Judgment 22/2013

The United States Securities and Exchange Commission and EFG Private Bank (Channel Islands) Limited and BC Capital Group SA (in liquidation) et al
Royal Court
18th July, 2013

Application pursuant to rule 37(1)(b) of the Royal Court Civil Procedure Rules, 2007 to be added as a further respondent.

Approved Text
18.07.2013

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Applicant

-AND-

EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

Interpleader Applicant

-AND-

(1) BC CAPITAL GROUP SA (IN LIQUIDATION)

(2) BC CAPITAL GROUP INTERNATIONAL SA (IN LIQUIDATION)

(3) BRICK KANE, KEVIN SEYMOUR AND KEVIN CAMBRIDGE IN THEIR CAPACITY AS JOINT OFFICIAL LIQUIDATORS OF BC CAPITAL GROUP SA (IN LIQUIDATION) AND BC CAPITAL GROUP INTERNATIONAL SA (IN LIQUIDATION)

(4) ROBB EVANS & ASSOCIATES LLC IN ITS CAPACITY AS RECEIVER OVER MR NIKOLAI SIMON BATTOO, BC CAPITAL GROUP SA, BC CAPITAL GROUP INTERNATIONAL LIMITED (ALSO KNOWN AS BC CAPITAL GROUP HOLDINGS LIMITED AND/OR BC CAPITAL GLOBAL), BC CAPITAL MANAGEMENT LLP AND BC CAPITAL GROUP HOLDINGS SA

(5) ANCHOR HEDGE FUND LIMITED (IN LIQUIDATION)

(6) FUTURESONE DIVERSIFIED FUND SPC LIMITED (IN LIQUIDATION)

(7) FUTURESONE INNOVATIVE FUND SPC LIMITED (IN LIQUIDATION)

(8) PHI R (SQUARED) INVESTMENT FUND SPC LIMITED (IN LIQUIDATION)

(9) HADLEY CHILTON AND JOHN GREENWOOD OF BAKER TILLY (BVI) LIMITED IN THEIR CAPACITY AS JOINT LIQUIDATORS OF THE FIFTH TO EIGHTH AND ELEVENTH TO EIGHTEENTH RESPONDENTS

(10) FUTURESONE DIVERSIFIED FUND LIMITED

(11) FUTURESONE F4 INVESTMENT LIMITED (IN LIQUIDATION)

(12) FUTURESONE F1 INVESTMENT LIMITED (IN LIQUIDATION)

(13) FUTURESONE A INVESTMENTS LIMITED (IN LIQUIDATION)

(14) GALAXY FUND, INC. (IN LIQUIDATION)

(15) GALAXY PE, LIMITED (IN LIQUIDATION)

(16) SILVER OAK FUND LIMITED (IN LIQUIDATION)

(17) SILVER OAK INVESTMENT MANAGEMENT LIMITED

(18) PHI R (SQUARED) MASTER SERIES INVESTMENT LIMITED (IN LIQUIDATION)

Interpleader Respondents

Hearing date: 14th June 2013
Judgment handed down: 18th July 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Applicant: Advocate S Dingle

Advocate for the Fifth to Eighteenth Respondents: Advocate J P Greenfield

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
Gresh v RBC Trust Company (Guernsey) Ltd and HM Revenue and Customs [2009-10] GLR 239
Sanders Lead Co. Inc. v Entores Metal Brokers Ltd. [1984] 1 WLR 452, 460
The Civil Procedure Rules 1998
Rules of the Supreme Court (*1999 White Book)*
Insolvency Act 2003 (BVI)
Forfeiture of Money, etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007

Introduction

1. By an Application dated 8 May 2013, the United States Securities and Exchange Commission (hereafter referred to as "the SEC") applied, pursuant to rule 37(1)(b) of the Royal Court Civil Rules, 2007 (hereafter referred to as the "2007 Rules"), to be added as a further Respondent to the interpleader proceedings dated 18 March 2013 commenced by EFG Private Bank (Channel Islands) Limited (hereafter referred to as "the Bank"). This Application was not opposed by the Bank or by the First to Fourth Interpleader Respondents. It was, however, opposed by the Fifth to Eighteenth Interpleader Respondents, who are represented by

Advocate Greenfield. For convenience, I will hereafter refer to the Interpleader Respondents as "Respondents" rather than adding "Interpleader" each time. The Skeleton Argument in support of the SEC's Application was prepared by Advocate Newman and Advocate Dingle represented the SEC at the hearing on 14 June 2013.

