

Judgment 34/2013

**EFG Private Bank (Channel Islands)
Limited and BC Capital Group SA (in
liquidation) et al
Royal Court
6th November 2013**

Application dated 6 June 2013 by the Ninth Respondents, as subsequently amended, for a stay of Interpleader Proceedings commenced in March 2013 and for an order that assets held on behalf of the Fifth to Eighth, Tenth to Sixteenth and Eighteenth Respondents be released into the custody and control of the Ninth Respondents for the purposes of the conduct of the liquidations they are carrying out in respect of each of those other Respondents.

**Approved Text
06.11.2013**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

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 THE 1st AND 2nd
RESPONDENTS**
- (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) FUTURES ONE F1 INVESTMENT LIMITED (IN LIQUIDATION)

(13) FUTURES ONE 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)

Respondents

Ninth Respondents' application to stay Interpleader Proceedings

Hearing date: 5th, 6th & 7th August 2013

Judgment handed down: 6th November 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Ninth Respondent:	Advocate J P Greenfield
Advocate for the First to Fourth Respondents:	Advocate A D Laws Advocate T W McGuffin
Advocate for the Interpleader Applicant/Bank:	Advocate A Lyall

Cases & Materials referred to:

The Insolvency Act 2003 (BVI)

The Insolvency Rules 2005 (BVI)

The Common Law (Declaration of Application) Act (Cap 13) (BVI)

The Royal Court Civil Rules, 2007

The Companies (Guernsey) Law, 2008

Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited [2009-10] GLR 38

Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112

Rubin v Eurofinance SA [2012] UKSC 46

In re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852

Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508

In re Stanford International Bank Ltd [2009] EWHC 1441 (Ch)

Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd [1967] 1 WLR 1017

Picard v Primeo Fund (in official liquidation) (unreported, 14 January 2013)

Schmitt v Deichmann [2012] 2 All ER 1217

Re Founding Partners Global Fund Ltd [2011] Bda L.R. 22

Lord Millett, *Cross-Border Insolvency: The Judicial Approach* (1997) 6 IIR 99

Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460

Healthspan Limited v Healthy Direct Limited [2003-04] GLR 193

Introduction

1. This is the judgment that I had prepared following the oral submissions I heard on 5 and 6 August 2013 with a view to delivering it at the resumed hearing on 7 August 2013. I did not do so because certain developments caused the parties to request that I defer giving judgment until a later date. They have now restored the matter for that purpose. Apart from taking the opportunity afforded by the delay to undertake a little tidying up, the shape and content of what follows was prepared overnight from the conclusion of the hearing on 6 August 2013 up to the intended time of resuming the hearing on the afternoon of 7 August 2013.
2. The Ninth Respondents, John Greenwood and Hadley Chilton of Baker Tilly (BVI) Limited, made an Application dated 6 June 2013, as subsequently amended, for a stay of the Interpleader Proceedings commenced by EFG Private Bank (Channel Islands) Limited (hereafter referred to as “the Bank”) in March 2013 and for an order that the Bank release the assets held on behalf of the Fifth to Eighth, Tenth to Sixteenth and Eighteenth Respondents (hereafter referred to as “the Assets”) into the custody and control of the Ninth Respondents for the purposes of the conduct of the liquidations they are carrying out in respect of each of those other Respondents (and to which I will refer as the “stay and remittance application”). There was some discussion as to whether the two elements of the Application were independent. However, I take the view that both paragraphs are inter-linked, indeed the remittance aspect may even be the main driver for the Ninth Respondents seeking to stay the Interpleader Proceedings, so I have approached the questions together, considering whether both a stay and remittance should be granted.
3. The Bank, represented by Advocate Abel Lyall, took a neutral position in relation to this Application. The parties to the Interpleader Proceedings informed me that, although a Seventeenth Respondent had been joined, they had all agreed that there was no need for it to be involved any longer. The Ninth Respondents had been joined to the Bank’s Interpleader Proceedings in their capacity as joint liquidators of the Fifth to Eighth Respondents and had, since March, assumed the role of liquidators or representatives of the other named Respondents. They are represented by Advocate Greenfield. The First to Fourth Respondents, who are all represented by Advocates Laws and McGuffin, oppose the Ninth Respondents’ Application. Those four Respondents include two Panamanian companies, which are in liquidation in The Bahamas. The Third Respondents are the Joint Official Liquidators of those two companies. The Fourth Respondent is Robb Evans & Associates LLC, which was appointed by the United States District Court for the Northern District of Illinois on 27 September 2012, in proceedings instituted by the United States Futures Trading Commission (hereafter referred to as “the CFTC”), as the Receiver of Nikolai Battoo and four entities with which he is associated. One of those four entities is the First Respondent, but Mr Battoo and the other three entities are not parties to the Interpleader Proceedings. The President and Chief Operating Officer of the Fourth Respondent is Brick Kane, who is also one of the Third Respondents.
4. The Sixteenth Respondent is an Anguillan company in liquidation. It has not been suggested that the position of that Respondent is different in a practical sense to the other Respondents in respect of which the Ninth Respondents have brought their Application, so I propose to concentrate on the position in relation to the liquidations of the companies incorporated in the British Virgin Islands, and the reasoning given can be applied *mutatis mutandis* to the Anguillan company.

