee.[5]
>
> Nevertheless the assets are impressed with a trust in this sense, that they constitute a fund to be administered by the liquidator as officer of the court and agent for the company, under the direction of the court, for the benefit of all persons interested in the winding up.[6] This does not mean that the liquidator is trustee for individual creditors while the company is still in existence.[7] He owes them a statutory duty for breach of which they can bring an action even after the company has been dissolved.[8] In short, like a director, he is a distinct species of fiduciary whose office is an amalgam of statutory rules and agency and trust principles.
>
> [2]Re Anglo-Moravian Hungarian Junction Ry. Co. (1875) 1 Ch.D. 130, CA; Knowles v. Scott [1891] 1 Ch. 717; Butler v. Broadhead [1975] Ch.97, 108.
> [3]Re Albert Life Assurance Co. (1871) 15 S.J 923; Paraguasu Co., Black & Co.'s Case (1873) L.R 8 Ch.254; Re Oriental Inland Steam Co. (1874) L.R. 9 Ch.App.557,559,560; cf.Pulsford v. Devenish [1903] 2 Ch.625,633; Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd [1976] A.C 167;[1975] 2 All E.R.537,542-543, HL; Butler v. Broadhead, n.11, above.

[4]Re Windsor Steam Coal Co. (1901) Ltd [1928] Ch.609; [1929] 1 Ch.151 (CA); Re Home & Colonial Insurance Co. Ltd [1930]1 Ch.102.
[5]Butler v.Broadhead [1975] Ch.97; Re Millingen's Ltd [1934] S.A.S.R. 72,80. See B.H. McPherson, The Law of Company Liquidations (5th ed., 2001), para. 8.22.
[6]Re Oriental Inland Steam Co., ex p. Scinde Railway Co. (1874) L.R.9 Ch. App.557; Re Anglo-Moravian Junction Railway Co. (1875) 1 Ch.D. 130, 133; Knowles v. Scott (1891) 1 Ch. 717; Re Hill's Waterfall Estate and Goldmining Co. [1896] 1 Ch. 947. See Palmer, Company Precedents, Pt II, p.180.
[7]Knowles v.Scott [1891] 1 Ch.717; Re Hill's Waterfall Estate and Goldming Co. [1896] 1 Ch. 947. cf.Re South Australian Petroleum Fields Ltd [1894] W.N. 189.
[8]Pulsford v. Devenish [1903] 2 Ch. 625: Re New Zealand Joint Stock Corporation (1907) 23 T.L.R. 238; Argyll's v. Coxeter (1913) 29 T.L.R.355; Smith (James) & Son (Norwood) Ltd v. Goodman [1936] 1 Ch. 216; Re Armstrong Whitworth Securities Co. Ltd [1947] Ch. 674.…"

5. The leading modern authority on the effect of a winding up under the law of England and Wales on the ownership of the company's assets is *Ayerst v C & K Construction* [1976] AC 167. Lord Diplock gave the leading judgment, with which the other members of the House agreed. His judgment refers to the statutory scheme in the Companies Act 1948, but for present purposes there is no material difference between this and the current statutory scheme to be found in the Insolvency Act 1986. Lord Diplock held:

> "My Lords, the making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up. The scheme is now contained in Part V of the Companies Act 1948 and extends to voluntary as well as to compulsory winding up;… For the sake of simplicity, in stating the essential characteristics of the statutory scheme I propose to refer only to those sections of the Companies Act 1948 which apply in a compulsory winding up and to omit those sections which have a corresponding effect in the case of a voluntary winding up.
>
> Upon the making of a winding-up order:
>
> > (1) The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to manage its affairs on its behalf, to a liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme (section 243). …

> (2) The statutory duty of the liquidator is to collect the assets of the company and to apply them in discharge of its liabilities (section 257 (1)). If there is any surplus he must distribute it among the members of the company in accordance with their respective rights under the memorandum and articles of association (section 265)….
>
> (3) All powers of dealing with the company's assets, including the power to carry on its business so far as may be necessary for its beneficial winding up, are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme….

The question of the beneficial ownership of the company's property was dealt with explicitly by both James L.J. and Mellish L.J. in *In re Oriental Inland Steam Co.* (1874) 9 Ch. App. 557:

> "The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company;…" (*per* James L.J. at p. 559)….

The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years…

My Lords, it is not to be supposed that in using the expression "trust" and "trust property" in reference to the assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. … All that was intended to be conveyed by the use of the expression "trust property" and "trust" in these and subsequent cases (of which the most recent is *Pritchard v. M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons."

6. In his speech in *Ayerst*, Lord Diplock refers to *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. In that case the Privy Council held that a

residuary legatee did not have a beneficial interest in an estate in the course of its administration. If and to the extent that this decision applies to creditors in a winding up under the Insolvency Act 1986, the result would be that the creditors would themselves have no beneficial interest in specific assets of SIB but would have a right to have them appropriated in payment of its debts and liabilities in accordance with the statutory scheme for distribution. Lord Radcliffe, giving the advice of the Privy Council, held that it was not necessary for the beneficial interest to the assets in administration to be vested in anyone during the course of the administration: the residuary legatee was sufficiently protected by his remedy against the personal representative. Although he approved the ruling of Lord Herschell in *Sudeley v AG* [1897] AC 11 (HL) that the residuary legatee did not "have any estate, right, or interest, legal or equitable, in" the assets under administration, he accepted that in some senses the residuary legatee could be said to have an "interest" in the assets under administration (pages 713B-C and 715D-F). Their interest, in my judgment, is an interest in possession and not a mere future interest.

7. In any event, the question of the meaning of "interest" in Article 46(3) must be determined in its context. In that regard, I note that the applicable definition of "property" in s 84 POCA includes things in action (s 84(1)(c)). Moreover s 447(6) POCA (which applies by virtue of Article 49 ERO) contains the following expansive provision:

> "(6) References to an interest, in relation to property other than land, include references to a right (including a right to possession)."