2. At the conclusion of the hearing, I reserved my decision. Because of the timetable running in respect of a further application in the interpleader proceedings, having decided to dismiss the SEC's Application, I provided the parties with the outcome and an outline of my reasoning on 5 July 2013. I indicated that full reasons would follow. I now set out that reasoning in this judgment.

The law

3. The parties were agreed about the legal approach the Court is required to adopt in relation to rule 37(1)(b), which provides:

> "*The Court may in any proceedings order that – ...*
> *(b) any person –*
> *(i) who ought to have been added as a party, or*
> *(ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings,*
> *shall be added as a party.*"

This consensus arises because the Court of Appeal has definitively explained the component parts of rule 37 in *Gresh v RBC Trust Company (Guernsey) Ltd and HM Revenue and Customs* [2009-10] GLR 239.

4. As is clear from paragraphs 9 and 10 of the judgment of the Court delivered by Vos JA, in *Gresh* there is initially a three-limb test and, even if the Court is satisfied of all three limbs, there remains a residual discretion as to whether to grant the joinder Application:

> "*9. It is common ground that Rule 37, therefore, requires the following matters to be established:-*
> *(1) There must be a question or issue between [the joinder applicant] and a party to the action.*
> *(2) The question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings.*
> *(3) It must be just and convenient to determine that issue as between him and that party as well as between the parties to the proceedings.*
> *10. It is also clear that, even if these three requirements are satisfied, there is an overriding discretion in the court, as appears from the opening words of Rule 37 to the effect that "[t]he Court **may** in any proceedings order ..." (emphasis added).*"

5. Because the opening words of rule 37 include "*in any proceedings*", I am satisfied that rule 37, and so the test described in *Gresh*, applies equally to interpleader proceedings brought under Part V of the 2007 Rules as to other proceedings under those Rules.

6. Reference was also made to a passage from the judgment of Kerr LJ in *Sanders Lead Co. Inc. v Entores Metal Brokers Ltd.* [1984] 1 WLR 452, 460, dealing with a similar, rule then applicable in England and Wales, to which Vos JA referred at para. 25 in *Gresh*:

> "*In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough. It may well be impossible, and would in any event be undesirable, to attempt to*

> *categorise the situations in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infringement of a patent, trademark or copyright with which the intervener is concerned (see Tetra Molectric Ltd. v. Japan Imports Ltd. [1976] R.P.C. 547 and Rexnord Inc. v. Rollerchain Distributors [1979] F.S.R. 119) though even in such cases the interest of the intervener must raise an existing issue and not merely a contingent one: see Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd. [1981] R.P.C. 280.*"

7. In Advocate Newman's Skeleton Argument, he noted that the wording of the applicable rules in England and Wales has changed from the version found previously in Order 15, rule 6(2) of the Rules of the Supreme Court (as amended in 1971) to what is now in place as Part 19 of the Civil Procedure Rules 1998. I have, as suggested by him, looked at the commentary to Order 15, rule 6 in the *1999 White Book* and found a number of general principles which I regard as being applicable to the approach I should adopt to rule 37, noting first that (para. 15/6/2):

> "*... generally speaking, the Court will make all such changes in respect of the parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute (McCheane v Gyles; Van Gelder v. Sowerby Bridge (1890) 44 Ch.D. 374; Montgomery v. Foy [1895] 2 Q.B. 321; Bennetts v. McIlwraith [1896] 2 Q.B. 464; cf. Pilley v. Robinson (1887) 20 Q.B.D. 155; Ideal Films Ltd v. Richards [1927] 1 K.B. 374).*"

It is further explained (at para. 15/6/10) that "*One of the main objects of the rule is to prevent the multiplicity of proceedings*".

8. Under the heading "Illustrations", relating to the required interest of a non-party would-be intervener, para. 15/6/11 of the commentary states:

> "*A person having no legal but only a commercial interest cannot be added for the convenience of the Court or otherwise (Re Farbenindustrie [1944] Ch. 41, CA).*
> *Generally speaking, intervention can only be insisted upon in three classes of case:*
>
> *(1) In a representative action where the intervener is one of a class whom the plaintiff claims to represent. The intervener may say, "I deny that plaintiff represents me – add me as a defendant" (per Buckley J., in McCheane v. Gyles (No. 2) [1902] 1 Ch. 911).*
>
> *(2) Where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision in Gurtner v. Circuit [1968] 2 Q.B. 587; [1968] 1 All E.R., CA, the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. ...*
>
> *(3) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed.*"

I have, therefore, borne in mind this general guidance derived from the approach taken to a similarly-worded provision under the previous English law provisions when considering how rule 37 should be applied in the present case.