Evidence

5. The evidence in support of the Application is contained in three Affidavits sworn by Hadley Chilton on 5 June, 12 and 19 July 2013. The evidence opposing the Application is contained

in two Affidavits of Brick Kane, sworn on 28 June and 19 July 2013. The background to the Application is also familiar to me from the evidence lodged in the Interpleader Proceedings themselves and in other applications made during the course of those proceedings. Without setting it out in any detail, I have taken it all into account to understand the present position of the parties contesting the Ninth Respondents' Application.

6. The factual matrix described in the various Affidavits has been supplemented by diagrams showing the inter-relationships of the various parties. These are complex matters that do not need to be gone into in detail for the purposes of this judgment. In short, the Bank's Interpleader Proceedings were really commenced as a response to earlier developments elsewhere and, in particular, the action taken by the United States Securities and Exchange Commission (hereafter referred to as "the SEC") and the CFTC in the Illinois court before Judge Chang. The allegations made are that Mr Battoo and entities associated with him and described as "the BC Common Enterprise", including the First Respondent, have been responsible for defrauding investors, many of whom are US-based. The five Defendants to those proceedings in the Illinois court have not appeared to answer the allegations made, with the result that Judge Chang has made the findings he has been invited to make on the papers by the SEC and the CFTC. Judge Chang had granted preliminary injunctions and, as already mentioned, appointed the Fourth Respondent as Receiver in respect of the five Defendants. The position faced by the Bank is described in the Affidavit from Stephen Watts on 18 March 2013 in support of the Bank's Interpleader Proceedings.
7. The precise linkage between the various parties remains disputed and will, in due course, potentially need to be resolved somewhere, once the First to Fourth Respondents make the proprietary claims they have intimated. It has been suggested that paragraph 13 of an Affidavit sworn on 24 May 2013 by William Sugden, who is the US Counsel to the Ninth Respondents, in opposition to an application by the SEC to be joined to the Interpleader Proceedings, sets out a helpful summary of the position:

- a. *The "victims" of the alleged wrongdoing (I say "alleged" as there has been no formal finding against any of the SEC Defendants or the CFTC Defendants at this stage) and those for whom the SEC alleges it is taking steps to assist, are alleged to be investors in two vehicles known as "Private International Wealth Management" and "Private International Wealth Management – Insurance" (together "PIWM"). Messrs Battoo and Sunderlage are alleged to have been responsible for soliciting investors to join PIWM.*
- b. *The monies collected via PIWM are alleged to have been invested in the investment vehicles named in the SEC and CFTC Complaints. Those entities in turn placed their collective funds with a Bahamian entity called Alliance Investment Management Limited ("Alliance").*
- c. *Alliance then invested in certain (but not all) of the 5th – 8th, 10th – 16th and 18th Interpleader Respondents. The 1st and 2nd Interpleader Respondents (for whom the SEC appears to agitate) are nothing more than investors in an investment vehicle (Alliance) which may have invested funds in some of the 5th – 8th, 10th – 16th and 18th Interpleader Respondents. The 17th Interpleader Respondent is an investment manager only.*
- d. *The 5th – 8th, 10th – 16th and 18th Interpleader Respondents also received funds from investors and creditors wholly separate from the investment process described in (a) – (c) above and therefore wholly unrelated to any individuals or entities named in either the SEC or CFTC Complaints.*
- e. *The 9th Interpleader Respondents are (as stated above) the Joint Liquidators of the 5th – 8th, 11th – 16th and 18th Interpleader Respondents and have had the Assets vested in them by virtue both of their appointment as Joint Liquidators and the ratification of various of their appointment by the BVI Court and their recognition by this Court (see **WSSI**, pages 19-56), with the exception of that portion of the Assets held by the 10th and 17th Interpleader Respondents, neither of which are in liquidation. Both the 10th and 17th Interpleader Respondents are represented via*

their respective Directors and maintain separate claims to the ownership of their funds held by EFG.”