8. Support for the proposition that the creditors obtain an interest may also be derived from the authorities on the late registration of company charges. Many charges over assets of a company have to be registered at the Companies Registry within twenty-

one days (Companies Act 2006, s 878). The register of charges can be rectified out of time so as to permit the late registration of a charge (Companies Act 2006, s 888), but such an order usually contains words saving rights acquired by parties against the property charged prior to the date of rectification. Prior to winding up, an unsecured creditor of the company cannot oppose an order for rectification. However, on liquidation the creditors are treated as acquiring rights against the company's property: "…on the winding-up commencing every creditor had a right to say, "So much per cent. of the assets belongs to me in due course of liquidation." (per Buckley J in *Re Anglo-Oriental Carpet Manufacturing Co Ltd* [1903] 1 Ch 914). As Lord Brightman, delivering the judgment of this court, put it in *re Ashpurton Estates Ltd* [1983] Ch 110, 123 (which post-dates *Ayerst*):

> "It soon became established that, so long as the company was a going concern at the date of registration, the proviso did not protect, and was not intended to protect, an unsecured creditor who had lent money at a time when the charge should have been but was not registered: see *Re Ehrmann Brothers Ltd* [1906] 2 Ch 697 and *Re Cardiff Workmen's Cottage Co Ltd* [1906] 2 Ch 627. The reason for this was that such unsecured creditor could not have intervened to prevent payment being made to the lender whose charge was not registered (whom I will call 'the unregistered chargee'). Nor could such unsecured creditor have prevented the creation of a new charge, duly registered, to take the place of the unregistered charge. The proviso was intended to protect only rights acquired against, or affecting, the property comprised in the unregistered charge, in the intervening period between the date of the creation of the unregistered charge and the registration of such charge. Such persons would include a subsequent chargee of the relevant property; a creditor who has levied execution against the relevant property; and an unsecured creditor if, but only if, the company has gone into liquidation before registration is effected. *Once the company has gone into liquidation, the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds pari passu among the unsecured creditors, subject to preferential debts. The assets of the company are at that stage vested in the company for the benefit of its creditors. The unsecured creditors are in the nature of cestuis que trust with beneficial interests extending to all the company's property*." (emphasis added)

9. Moreover, if the creditors do not have an interest, consideration would have to be given to the question whether the rights of the creditors constituted "property" for the purposes of Article 1 FPC, and the provisions of s 3 HRA might be in point.

10. Those provisions of ss 426 (4) to (6) POCA are, in my judgment, correctly not applied to a restraint order under ERO because the rights of creditors vis-à-vis the assets of the company in liquidation in another jurisdiction are not a matter for English law (see generally Dicey, Morris & Collins, *The Conflict of Laws* 14 ed., Vol. 2, pp. 1378-9). Moreover it is open to different systems of law to take different views about those rights. However, if their rights are the same as those of creditors in an English winding up, these provisions indicate that Parliament considered that the creditors following winding up did have a relevant interest.

11. Furthermore, Lord Diplock left open the question whether a person other than a residuary legatee might have a fully vested interest in the assets of the deceased in the course of administration, and thus conceivably some creditors (eg preferential creditors, if any) might have an interest in the assets of the company in winding up.

12. In *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1248, a case concerning the question whether a deserted wife had an "overriding interest" in the matrimonial home, Lord Wilberforce held that:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

13. But, whereas a deserted wife could not require to be accommodated in any particular property of her husband and could not obtain an order preventing him from disposing of the matrimonial home to a third party, creditors in a liquidation have a right to see

that all the company's assets are (subject to prior charges) applied in paying their debts and can prevent execution being levied on any of those assets. They can also assign their interests in the liquidation, and their interests persist until the company is dissolved. Thus their claims would appear to meet the requirements laid down by Lord Wilberforce that they should be "definable, identifiable by third parties, capable in [their] nature of assumption by third parties, and have some degree of permanence or stability".

14. I make no reference to any interest of shareholders or contributories as SIB is insolvent.

15. It is not material that an order recognising the appointment of the liquidators in England and Wales was not made until 3 July 2009. The interest, if any, which arose on winding up is in principle capable of being asserted at any time while the assets are subject to a restraint order.

Conclusion on the potential interest of unsecured creditors of SIB in its liquidation commencing before the date of the restraint order

16. In my judgment, contrary to the submission of SFO, it is reasonably arguable that the unsecured creditors of SIB in its liquidation commencing before the making of a restraint order have an interest in its assets the purposes of Article 46(3)(a) ERO. They are collectively entitled to direct that the assets be distributed in accordance with the statutory provisions for winding up. They can take steps to prevent the assets from being subject to privation by creditors seeking to levy execution. They have been described by this court as having "beneficial interests" in the assets of the company in liquidation.

17. If I am correct in my interpretation of the domestic system of restraint orders, the analysis in this Annex would appear potentially to put SIB's unsecured creditors, in the event of a supervening restraint order, in a position which is consistent with that of creditors of a defendant which is subject to a winding up under the Insolvency Act 1986 made prior to a domestic restraint order.

18. This court should, unless the parties do not wish it to do so, determine whether the unsecured creditors have an interest in SIB's assets for the purposes of Article 46(3)(a) before discharging the restraint order dated 7 April 2009. Alternatively a creditor may require the issue to be determined separately hereafter: see paragraph 158 of my judgment of which this Annex forms part.

Lord Justice Hughes:

159. For all the reasons so clearly set out in the judgment of the Chancellor, and summarised in paragraph 67, I respectfully agree with his four conclusions in relation to the judgment of Lewison J, and have nothing to add. I agree also with his formulation in paragraph 58 of the correct test for this court upon appeal.

160. I deal here separately with the appeal from Judge Kramer QC, although I should say at the outset that my reasoning is in most respects, though not quite all, the same as that of the Chancellor, and my conclusion is the same.