9. In passing, I also noted the passage at para. 15/6/2 of the commentary:

> "*By the comity of nations, the courts of the United Kingdom recognise a corporate body created by the laws of a foreign state which is recognised by the Crown, and*

> *accordingly where such a foreign state as the United Arab Emirates duly conferred legal personality on the Arab Monetary Fund and thereby created a corporate body, the English courts could and should recognise that body as entitled to sue (Arab Monetary Fund v Hashim (No. 3) [1991] 2 A.C. 114 ...).*"

The Courts in Guernsey follow the same approach. Whilst Advocate Greenfield took no issue about the capacity of the SEC to apply to be joined to the interpleader proceedings, I can confirm that, having regard to the comity of nations, I would have had no difficulty in granting the SEC's Application had the requirements under rule 37 been satisfied. In particular, I am satisfied that this is not a case in which the purpose or effect of its intervention was to enable the SEC to enforce, directly or indirectly, US revenue law.

The evidence

10. A First Affidavit of John Mitchell, a senior attorney in the Division of Enforcement at the SEC, sworn on 8 May 2013, was lodged in support of the SEC's Application. On behalf of the Fifth to Eighteenth Respondents to the interpleader proceedings, William Sugden, US Counsel to the Ninth Respondents, namely the joint liquidators of the other opposing parties, swore an Affidavit in response on 24 May 2013. Mr Mitchell replied by way of his Second Affidavit sworn on 3 June 2013. An Affidavit of Pesach Glaser, an accountant with the SEC, affirmed on 3 June 2013, was also lodged on behalf of the Applicant.

11. As is readily apparent from the description of the two groups of Respondents, the fifteen corporate entities involved are, or are on the verge of being placed, in liquidation. The inevitable complexities underpinning this cross-border insolvency exercise are yet to be fully addressed. For present purposes, I am proceeding on the simple premise that the Bank holds monies and other assets in accounts in the names of the Fifth to Eighteenth Respondents, save for the Ninth Respondents. The account holders, mostly acting through the Ninth Respondents, wish to have their assets returned to them. As set out in the Affidavit in support sworn by Stephen Watts, the Bank's managing director, on 18 March 2013 (and which was exhibited to Mr Sugden's Affidavit), the Bank brought its interpleader proceedings because "*it is aware that the Third, Fourth and Ninth Respondents may have a claim*" to certain of the assets held by the Bank (para. 143). Those claims arise because the Third, Fourth and Ninth Respondents are liquidators and a receiver performing the roles ascribed to them by the jurisdictions of their appointments.

12. The two gentlemen who are the Ninth Respondents, by way of example, have the powers of liquidators under schedule 2 to the Insolvency Act 2003 of the British Virgin Islands by virtue of their appointments as joint liquidators of the companies within the Fifth to Eighteenth Respondents which are BVI companies. The joint liquidators are expressly sanctioned by orders of the Eastern Caribbean Supreme Court "*to carry out all investigations and enquiries into the Company's assets in Guernsey*". The Royal Court recognised and accepted the appointment of the Ninth Respondents as joint liquidators of the Fifth to Eighth Respondents under the Bailiff's Order of 21 November 2012.

13. The First and Second Respondents are Panamanian companies which are also in liquidation. The three gentlemen who are the Third Respondents were appointed as liquidators in respect of the First and Second Respondents and, by orders of the Supreme Court of the Commonwealth of the Bahamas dated 12 November 2012, those liquidations are being continued under the supervision of that Court with the three gentlemen appointed as joint official liquidators. The Royal Court recognised and accepted the appointment of the Third Respondents as joint official liquidators of the First and Second Respondents under the Bailiff's Order of 7 December 2012.

14. The Fourth Respondent was appointed the Receiver of a group of persons including the First Respondent by order of the United States District Court for the Northern District of Illinois Eastern Division on 27 September 2012. The other Defendants to those proceedings, which included a preliminary injunction restraining their commercial activities, are Nikolai Simon

Battoo, BC Capital Group International Limited, BC Capital Management LLP and BC Capital Group Holdings SA. The Plaintiff in that action is the United States Commodity Futures Trading Commission (hereafter referred to as "the CFTC"), which is seeking a permanent injunction, civil monetary penalties and other equitable relief pursuant to a complaint dated 6 September 2012. The judge who made that order is the Hon. Edmond E. Chang. The President and Chief Operating Officer of the Fourth Respondent is Brick Kane, who is one of the three joint official liquidators comprising the Third Respondents.