8. I am aware that proceedings related to the issues in the present case before this Court have already been taking place elsewhere, and in which judgments have been given. I have reminded myself of the content of those judgments, including any factual findings, and in particular have reminded myself of what Justice Bannister had to say in the case heard in the British Virgin Islands in March 2013, setting out the consequences of the liquidations for the ownership of the companies' shares.
9. In his Fourth Affidavit, Mr Chilton has set out in considerable detail the duties of liquidators appointed in the British Virgin Islands under the Insolvency Act 2003, as amended, the provisions of which are supplemented by the Insolvency Rules 2005. The regime in the British Virgin Islands appears largely to be modelled on the English law position and is by comparison, therefore, more detailed and comprehensive than Guernsey's rather sparse statutory regime. He also refers to the Common Law (Declaration of Application) Act (Cap 13), which provides that “*the Common Law of England, as far as it stands unaltered by any written Laws of these islands ... is in force in each of these your Majesty's Leeward Caribbean Islands*”. The primary duty to which he refers is contained in section 185(1) of the 2003 Act:

“The principal duties of a liquidator of a company are

- (a) to take possession of, protect and realise the assets of the company;*
- (b) to distribute the assets or the proceeds of realisation of the assets in accordance with this Act; and*
- (c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with this Act.”*

He has also set out the effects produced, in accordance with section 175(1) of that Act, upon a company entering liquidation, including that “*the liquidator has custody and control of the assets of the company*”. He further highlights the moratorium imposed by section 175(1)(c):

“unless the Court otherwise orders, no person may

- (i) commence or proceed with any action or proceeding against the company or in relation to its assets, or*
- (ii) exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company”.*

10. I should also add at the outset that the Ninth Respondents have offered an undertaking not to distribute any Assets remitted without prior permission of the court in the British Virgin Islands, which I have borne in mind when considering how to determine their Application.

Provenance of Assets

11. One of the issues that has been raised on more than one occasion since the Bank's Interpleader Proceedings were commenced is whether the allegations being made mean that the Assets represent the proceeds of crime. Advocate Greenfield has suggested that, because there has been no evidence showing the Bank has taken any steps to treat the Assets as suspicious, a proper inference to be drawn is that this was not the Bank's position. However, the Illinois court has proceeded on basis that the assets with which it has been concerned, ie, those assets that might now be termed as being the “receivership assets” for which the Fourth Respondent is responsible, are potentially liable to civil forfeiture in accordance with US law. I consider that I can properly take note of that fact because the precise provenance of the Assets will have to await any formulation of the claims made by the First to Fourth Respondents.

Chronology

12. Before turning to the detail of the current Application, I have reminded myself of the purpose of Interpleader Proceedings and how they have been progressing. The Bank issued its application on 18 March 2013, setting out reasons for it and complying with Part V of the Royal Court Civil Rules, 2007, particularly rule 26(3). They were returnable against some of the Respondents on 22 March 2013, on which date leave to serve outside the jurisdiction on the remaining Respondents was sought and granted. Accordingly, the first convening of all Respondents took place on 19 April 2013. There has been a number of adjournments to the Interpleader Proceedings to accommodate other procedural applications, eg, the joinder application from the SEC, a disclosure application, and applications on behalf of the First to Fourth Respondents seeking extensions of time in which to file their claims. The stay and remittance application was also made during these stages and directions given setting a timetable to the present hearing.
13. I take the view that it is important not to lose sight of what the proceedings before the Court are concerned with. *The White Book*, referring to the procedure under Order 17 of the old Rules of the Supreme Court, explains that

“Interpleader is a proceeding by which a person, from whom two or more persons claim the same property or debt, and who does not himself claim the property or dispute the debt, can protect himself from legal proceedings by calling the two claimants to interplead, that is to say, claim against one another, so that the title to the property or debt may be decided by the Court.”

The real difficulty in this case is that the claims on behalf of the Fifth to Eighteenth Respondents have already been formulated, whereas the First to Fourth Respondents are still working on theirs. A variety of different proprietary claims may be advanced on behalf of some or all of the First to Fourth Respondents. Those under consideration are listed by Mr Kane in his Third Affidavit (which was technically filed in support of an application for disclosure, but contains a helpful summary of what had been set out in an earlier Preliminary Skeleton Argument).

14. The latest deadline imposed by the Court for the First to Fourth Respondents to formulate their claims was 30 July 2013. The reason for directing the lodging of their claims by that date was with a view to having a better understanding of the position. An application to extend that deadline was made prior to that date, but is yet to be determined.
15. Advocate Greenfield submits that the Court should place great weight on there being no formulated proprietary claims yet, though he did not go so far as to say that the First to Fourth Respondents should now be shut out from making any claim. I queried whether I could properly determine the stay and remittance application before seeing how the other side of the competing claims is being formulated. Advocate Laws understood the difficulties faced by the Court but suggested that, if I were minded to stay the Bank’s Interpleader Proceedings, the Court should not remit the Assets immediately, but leave matters to be resolved elsewhere and await their outcome before moving to that stage.
16. I have decided that the most appropriate way to proceed at this stage is to conclude that some claim will ultimately be advanced (and in a timely fashion) on behalf of some or all of the First to Fourth Respondents and that this will involve an element of competing against the claims made by the Fifth to Eighteenth Respondents, meaning that it will call for determination in Guernsey in the context of the Interpleader Proceedings. However, my patience on this question of delays is wearing thin.