<u>POCA and the ERO</u>

161. The ERO (made under enabling powers contained in s 444 POCA) is designed to give powers for (i) the implementation here of overseas confiscation orders ("external orders": s 447(2)), and (ii) the making of restraint orders in response to requests from overseas authorities ("external requests": s 447(1)).

162. An English confiscation order is not made *in rem* in relation to traced proceeds of crime. Rather, it is an order to pay a sum calculated according to the statute's (expansive) rules for determining the quantum of a defendant's "benefit", and it is to be paid out of any assets held by him, whatever their provenance. That is the effect of sections 6-10 POCA, and in particular ss 6(5), 7(1) & (2) and 9(1). Some foreign systems adopt a similar approach, but some rely upon tracing the actual proceeds of crime. A system such as ours is sometimes referred to as a 'value based' regime; one relying on tracing is sometimes referred to as a 'specific property based' regime. Neither are English statutory expressions, but in the context of foreign proceedings both POCA and the ERO consistently juxtapose references to orders for the recovery of 'specified property' with references to those for the recovery of 'a specified sum of money': see for example s 447(2)(b). It may be that some countries operate systems which combine both types of approach. Whatever other forms of order may or may not be made from time to time in the USA, in the present case it has been clear from the outset that the American prosecutors rely upon the assertion that the contents of the bank accounts which it seeks to restrain are the traceable proceeds of crime.

163. An English restraint order made under s 41 POCA is an anticipatory and protective order, sharing many characteristics with a civil freezing order. It is designed to preserve assets against the possibility of a future confiscation order. It is defined as an order "prohibiting any specified person from dealing with any realisable property held by him.": s 41(1). The specified person need not be, and often is not, an actual or potential defendant. Although the statute here introduces for the first time the expression 'realisable property', that concept is defined in s 83 in terms which effectively mirror the definition in section 9(1) of assets which may be attacked in due course by a confiscation order, that is to say (i) free property held by the defendant

and (ii) free property which has been the subject of a tainted gift. Those provisions are thus geared as one would expect to the English value based confiscation system.

164. The equivalent words in Article 8(1) of the ERO define the restraint order which may be made as one "prohibiting any specified person from dealing with *relevant* property which is identified in the external request and specified in the order". That modification of wording, substituting 'relevant' for 'realisable' is designed to cater both for value based systems and those relying on tracing.

165. "Relevant property" is defined in s 447(7) as property in respect of which "there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or may be made." That belief may accordingly arise in relation either to traceable property sought under an overseas specific property based regime or to any assets sought under an overseas value based regime.

166. Both domestically and under the ERO, the making of a restraint order is a matter of discretion. The operative words in both section 41(1) and Article 8(1) are "the Crown Court **may** make". However, the discretion is not left wide open by the statutory provisions. Section 69 and its ERO equivalent Article 46 provide guidance on its exercise, sometimes referred to as 'the legislative steer'. It will be necessary to consider Article 46 below.

<u>The application made to Judge Kramer QC.</u>

167. The application presented to Judge Kramer QC ex parte on 7 April 2009 was based upon the first condition in Article 7: Article 7(2), and that condition was satisfied. The contrary has not been argued. The contents of the bank accounts were 'relevant property' because there were reasonable grounds to believe that they might be needed

to satisfy an American confiscation order. A criminal investigation had been begun, and there was reasonable cause to believe that the various persons under investigation had benefited from the fraud. It should be noted that Article 7(2) does not require that the person(s) who appear to have benefited from crime should necessarily be the person(s) in whose name the assets are held, any more than section 41 requires for a domestic restraint order that the assets should be in the hands of the alleged criminal. Although in fact SIB was named as a person under investigation, it was a quite sufficient basis for a restraint order that Stanford or one or more of his associates was alleged to have benefited from criminal conduct, providing that the assets in question might reasonably be needed to satisfy an American confiscation order if subsequently made.

168. The contents of the Letter of Request ('LOR') also showed that the US prosecutors' prospective claim to confiscation (and perhaps the American confiscation system generally) was and is based squarely upon the tracing of identifiable proceeds of crime. It was not, and is not, a potential claim to a value based sum of money, such as an English confiscation order would be. One consequence of this is that arguments as to when an English court would or would not pierce the corporate veil of SIB are irrelevant. What matters in the case of an external request for the restraint of identified property is whether the *foreign* jurisdiction may make an order in relation to the property identified, so that there are reasonable grounds for believing that it may be needed to satisfy a foreign confiscation order. Here, because the property was said to be the direct proceeds of the fraud and because of the way the American regime works, a foreign confiscation order was clearly on the cards in America and there were reasonable grounds for believing that the contents of the bank accounts would be needed to satisfy it.

169. By the time of the second, inter partes, hearing before Judge Kramer in July criminal proceedings had been begun in the USA against the individual defendants. SIB had not been prosecuted, although only for the purely pragmatic reason that to prosecute it would add nothing except cost to the prosecution of the individuals. It follows that as at the time of the second hearing before Judge Kramer the second condition, viz Article 7(3), applied and was satisfied. The contents of the bank accounts were identified and were 'relevant property' because there were reasonable grounds to believe that they would be needed to satisfy an American confiscation order (based upon tracing) if made. Proceedings had been begun against Stanford and others. There was cause to believe that those persons, named in the LOR, had benefited from their criminal conduct. They were 'defendants' for the purposes of Article 7(3) because they were persons against whom proceedings had been begun (Article 54(a)(ii)). That SIB was not a defendant did not matter. Once again, it is not a requirement of Article 7(3) that the property restrained be held in the name of the defendant, providing there are reasonable grounds to believe that it may be required to satisfy an external order. Moreover Article 7(2) seems to me to have continued to apply, since SIB remained under investigation by the prosecutors and if their case is correct must have been equally guilty of the alleged fraud. We do not know enough about the intricacies of the Texan criminal process to know whether it might at any time have been necessary to add it to the indictment as a defendant. No doubt ordinarily once the only prosecution which is going to ensue has been begun the relevant condition becomes Article 7(3) in place of Article 7(2), but it may not infrequently happen that a prosecution is begun against some defendants whilst a decision about others is not finally made and they remain under investigation. Of course, if the only prospect of a foreign confiscation order in relation to the assets in

question were to depend on a prosecution being started against an additional defendant and that looks to be unlikely, the court may well refuse, in the exercise of its discretion, to make a restraint order. But that is not this case.