15. By a complaint also dated 6 September 2012, the SEC brought a "*civil law enforcement action on an emergency basis to protect U.S.-based investors whose investments are currently being held hostage by defendant Nikolai S. Battoo and entities under his control*" (para. 1), claiming that "*The jig appears to be up. Clients are now clamoring for redemptions, so Battoo has doubled-down on his deception*" (para. 3). Without going into any detail, but by way of example, the SEC alleges that US-based investors have lost money and that Mr Battoo, a Hong Kong-based entity and the First Respondent to the interpleader proceedings have "*employed devices, schemes and artifices to defraud*" (paras. 66 and 77). This matter has also been dealt with by the Hon. Edmond E. Chang, initially *ex parte* on 6 September 2012, when he granted a temporary restraining order and an asset freeze order, both of which were subsequently renewed on 13 September 2012, before being replaced by a preliminary injunction on 27 September 2012 (as exhibited to Mr Mitchell's First Affidavit), which includes in section II.E an asset freeze order, which provides *inter alia*:

> "*1. Defendants Battoo, BC Panama [ie, the First Respondent to the interpleader proceedings], and BC Hong Kong and their agents, servants, employees, attorneys, and those persons in active concert or participation with any one or more of them, and each of them, who receive actual notice of this Order or of the terms of the asset freeze provisions contained herein, by personal service, mail, facsimile transmission, email, or otherwise, are hereby restrained and enjoined from, directly or indirectly, selling, encumbering, receiving, concealing, changing, pledging, hypothecating, assigning, transferring, liquidating, incurring debt upon, or otherwise disposing of, or withdrawing, any funds, assets, or other property in the possession, custody or control of any of the Battoo Defendants, wherever located, including, but not limited to, all such funds and other assets held at Newedge USA LLC and at Reed Smith LLP.*
>
> *...*
>
> *3. Any bank, financial or brokerage institution or other person or entity within the territory of the United States holding any funds or other assets described or referred to in Paragraph 1 and 2 of Section II.E of this Order that receives actual notice of this Order or of the terms of the asset freeze provisions contained herein, by personal service, mail, facsimile transmission, email or otherwise, shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance, assignment, set off, sale, liquidation, dissipation, concealment, or other disposal of any such funds or other assets. This includes, but is not limited to, all such funds, assets or other property held in accounts in the name of any one or more of the Battoo Defendants, and/or held in accounts in which any of the Battoo Defendants has signatory authority or a beneficial interest, or which any Battoo Defendant directly or indirectly controls, owns or manages.*"

At para. 35 of his First Affidavit, Mr Mitchell explained that:

> "*The SEC's mission is to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation. The SEC oversees the key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds. In that capacity, the SEC is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting investors and prospective investors against fraud.*"

The position of the SEC is that the assets held at the Bank are subject to the US Court order of 27 September 2012 because they were "*in the possession, custody or control*" of Mr Battoo on that date and it "*believes that the assets at [the Bank] should be deposited with the US Receiver*" (para. 5 of Mr Mitchell's First Affidavit). Mr Mitchell points out that it was Mr Battoo, in his capacity as the sole director of the sole member of each of the Fifth to Eighth Respondents, who resolved on 11 October 2012 that each of those Respondents should be placed in liquidation and appointed the Ninth Respondents as the joint liquidators of those companies. This was done so as to attempt "*to transfer control over the assets of these Respondents to [the Ninth Respondents], as joint liquidators of those entities, in violation of the Preliminary Injunction*" (para. 24). Mr Mitchell confirmed that the SEC did not envisage using any of the assets held at the Bank to satisfy any penalties that may be imposed against the Defendants in the proceedings brought by it in the US court. He believed that the CFTC, which he described as the SEC's "*sister agency*" (para. 20), was probably "*satisfied that its interests will be satisfactorily represented*" by the Fourth Respondent, as Receiver (para. 40) but, "*notwithstanding that [the SEC's] interests are likely to be aligned to a certain degree with that of the Receiver*" (para. 41), in order for the SEC to comply fully with its statutory obligations, it wished to be joined as an additional Respondent to the Bank's interpleader proceedings.