170. The contention of the Antiguan Liquidators that the restraint order should not have been made, alternatively should now be discharged, was founded upon the threefold arguments that:

i) the US prosecutors, via the SFO, failed in their duty of frank disclosure when applying for the restraint order without notice, indeed made positive misrepresentations;

ii) once the liquidators had been appointed as such (on 15 April 2009) the assets of SIB vested in them, giving them an interest in the UK bank accounts which Article 46(3)(a) of the ERO recognises should be retained by them;
and

iii) for other reasons, chiefly in order to allow the Antiguan liquidation to proceed unhindered, the discretion accorded to the court by the ERO should not have been exercised on 7 April in favour of making a restraint order without notice, or should have been exercised on 29 July by discharging it.

It is convenient to deal first with the second argument, which raises questions relating to the inter-relation of restraint orders and insolvency.

<u>The 'interest' of the Antiguan Liquidators.</u>

171. There is obvious potential for competition between on the one hand the interests of creditors of a defendant and on the other the public interest in the criminal court being

enabled in due course to make and enforce a confiscation order, whether or not the latter is associated with any compensation for victims of crime. If and when a confiscation order is made, unsecured creditors of the defendant are postponed to the enforcement of the order: see s 9. At the prior stage when a restraint order is under consideration, the same ordinarily applies: SFO v Lexi Holdings [2008] EWCA Crim 1443.

172 Where a defendant is insolvent and an official with statutory duties, the liquidator or trustee in bankruptcy, is charged with administering the estate for the benefit of creditors generally there is a similar potential for competition with the public interest in a restraint order preserving assets for an eventual confiscation order. In the domestic context this competition is resolved by the rules contained in sections 417, 418 and 426 (see below).

173. Those rules have not been reproduced in the ERO. It may be that one reason is that it would be inappropriate (and incompetent) for English law to direct what can and cannot fall into the estate in a foreign bankruptcy or under the powers of a foreign liquidator. What *has* been transposed to the ERO is the so-called 'legislative steer' contained in s 69(1) – (3) POCA. In the ERO it appears in Article 46(1) – (3), in terms identical to s 69 except for minor terminological alterations to meet the distinct case of external requests or orders.

174 In this case, the US prosecutor says that Article 46(2) means that the ERO powers ought to be exercised by making a restraint order, and thus preserving the contents of the specified bank accounts, without diminution, so that they are available to satisfy an American confiscation order if and when it is made. By contrast, the Antiguan Liquidators say that Article 46(3), to which Article 46(2) is expressly subject, means

that at least from their appointment as such on 15 April 2009 and the order vesting the assets of SIB in them, they have an interest in the bank accounts held in the name of SIB and no restraint order should be made or continued which would interfere with their retention of that interest.

175. I agree that under Antiguan law the winding up order vested the assets of SIB in the liquidators. Note that in this respect English law differs subtly: assets vest in a trustee in bankruptcy, but do not, absent a specific order, vest in a company's liquidator. But I do not agree that Article 46(3) means that no restraint order ought to be made over the bank accounts. The terminology of Article 46, as of its domestic elder brother s 69, is complex, in part perhaps because it applies not simply, or principally, to making or refusing restraint orders but to all the various powers contained in Part 2 of the ERO, including those giving effect to external orders and governing the activities of management receivers and enforcement receivers. But the plain purpose of Article 46(3), as of s 69(3) which is in identical terms, is to keep free from the confiscation process (and restraint in aid of it) interests in property which are independent of the person who is the potential object of a confiscation order.

176. The role of a liquidator or trustee in bankruptcy is merely to administer the assets of the insolvent company or individual. He stands in the place of the insolvent and is his agent. This is recognised by section 84 of the Act which contains general rules relating to property. Those not irrelevant to foreign proceedings are applied to the ERO by Article 49(3). Among those thus applied is s 84(2)(d), which provides:

> "(d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985 (c 66) or liquidator."

177. SIB was, both in April and July, an alleged offender and under investigation. That meant that it was a 'defendant' for the purposes of Article 46(3)(a): see Article 54(a)(i). Accordingly the bank accounts in question remained its property for the purposes of the ERO. That means that they are its property for the purposes of Article 46(2)(a) and the court is required to exercise its powers with a view to them being made available to meet any confiscation order which may be made. It is impossible in the face of that position to treat the position of the liquidators as an independent interest for the purposes of Article 46(3)(a).

Creditors' interest ?

178. I did not understand the Antiguan Liquidators to argue that even if they do not have an interest for the purposes of Article 46(3)(a), the creditors of SIB nevertheless do. I have, however, had the advantage of seeing in draft the judgment of Arden LJ which raises this possibility. It has not been argued and for that reason I do not think that we ought to purport to decide it. My clear provisional view is that unsecured creditors do not 'hold' such an 'interest'. As I understand it, the position of the unsecured creditor is that he can enforce the liquidator's statutory and fiduciary duty to administer the assets, but that is not a proprietary interest nor any other kind of interest (if such there be) within Article 46(3). But whatever may be the exact position for other purposes of unsecured creditors (whether collectively, if they have any collective capacity, or individually) under a liquidation or bankruptcy, I am for my part unable to see that they can have an interest in the assets for the purposes of Article 46(3). That would render impossible any confiscation order in any case of insolvency, since by definition if there is insolvency the debts will swallow up all the assets. It would be

inconsistent with my reading of s 84(2)(d). It would enable an insolvent defendant to avoid confiscation by voluntary or collusive bankruptcy or liquidation.

179. If there is, contrary to my clear provisional view, an arguable case for such an interest in the creditors, I agree with Arden LJ that that does not give rise to a duty upon the court before whom an application for a restraint order is made to enquire into it unless and until it is asserted. A restraint order alters no rights; it merely freezes the property to which it is applied. There is no difficulty in third parties who assert rights in that property coming forward to make their claim, and this is what is commonly done by those such as spouses claiming a proprietary right in dwelling houses and business associates claiming a proprietary right over business assets. If such a claim is upheld, the remedy is the discharge or variation of the restraint order to take account of it. An application for such variation or discharge remains available to any creditor in this case if he wishes to contend that he has such an interest. I should not wish anything that I have said to encourage such application.

180. For my part I would not think it helpful for a restraint order to carry on its face a reservation referring to some as yet unasserted third party interest, because of the danger that those bound by the order may entertain doubt about what they can and cannot do. But if it were clear to a judge making a restraint order that there might be a third party claim he is of course perfectly entitled to say, when making his order, that he has as yet had no opportunity to consider such a possibility. Equally, if the third party claim is known to be being asserted, the judge may in an appropriate case give directions for it to be adjudicated upon.

Sections 417-8 & 426

181. The rule created by these sections does not apply to the ERO. Nor have we heard any argument about this rule. Accordingly there is no occasion to decide its meaning. I would record only these observations:

i) As between a restraint order and a bankruptcy/liquidation these sections clearly establish a rule that the first in time prevails.

ii) The more difficult question is whether once a confiscation order (not a restraint order) is made, any assets which remain under administration by the trustee in bankruptcy or the liquidator are excluded from realisation to satisfy the confiscation order.

iii) Whilst I see the logical attraction of the interpretation set out in the judgment of Arden LJ, I have, for my part, real difficulty, despite paragraph 562 of the explanatory notes, quoted by her, in reading the Act in that way. The powers which ss 418(2)(a) and 426(5)(a) either prevent being exercised or modify, where there is a pre-existing bankruptcy or winding-up order, are those 'conferred on a court by ss 41-67' and conferred on a receiver under ss 48 and 50. Those are, save for s 50 (enforcement receivers), all powers relating to restraint orders and not to realisation of assets to satisfy a confiscation order. Sections 418 and 426 do not appear in any manner to alter the property available to satisfy a confiscation order, if in due course one be made, and that property includes assets then in the hands of the trustee or liquidator: see the route to the definition of property which runs from s 6(5) via ss 7(1) & (2), s 9, s 82 and s 83 to s 84(2)(d).

iv) Whilst I also agree that there may be unsatisfactory features of the statutory position as I see it to be, there are also significant difficulties if it is otherwise.

> In particular, it would as it seems to me enable a dishonest defendant to evade the prospect of a confiscation order by conniving in an insolvency order made before there could be a restraint order, and the potential for that to be done with a view to preserving assets for persons claiming to be creditors but linked in some manner to the defendant would be considerable. At best, there would be scope for unseemly races between insolvency practitioners and prosecutors.

All this is, however, for another day.

Non-disclosure/misrepresentation

182. A number of complaints of misrepresentation or non-disclosure are made about the original application to Judge Kramer.

183. Mr Tehal mis-stated the position when saying that proceedings had been begun and (by implication) that SIB was one of the defendants to them. But he disclaimed any knowledge of the case beyond what was in the LOR, and the latter made it quite clear what the true position was, as did oral information given to the judge. For the reasons given above, the condition in Article 7(2) and/or (3) was met in any event, whichever was the case. The judge concluded that the error in Mr Tehal's affidavit was irrelevant. I agree. It was a telling demonstration of sloppiness (no doubt in a hurry), but the true position was made clear to the judge, and the error made no difference at all. The Antiguan liquidator did not submit to us that *this* mis-statement justified setting aside the restraint order.

184. Much more significantly, the judge was not told of the Antiguan proceedings. Under them the company which held the assets he was being asked to restrain had been put into the hands of receivers, and there were contested winding up proceedings about to

be tried. There is no excuse for the failure to tell him this. In his later witness statement of 27 July 2009, Mr de Kluiver, a senior attorney in the US Department of Justice and one of the prosecutors in the American case, said this:

> "The existence *vel non* of an Antiguan receiver at the time of the letter of request had no relevance to our criminal case, so we are not sure why we would be under any obligation to disclose that fact. Moreover at the time we sent out the letter of request, the Antiguan receiver, while appointed by the FSRC, had not been legally recognised as such by any court. At the time, the only receiver that had been recognised by any court was the US Receiver, and the only orders obtained regarding assets were the US orders of restraint obtained by the SEC that are referenced in the Letter of Request.
>
> ……
>
> The US Receiver who has been vigorously opposing the Antiguan receiver is not acting in concert with the Department of Justice. The US Receiver has an obligation to protect the victims' interests that arise under US laws separate and apart from our criminal powers and he answers only to the judge who appoints him. The Department of Justice does not control the actions of the Judge the US Receiver reports to. The criminal powers that the Department of Justice exercises are completely unrelated to the US Receiver's actions."

This statement appears to be close to an admission that the Antiguan proceedings were known to the American prosecutors seeking the English restraint order. If they did not know, they certainly ought to have found out. They were travelling several thousand miles to ask a foreign court to assist them, and in a hurry. They had a clear duty to ascertain what the legal status was, in its country of incorporation, of the company holding the assets which they were chasing. They knew that in addition to their contemplated prosecution the American receiver had been appointed by the regulatory authority, the SEC. Making the assumption in their favour that the receiver and the prosecutors were quite separate bodies, there clearly needed to be liaison between them. There plainly was such liaison, for the LOR speaks frequently of the appointment of the receiver and of the fact that he had obtained freezing orders in the USA; indeed it appears from what we were told that the prosecutors had, in co-

operation with the receiver, left pre-trial restraint in America to him, because of the way local law worked. The American receiver knew all about the Antiguan proceedings because he had intervened in them. It was factually wrong to state that at the time of the LOR the Antiguan receivers (as they then were) had not been recognised by any court, for they had been appointed as such by the Antiguan High Court on 26 February 2009, over a month earlier. By the time of the LOR moreover, petitions to wind up SIB were pending and the court hearing of the US Receiver's application to intervene was starting in Antigua either that day or the next. It may be true that the existence of the Antiguan receivers had no relevance to the criminal prosecution in Texas but that is the wrong question. The question is whether they had relevance, as professionals appointed to control the assets of SIB, to an application to a foreign court to freeze those same assets, especially when there was pending an application to wind the company up. That question admits of only one answer.