16. In responding to that evidence, Mr Sugden drew attention to the judgments given in proceedings in other jurisdictions involving the parties. On 25 March 2013, Judge Chang dealt with the Receiver's allegation that the BVI liquidators were in contempt of the asset freeze order obtained by the CFTC. This was an action taken by the Fourth Respondent to the interpleader proceedings against the Ninth Respondents. Very fairly, Mr Sugden highlighted that this judgment does not directly concern the SEC's own asset freeze order but he also points out that the bases of both orders are so similar as not really to be distinguishable. Judge Chang concluded that the Fourth Respondent's allegation that the Ninth Respondents were in contempt was not proved:

> "*.... to prevail in its motion to hold the Liquidators in contempt for violating the asset freeze order, the Receiver must show that the Liquidators are acting in <u>concert</u> with Battoo. Otherwise, the Liquidators have not violated the assert [sic] freeze order and are not in contempt of court. Even <u>Homa</u> and <u>Waffenschmidt</u>, which lay out the Receiver's desired rule, require that non-parties aid and abet the party to an injunctive order.*
> *... the evidence shows the contrary – although Battoo signed the shareholder resolutions placing the four hedge funds [ie, the Fifth to Eighth Respondents to the interpleader proceedings] into liquidation, there has been no other indication that he is working <u>with</u> the Liquidators to actively pursue the EFG Bank assets. Indeed, under the British Virgin Islands Insolvency Act of 2003, the Liquidators are legal agents of the hedge funds and <u>not</u> of Battoo. Virgin Islands Insolvency Act § 184(2). Their appointment was ratified by the funds' creditors, who did not include Battoo.*"

I understand that the contempt proceedings against Mr Battoo brought by the CFTC have not yet been determined. Mr Sugden also referred to the decision of Bannister J in the Eastern Caribbean Supreme Court of 20 March 2013 confirming that the Ninth Respondents had been validly appointed under BVI law. The declaratory relief sought had been opposed by the Fourth Respondent. In response to a submission that the appointments of the Ninth Respondents amounted to fraudulent attempts to circumvent the US court's receivership order, Bannister J stated (at [18]):

> "*It cannot be said that placing the management and control of a company into the hands of officers of a Court of competent jurisdiction amounts to wrongdoing. A similar submission was made in relation to the assets of each of the four companies. It was somehow suggested that by putting the companies into liquidation Mr. Battoo had extricated them from the reach of the Receiver. This seems to be based on a*

> *misunderstanding of the effect of a liquidation carried out under the Act. The appointment of liquidators has no effect upon the shares in or assets of a company. The shareholders remain the same and the company continues to own its assets as before. If it held assets on behalf of a third party before it went into liquidation, it will continue so to hold them after it has been put into liquidation. Liquidation effects a change in management and, if the company is solvent, imposes a scheme for the protection and distribution of its assets, it effects no assignment of the company's assets, whether held by the company beneficially or on behalf of others. If it turns out that assets held in its name belong to others, they will be handed over to their rightful owners once their title is established. It is not possible, therefore, to prevent the true owner of assets or its recognized representatives from recovering assets held for it by a BVI company by putting that company into liquidation.*"

Whilst I have quoted short passages from both of these judgments, I have taken into account the entirety of each judgment and how matters are being litigated in other jurisdictions before reaching my conclusions on the SEC's joinder Application. The existence of such related litigation in jurisdictions also points towards the joinder Application not really being an effective means by which to prevent multiplicity of proceedings.

17. The relationship between the First to Fourth Respondents and the Fifth to Eighteenth Respondents as two distinct groups was commented on by Mr Sugden at para. 16 of his Affidavit:

> "*It is notable that the 1st – 4th Interpleader Respondents are not (and do not represent) direct creditors and/or investors of/in any of the 5th – 18th Interpleader Respondents. They are (or represent) investors in investment vehicles, which may (or may not) have invested funds in certain of the 5th – 8th, 10th – 16th and 18th Interpleader Respondents.*"

18. In reply, Mr Mitchell used his Second Affidavit to query why Mr Sugden had not raised any reason why the SEC had failed to meet the test for joinder in rule 37(1)(b) of the 2007 Rules (see para. 7). With respect to him, the answer to that query is that submissions about whether a legal test is met or not can only properly be made in a Skeleton Argument and in an oral address to the Court; they are not matters for evidence, which is what Affidavits should contain. Mr Mitchell then proceeded to set out the findings of Judge Chang in respect of the SEC's claims. Those findings are, of course, the result of the SEC's evidence and submissions to that Court and have not been challenged on behalf of any of the Defendants to those proceedings. They do, however, record that "*the Battoo Defendants have engaged in a scheme to defraud by both material affirmative misstatements and material omissions*".