185. With that serious failure of disclosure went an assertion to Judge Kramer about the civil freezing order previously applied for in the UK by the American SEC and made by Jack J on 27 March 2009. Mr Tehal's affidavit asserted:

> "The reason for the application for this restraint order is that it is believed that the civil freezing order will be discharge (*sic*) shortly."

It is mysterious where this assertion came from. There is no reference to it in the LOR, although one might expect that the American prosecutors might have been kept abreast of the existence of Jack J's order. On the face of it the only probable source is the SEC or its US Receiver, the former of whom had been the applicant for Jack J's order. It is true that that order had been made without notice and with a return date of 6 April, but by the time of the hearing before Judge Kramer that day had passed and the order had been continued. The applicant prosecutors, who were asserting an

expectation that the order would be discharged can have no excuse for not knowing that it had in fact been continued. It was clearly at least likely that it would be continued from time to time at least until a full inter partes hearing could be held, as indeed it was. The judge needed to be told all of this.

186. The application to Judge Kramer was demonstrably made in considerable haste. The LOR (dated 6 April 2009) contained the following request:

> "**Time Constraints**
>
> US authorities request the UK authorities file an application to freeze or restrain the identified criminal assets requested by close of business on Tuesday 7th April 2009. Details of such need will be provided on request."

The LOR also sought confidentiality so as not to prejudice the ongoing enquiries in the US.

187. It was not nearly good enough to assert such need for urgency without justifying it. The SFO, charged with presenting the application, was under a clear duty to find out from the US prosecutors what the need for urgency was and to tell the judge. It may be that the assertion in Mr Tehal's affidavit that the civil freezing order was about to be discharged represented some attempt to justify this claim to expedition, but judges are not to be left to guess at what basis there may be for their being asked to act with urgency, and in any event no evidential basis was offered for that assertion. Nor was it right simply to assert a request for confidentiality. We are now told that the concern was that the individual potential defendants might flee the jurisdiction of the US prosecutors before the indictment could be laid. I would myself accept that there may well have existed such a risk, but if so there was no possible reason not to tell the judge. Of course every court is aware that the conduct of criminal investigation frequently consists of delicate balancing of public and confidential activities. An

application for a restraint order may be made without notice, and frequently this is necessary if a criminal is not to be tipped off and given the opportunity to move assets. But there are two vital qualifications which appear to have been ignored in this case:

i) the fact that the application is made without notice to the defendant or holder of the assets does not justify keeping the judge in the dark about what is going on; on the contrary, it is this which creates the onerous duty of full and frank disclosure to the court; and

ii) once an order is made, the investigators have to that extent gone public; the fact of the order and at least the bulk of the evidence on which it was made are going to have to be disclosed to all interested parties, if not immediately then at least very soon.

188. The existence of the American receivership was properly disclosed in the LOR, as was the fact that an asset freeze had been granted in Texas. It is true that in Bank of Sharjah v Dellbourg [1993] 2 Bank LR 109 at 112 this court observed that the proper place for relevant facts is in the affidavit rather than in the exhibits. I agree that it is wrong for relevant facts to be left to be extracted from different places in a bundle of separate exhibits, especially where the hearing will be one-sided, but in this case the affidavit did scarcely more than produce the relevant single operative document, which was the LOR. I would not myself criticise that course; it was better to let the LOR speak for itself than to attempt to précis it. Had the LOR then had a variety of exhibits attached, Dellbourg would have applied, but it did not.

189. The Antiguan Liquidators also complained that they were not provided with the evidence which had been put before Judge Kramer until the beginning of the *inter*

partes hearing. Whether or not there was sufficient reason for that, it is not a complaint of failure to disclose relevant material to the judge when seeking an order without notice and no more need be said about it.

190. I conclude that there were serious and material failures of the duty of candour in this case. It matters not where the responsibility for it lies as between the US prosecutors and the SFO as the DoJ's English agents and (presumably) advisors. The applicants failed to disclose:

i) the existence of the Antiguan proceedings, the prior appointment of receivers over SIB and the pending application to wind it up; and

ii) the correspondence between the Antiguan receivers and the banks;

and they misstated or at least failed to explain:

iii) the risk of Jack J's order being discharged; and

iv) the consequential need for urgency.

191. Whilst I respectfully agree with the view expressed by Slade LJ in Brinks Mat v Ellcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other

applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge. This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example.

192. On the *inter partes* hearing in July, Judge Kramer directed himself that there were four questions: was there material (1) misrepresentation or (2) non-disclosure, as a result of which the order was obtained ? Even if there was, (3) should the order be discharged ? In any event, (4) should the order be varied as requested ?

193. I agree that the first two questions elided two different issues. The principal question is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms: see e.g. Dormeuil Freres SA v Nicolian Ltd [1988] 1 WLR 1362, 1368. Once that question is answered in the affirmative, one comes to the consequential question

whether the order made ought to be discharged. The judge accepted the SFO's submission that a restraint order would have been made even if there had been disclosure of the Antiguan proceedings, but that was to go straight to the consequential question. There could only be one answer to the question whether that non-disclosure was material; it was. The judge did not address separately the treatment of urgency and the civil freezing order, but those too involved material failings of candour.