19. Whilst acknowledging that no permission had been given to adduce expert evidence on US law (see para. 19), Mr Mitchell set out his opinion on the law relating to the power of a US court to grant an asset freeze order once personal jurisdiction over the subject of it has been obtained, including in respect of assets outside the United States of America. In doing so, he was replying to the material that Mr Sugden had quoted in his Affidavit, taken from the latter's correspondence with the CFTC and the SEC dated 20 December 2012. In order to resolve the SEC's Application, I do not need to decide which of the US Counsel's unsolicited opinion evidence to prefer. I have read their contentions with interest but, as a matter of Guernsey law, in the absence of any order of the Royal Court mirroring whatever may have been obtained elsewhere, enforcement domestically is most unlikely to be successful.

20. Mr Glaser's Affidavit describes the information he gleaned from a telephone interview with William Harris held on 31 May 2013. Mr Harris is the managing director of a BVI company which served as hedge fund administrator to several of the Respondents until April 2012. Mr Harris had explained to Mr Glaser that Mr Battoo was responsible for decisions relating to the assets of the hedge funds in question, including for the purposes of giving instructions to the

Bank in relation to assets held there. This evidence does not assist me to determine the SEC's joinder Application.

21. Having set out a summary of the material placed before the Court, I can move on to consider each of the limbs of the test derived from *Gresh* in turn.

Question or issue between SEC and a party to the action

22. I am satisfied that the first limb of the test is satisfied. Although the Advocates representing the SEC suggested that the issue is as broad as "*what happens to the EFG Assets*", I have had regard to the way in which the interpleader proceedings are most likely to be conducted. The Fifth to Eighteenth Respondents make claims to assets held by the Bank in their names or, in the case of the Ninth Respondents, in the names of those other Respondents. Accordingly, the proceedings may well develop in such a way that this group of Respondents, effectively represented by the Ninth Respondents, will be treated as a claimant to those assets and the other group of Respondents, effectively being led by the Fourth Respondent, with some assistance from the Third Respondents, will be arguing against the outcome sought by the Ninth Respondents. Because of the need for additional time to formulate the claims, the precise manner of the approach to be taken by the Fourth Respondent is as yet unknown. However, from the material used by the CFTC and the Fourth Respondent in proceedings in other jurisdictions, I consider it most likely that it will be argued that the assets in the accounts held with the Bank represent the proceeds of crime. The SEC also appears to me to be asserting that these assets represent the proceeds of crime and so do not belong to, or cannot be claimed by, each of the Fifth to Eighteenth Respondents. Therefore, the primary issue to be determined between the SEC and each of the Fifth to Eighteenth Respondents does amount to a question or issue between them. Indeed, it involves the same high-level issue as between the First to Fourth Respondents and each of the Fifth to Eighteenth Respondents.

Arising out of, or relating to, or connected with the relief or remedy claimed in the proceedings

23. In order to determine the second limb of the test, it is necessary to consider first the relief sought by the Bank as the Applicant in the interpleader proceedings. The Bank seeks a judgment "*determining the rights and claims of the Respondents to the Assets*". As I have already indicated, the only Assets under consideration are those held by the Bank in accounts in the names of the Fifth to Eighth and Tenth to Eighteenth Respondents. The SEC is not apparently asserting any direct claim to any of those Assets. Instead, it "*has an interest in what happens*" to them. That level of interest is, in my view, closely, if not precisely, aligned with the interest of the Fourth Respondent.

24. Although Counsel left me with the impression that they felt that the principles from *Sanders Lead Co. Inc. v Entores Metal Brokers Ltd.* (*supra*), to which I have already referred, related to the first limb of the *Gresh* test, I consider that their relevance appears to be more directed towards this second limb (see, eg, the headnote to the report). I further note that the paragraph from the judgment of Kerr LJ at p. 460 quoted above concludes with the following words:

> "*... no case has gone so far as to allow intervention by someone who is only a creditor, or alleged creditor, with no more than a creditor's commercial interest in the outcome of the action, and in my view it makes no difference whatever that the creditor in question is one who has obtained a Mareva injunction whose fate may in some way depend on the outcome.*"