194. What if the judge had been told all that he should have been told in April ? Certain it is that the case was not the ordinary one where there is a danger of the defendant personally moving or dissipating the assets; that much was known because of the disclosed existence of the civil freezing order. For my part I agree with the SFO that if the judge had been told of the Antiguan proceedings he would have perceived a risk that the Antiguan receivers, or liquidators if that they became, would make application to discharge the civil freezing order so that they could proceed to collect in SIB's assets. Similarly, while the correspondence between the Antiguan receivers and the banks would have made it unlikely that the latter would accept instructions from anyone else, it would have left it very likely that, absent some restraint, the instructions of the receivers/liquidators would be accepted. But he would have approached the application quite differently. It would have been clear to him that the Antiguan Liquidators had a potential claim to the release of the money which would have to be weighed against the prosecutors' claim for a restraint order. That required that the liquidators be heard. The liquidators meanwhile were not absent restraint; the assets were frozen by the civil injunction. The judge would have been likely, as it seems to me, to point out that with a civil restraint order in force, the US prosecutors did not need a separate criminal restraint order that day. They had only to put the

Antiguan receivers/liquidators on notice of their interest in any application to discharge the civil order, and of their intention to seek a criminal restraint order if co-operation was not offered. He might also have taken steps to see whether the application for a criminal restraint order could not be heard at the same time as any further application in relation to the civil freezing order: see the practical suggestions made below at paragraphs 203-212. At most, he might have made a short-term restraint order with an identified return date and an order for service upon the Antiguan Liquidators, so as to enable them, in the exercise of their public functions, to be heard as soon as convenient, but even that was unnecessary. He was unable to consider any of this because of the misleading information which he was given.

195. In the particular circumstances of this case I accordingly agree that the proper course at the further hearing of 29 July would have been to set aside the restraint order obtained on 7 April on the grounds of non-disclosure, and to consider afresh the question whether a restraint order should or should not be made.

196. Judge Kramer deprived the SFO of its costs at the July hearing. So far as I can see, the costs of the Antiguan Liquidators in relation to that hearing are unlikely to have been different if the April application had been dealt with in the manner in which it should have been. The difference between, on the one hand, resisting the prosecutors' application to continue the order and applying to discharge it and, on the other, resisting a fresh application for an order, seems unlikely to have sounded in costs. If, however, there is any difference in the costs, I would be sympathetic to an application that the SFO pay the difference. On this topic I would give the Antiguan Liquidators the opportunity to make further written submissions if so advised, with the opportunity for the SFO to respond.

197. I would observe in passing that this is an invitation by the court to offer further written submissions upon a discrete topic which did not arise during oral argument. That is quite different from the generally illegitimate practice of a party seeking to supplement its already very full oral submissions with further written arguments after the hearing, but without any invitation from the court to do so. It was wrong for the Antiguan Liquidators to attempt the latter course after the end of the hearing before us, and it clearly put the SFO to additional cost in responding. A similar unsatisfactory practice, extending to the filing of further evidence, appears to have been adopted after the hearing before Lewison J.

Discretion

198. There are unusual features of this case that (i) there appears to be little risk of the alleged criminals getting their hands on the assets in question, at least unless the allegations prove to be misplaced, but (ii) there are no less than three institutional claimants all seeking to administer those assets. I doubt whether anyone could fail to agree with Jack and Lewison JJ and Judge Kramer that it is a matter of considerable regret that the lack of co-operation between them has greatly increased the costs at the eventual expense of the victims of the fraud and perhaps other creditors, but the contest is a fact. Moreover, it is an unusual feature of the US prosecutors' case that the confiscation order which they seek in due course is one which will have as its object the compensation of victims of the fraud. I do not agree that the court's discretion ought to be exercised to refuse a restraint order. The legislative steer points firmly in favour of making such an order and the assurance that if a confiscation order ensues it will be treated as a means of compensation, rather than of mere deprivation, adds strength to the case. The liquidators would not distribute whatever assets they

collect in the same way as the US prosecutors. First, ordinary creditors would rank alongside the victims of the alleged fraud. We have no reliable figures for their numbers or nature, but even assuming that there are none who are closely connected with the alleged criminals it is contrary to the steer provided by Article 46(2) to treat them the same as the victims. Secondly, although it may well be that most of the victims of the alleged fraud parted with their money to SIB, a significant number (parting, we were told, with over $1bn) did not, and those who did not could not be the subject of any distribution by the liquidators. Thirdly, the costs of the liquidators are considerable; their own case led them to seek the release from the London assets of over $1.6m to fund expenses to date, and likely future expenses are said to run at something like $3m per year. Nor would the costs of any distribution by the US Receiver be insubstantial. Although any distribution to victims via an eventual confiscation order would not be without some cost, there is good reason on the material before us to conclude that because there would in effect be a large element of public funding the net sums available for distribution would be much greater if this route is taken.

199. A further reason for exercising the discretion in this way is that there are good grounds for believing that the assets in dispute are not merely property of the fraudulent company from which repayment to victims might be made, but are the traceable proceeds of the fraud. As between, on the one hand, those who invested these funds as a result of fraudulent inducements and, on the other, those who have commercial or other claims upon SIB, there is elementary justice in taking steps which will improve the prospects of the former receiving at least something from assets traceable to their investment.

200. Should the restraint order be re-imposed with effect from the original hearing before Judge Kramer on 7 April, or from the inter partes hearing in July ?

201. It is worth pointing out that if, contrary to what I at least think to be the position, the winding up order created for the unsecured creditors an interest in the assets for the purposes of Article 46(3), which previously they did not have, and if the rule in s 426 is to be applied to the ERO by analogy, and if the effect of that rule is to remove assets under winding up order from any eventual realisation to satisfy a confiscation order, there would then be a reason to re-impose the restraint order with effect from 7 April. If a properly informed judge should have been told of all those conditions, then he ought, if he had known the true position, to have made a restraint order then. In that event, the civil injunction would not sufficiently have protected the assets for future confiscation.

202. Since, however, in my view these conditions did not apply, and in particular the creditors did not have an interest created by the winding up order, the civil injunction did sufficiently protect the assets. It was because of the civil injunction that the public interest explained by this court in Jennings v CPS [2005] EWCA Civ 746; [2006] 1 WLR 182 did not militate in favour of the re-imposition of the order from April, notwithstanding the failures of disclosure. In the circumstances of this case I therefore do not disagree with the Chancellor's proposal that the restraint order should be re-imposed from July.

Conclusions on the appeals

203. Accordingly I concur in the Chancellor's proposal that this court should make a restraint order with effect from 29 July 2009. I also concur in the other orders which he proposes at paragraph 105 of his judgment. The only matter reserved for further argument was the question of what use should be made of article 20(2) of Uncitral. Even if asked to do so, it would not be appropriate for us at this late stage to consider

any claim to an interest by SIB's unsecured creditors, when such was argued before neither the judge nor us.

Practice: restraint orders and concurrent civil proceedings

204. This case is a good example, but by no means the only one, of the manner in which an application for a restraint order under POCA 2002 may interlock with complex issues which arise in other litigation. It provides an opportunity to consider the best methods of managing such applications.

205. Prior to POCA 2002 all applications for restraint orders under either the Criminal Justice Act 1988 or the Drug Trafficking act 1994 had to be made in the High Court. Now, by sections 40-41 of POCA the jurisdiction is committed to the Crown Court. The same court has the only jurisdiction to vary or discharge a restraint order once made: see section 42. Subsections 58(5) and (6) plainly contemplate that other litigation relating to property which is subject to a restraint order may, as a result of the order, need to be stayed or permitted to proceed only on terms. Accordingly the initiative is firmly in the hands of the Crown Court.

206. It does not follow that efforts should not be made to achieve two aims where possible. The first is to do what is practicable to match suitable judicial expertise to the case. The second is to manage restraint order applications and associated litigation, so far as can be accomplished, in a co-ordinated manner.

207. Many applications for restraint orders are made in circumstances of some urgency and initially *ex parte*. They must be made to whichever judge is currently available in a convenient Crown Court. In London there is a special expertise at Southwark Crown Court which justifies making complicated applications there where possible, but it

will not always be practicable. Elsewhere in the country there may also be particular Crown Court judges well used to dealing with such applications; similarly, allocation to them by listing officers is desirable, but will not always be possible.

208. In SFO v Lexi Holdings plc [2008] EWCA Crim 1443; [2009] 2 WLR 905 this court said this at paragraph 92:

> "..there can be no doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal (Criminal Division) was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues."

Those far-sighted words are well borne out by the present case involving an apparent fraud running into several billions of dollars, a contested Antiguan winding up, an American court-appointed receiver, separate American prosecutors, competing applications for cross-border recognition of insolvency administrations, and concurrent proceedings in Canada if not also elsewhere. Crown Court judges should not of course shrink from deciding issues of civil law where they properly can, even if they are less familiar to them than is the daily round of the criminal jurisdiction. But there will be a few cases where the complexities are such that a Crown Court judge should not fear to explore the possibility of onward allocation to another judge. The legal complexities may be of property law or equity, as in Lexi Holdings, but are not limited to those issues. They may be of insolvency and cross-border recognition, as

here. In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.

209. Even in such a case, the Crown Court judge will ordinarily have to deal with the initial application. If it is apparent that the case is one of the few which require special expertise, he may, depending on the circumstances, either adjourn the application without making any order or make a restraint order for a limited period and appoint a relatively short return date for a fuller hearing. In other cases, the potential for complexity may arise only on application for variation or discharge. At whichever stage the need for consideration of special expertise arises, it is open to the judge to seek the assistance of his Circuit's Presiding Judge in exploring the question of whether a judge of suitably mixed expertise can be found to deal with the case from that point on.

210. Section 8 Senior Courts Act 1981 provides that:

> "8(1) The jurisdiction of the Crown Court shall be exercisable by –
>
> (a) any judge of the High Court; or
>
> (b) any Circuit Judge, Recorder or District Judge (Magistrates' Courts);
>
> …..
>
> and any such persons when exercising the jurisdiction of the Crown Court shall be judges of the Crown Court."

211. The judge eventually hearing the restraint order proceedings should ordinarily have some experience of criminal cases, the nature of the confiscation regime, and the manner in which prosecutions and the defence thereto proceed. But there is no reason why a judge of the High Court should not sit in the Crown Court to deal with a complex restraint order case. He or she may be from the Queen's Bench, Chancery or

Family Division, or Commercial Court, according to need and availability. Some cases may be suitable for hearing by a specialist mercantile or chancery senior circuit judge. The Presiding Judge will be in a position to consult the appropriate Head of Division (in London) or Liaison Judge (on circuit) in order to explore availability. It will need to be remembered that the availability of the relatively few judges of suitable mixed expertise will be quite limited and calls upon it need to be judged carefully. The decisions involved are matters of pure case management and are most unlikely to generate appealable rulings.

212. The process described is quite different from one in which an application is made uninvited by a party to a High Court judge and coupled with a request that he constitute himself a judge of the Crown Court without reference to the court where restraint proceedings are in process. Such latter procedure is not appropriate, as Sir Mark Potter P held in T v B & RCPO [2009] 1 FLR 1231.

213. The need for this procedure to work properly in the few cases where it will be called for underlines still further the essential requirement that applicants for restraint orders make full disclosure to the initial judge of potential complications. The present case is a vivid illustration. The failure of the prosecution to discover and reveal the pending and all too patent Antiguan winding up proceedings, and to tell the judge what was happening in the equally patent civil freezing order proceedings, was inexcusable, wherever the responsibility for it lay. It was equally inexcusable that notice of the lengthy proceedings before Lewison J was never given to the prosecutors, nor was that judge's attention drawn to Article 17(5) of the ERO.