25. I acknowledge that the SEC is not arguing that it is a creditor of any of the existing parties to the interpleader proceedings so that these comments are not directly relevant. However, the interest that the SEC asserts is through the medium of the asset freeze order that it has obtained from Judge Chang in the context of its civil enforcement proceedings in the US court. As a matter of Guernsey law, no "mirror" order has been sought or obtained and so the interest of the SEC in the assets held with the Bank is one step further removed. Advocate

Dingle suggested that it would have been a waste of time and money for the SEC to have sought a "mirror order". Advocate Greenfield disagreed, highlighting the limited terms of the extent of the asset freeze as it affects banks not in the United States of America. In itself, taking such a step would not have affected the outcome of the present Application but it would, I think, have served to concentrate minds on the consequences of the relief sought in the interpleader proceedings. The SEC has, no doubt consistently with its statutory functions and obligations in the United States of America, taken steps to preserve the assets it identifies as potentially being the proceeds of crime. However, it has done so for the benefit of others rather than as a result of staking its own claim to the monies. In that respect, its interest in the outcome of the interpleader proceedings differs from that of the other Respondents because it is not asserting any proprietary claim.

26. In his judgment in the ***Sanders*** case, Kerr LJ continued at p. 461:

> "*If an alleged creditor who has obtained a Mareva injunction could ever be permitted to intervene in an action where his interest in the outcome relates solely to the fate of his injunction, then this could only be so in the most exceptional circumstances.*"

Taking the SEC's case at its highest, by virtue of its asset freeze order the question or issue between it and each of the Fifth to Eighteenth Respondents might be connected with the relief or remedy claimed in the proceedings but it is not, in my view, something that arises out of or is related to that relief or remedy. What is required is an interest that is more direct than that of the SEC. Therefore, even taking the SEC's case at its highest, I am not persuaded that the type of "*exceptional circumstances*" to which Kerr LJ referred exist. Accordingly, I have concluded that, on balance, the SEC's interest in the interpleader proceedings does not satisfy this second limb of the ***Gresh*** test because it is too far removed from the issues or questions for which relief or remedy is sought by the Bank. Put another way, effectual adjudication on any issue or question between the SEC, as the holder of an asset freeze order, does not require it to be made a party to the Bank's interpleader proceedings. Whatever the outcome of the proceedings, the SEC's position appears to remain the same.

Just and convenient

27. If I am wrong to reach that conclusion, I would still go on to conclude that it is not just and convenient to grant the SEC's joinder Application.

28. This third limb of the test involves conducting a balancing exercise. In doing so, I consider it appropriate also to have regard to the overriding objective in rule 1 of the 2007 Rules to deal with cases justly. The interpleader proceedings were commenced by the Bank some months ago now. The claims on behalf of the Fifth to Eighteenth Respondents have been formulated and further steps in the proceedings have already been timetabled. Whilst granting the SEC's joinder Application would not automatically derail that timetable, the addition of a further party would, I expect, mean that the case would not be dealt with as expeditiously as will otherwise be the case. I have also taken note of the fact that proceedings have been taken in other jurisdictions already and so the element of using joinder to avoid a multiplicity of proceedings is unlikely to apply in this case as clearly as it will in other situations. The SEC proceedings in the US court involves directly only one of the Respondents to the Bank's interpleader proceedings and so may still need to be progressed further rather than its involvement in these proceedings becoming the only forum in which these matters are being litigated. Accordingly, the joinder Application does not necessarily support the overriding objective.

29. I have some sympathy with Advocate Greenfield's submission that "*It is rarely appropriate to add parties to litigation simply because they wish to advocate the position of an existing (and legally represented) party to the litigation, but have no direct interest themselves*". In this regard, I have paid particular attention to the position of the Fourth Respondent. The Receiver was appointed by the same court as that which granted the SEC its asset freeze order. The appointment of the Receiver was made pursuant to action taken by the SEC's

"*sister agency*" in the United States of America. There was a degree of concession that the SEC would be able to assist the Fourth Respondent without being made a party and that the arguments to be advocated and the evidence to be led would be closely aligned. To the extent that the Affidavit evidence in support of the SEC's Application suggests that it would be able to provide information that would otherwise not be available or to articulate arguments that would otherwise not be mounted, I am not convinced that that is right. On the analysis of the various parties' positions as I understand them, the position of the US authorities can be adequately represented through the Fourth Respondent. Accordingly, having regard to the position of the other parties to the Bank's interpleader proceedings, I do not consider that it would be just and convenient to determine the issue as to whether the assets held by the Bank represent the proceeds of crime between the SEC and the Fifth to Eighteenth Respondents as well as between the existing parties to those proceedings.

Discretion

30. Once again, even if I were to be wrong to conclude that the second or the third limbs of the *Gresh* test had not been satisfied by the SEC, I would have chosen not to exercise the discretion that remains under rule 37 in the SEC's favour.

31. Whilst I am conscious of the extent, and potentially the complexity, of the cross-border insolvency issues being raised as between existing Respondents, those issues do not directly involve the SEC. The SEC, as previously noted, has taken the steps it considers appropriate to preserve the assets that it suggests are the proceeds of crime. It has not taken steps to appoint a receiver because that course of action has been pursued by the CFTC. As Bannister J pointed out in his judgment in the Eastern Caribbean Supreme Court in relation to the effect of the appointment of liquidators over the assets nominally held by the company placed in liquidation, "*If it turns out that assets held in its name belong to others, they will be handed over to their rightful owners once their title is established*". Accordingly, the position of the SEC will not be affected whether or not it is made a party to the Bank's interpleader proceedings. The Fourth Respondent is, in my view, as well placed as anyone to advance the arguments about the provenance of the assets held with the Bank, especially if it has, as I suspect it will, assistance from the CFTC and the SEC. When those agencies took steps to obtain the orders they did in September 2012, it looks very much like their efforts were co-ordinated and I have seen nothing in the evidence to suggest that this would not continue to be the case. These are, in my view, factors pointing against exercising the discretion available under rule 37 in favour of the SEC.

32. One of the aspects of the SEC's position that has not been addressed to the extent that it might have been, despite me raising the question, is why some assistance from HM Procureur has not been sought. Given the content of the material placed before Judge Chang and the latter's findings, there appears to be an alternative way in which the SEC could have sought to achieve the level of protection for US-based investors that it desires over the assets held at the Bank. That might involve use of the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 or some other appropriate regime. Such steps would have precipitated other considerations and addressed the primary issue to which I have already referred in a different, but arguably more appropriate, manner. In those circumstances, I would be more sympathetic to affording the opportunity for the Law Officers of the Crown to make representations about the provenance of the assets than I am to granting the SEC's joinder Application. Accordingly, even if the three limbs of the *Gresh* test were satisfied (and this element may also overlap with the third "*just and convenient*" limb), the joinder Application would still fall to be dismissed.

33. Because it was something I raised during the course of the hearing, I have also given consideration as to whether, despite my decision to dismiss the Application, this was a case in which some limited form of participation by the SEC might properly be countenanced. In particular, I have carefully considered whether limited joinder in respect only of the next stage of the interpleader proceedings (possibly even subject to the imposition of further conditions pursuant to rule 50(3)(a) of the 2007 Rules, eg, giving a direction that separate representation

is not permitted) is a way of dealing with the case justly and warrants making a different order from that of simply dismissing the Application. Such a course of action might then have enabled the SEC to participate in the determination of the application brought for the Royal Court to decline jurisdiction in favour of a more appropriate forum. To the extent that such a distinct and discrete stage of the proceedings is something in which the SEC has a more direct interest, I can see that it would be arguable that the ***Gresh*** test would be satisfied if it were confined only to considering the determination of that issue. However, I am not minded to exercise the discretion that might then have been available to the Court for the same reasons I have already set out. In my view, the position of the SEC, at one remove from the issues to be determined as between the two groups of existing Respondents, can be satisfactorily met without being joined as a party but rather in assisting, as far as may be appropriate, the Fourth Respondent. If circumstances change to a material degree, it would be open to the SEC to make a fresh application.

Conclusion

34. For the reasons given, I am not satisfied that the SEC has demonstrated that rule 37(1)(b)(ii) of the 2007 Rules has been met. The consequence is that its Application to be added as a party to the Bank's interpleader proceedings is dismissed.

35. In relation to the costs incurred by the Fifth to Eighteenth Respondents in resisting the SEC's Application, I would be minded to deal with them in the usual way by ruling that the costs follow the event. However, if any of the parties to the Application wish to seek an alternative order, an appropriate costs application should be listed before a suitable Interlocutory Court. In default of such an application being intimated within 21 days from the handing down of this reasoned decision, the SEC will be ordered to pay the Fifth to Eighteenth Respondents' costs on the standard recoverable basis.