Recognition

17. The Ninth Respondents, in their capacity as liquidators of the Fifth to Eighth Respondents have been recognised by the Royal Court by virtue of an Act of Court of 21 November 2012. As a result of that decision, the Court has recognised their appointment and their powers

under the Insolvency Act of 2003, authorising them to exercise those powers so far as like powers would be exercisable by a liquidator appointed under the Companies (Guernsey) Law, 2008. The Ninth Respondents have also expressly been permitted access to documentation and information relating to each of the company's bank accounts from banks located in Guernsey, which is a general permission and not limited to the Bank. The approach taken was consistent with the Letters of Request dated 15 November 2012 received from the Eastern Caribbean Supreme Court, Commercial Division, British Virgin Islands, an example of which I saw relating to the Fifth Respondent. I suggest that this is precisely the type of active assistance, a principle to which I will turn in more detail shortly, to which Advocate Greenfield has referred.

18. The Third Respondents have been similarly recognised by the Court and the Fourth Respondent has an application for recognition, which has yet to be determined. For present purposes, I do not consider that the absence of recognition of the Fourth Respondent makes any difference to the determination of the Ninth Respondents' stay and remittance application. Indeed, because of the significant Assets held at the bank, it is hardly surprising that each of those appointed elsewhere to exercise functions in respect of those Assets wishes to be able to play a full part in investigating matters and taking control of any part of the Assets to which the entities they represent are entitled.

Active assistance

19. Advocate Greenfield's primary submission is a simple one, although its simplicity clothes the complexities underlying it. The basis of the Ninth Respondents' Application is that there is a principle of universalism, which means that the court in the British Virgin Islands should be allowed, as an aspect of the Royal Court rendering active assistance to the liquidations taking place in the British Virgin Islands, to determine questions of ownership of any disputed part of the Assets.
20. In response, Advocate Laws has acknowledged the existence of the principle, but submits that it does not assist to the degree suggested by Advocate Greenfield. Instead, he argues that the questions raised by the Application fall to be determined by reference to the *forum non conveniens* doctrine. He candidly accepted that the ownership issue could be litigated in the British Virgin Islands but suggested that the application of the *forum non conveniens* doctrine did not support that outcome. Of course, I appreciate that the Ninth Respondents' primary case is not based on *forum non conveniens*.
21. In my judgment, there is necessarily some overlap here between the principle of universalism and the doctrine of *forum non conveniens*. Indeed, Advocate Greenfield recognised that the *forum non conveniens* doctrine had a role to play in the exercise of the Court's discretion to give active assistance. Accordingly, I will proceed on the basis of there being an overlap, with the result that I will not attempt to apply the principle and doctrine distinctly and sequentially, but rather apply an overall synthesis of them at the same time.
22. A number of cases from other jurisdictions were referred to by the Advocates setting out and explaining the principle of active assistance. Whilst most of the material to which I have been referred is English law authority, or decision of courts in Overseas Territories, rather than being Guernsey cases, this is an area of Guernsey law where it is, consistent with the guidance offered by Southwell L-B in *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited* [2009-10] GLR 38 (at para. 91(7)), appropriate to develop Guernsey law in the light of the approach in England and Wales and, indeed, in other jurisdictions with a similar common law heritage. None of the cases, however, is directly in point because they do not address the consequences where there is a challenge to the assets in question even belonging to the company in liquidation.
23. The issue in the present case is which Court should determine that question of ownership. Is it properly this Court in the Interpleader Proceedings or the court in the British Virgin

Islands? Although there was some discussion about whether such a challenge relating to ownership would be for the liquidators or the court in the British Virgin Islands to resolve, Advocate Greenfield acknowledged that there was a strong likelihood of it requiring determination by the court. I agree, and so have proceeded to consider the case on that basis. In effect, I have to decide between determination by the court in each jurisdiction.

Preliminary comments

24. This case does not, like some, involve a creditor trying to gain some advantage outside of the main (or indeed sole) insolvency processes taking place in the British Virgin Islands. To that extent, that set of cases, including *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, can easily be distinguished. That is not the basis for the Ninth Respondents seeking to stay the Interpleader Proceedings and so does not assist.
25. This case does not, like some of those to which reference has been made, involve competing claims by different persons appointed in separate jurisdictions purporting to act on behalf of the same company. The Third and Fourth Respondents have been appointed in respect of persons and entities distinct from those whose liquidations the Ninth Respondents are conducting. This is not, therefore, a case of which officially-appointed person should act, or act first, but rather a dispute at an earlier stage of which of them even has the lawful entitlement to get in those parts of the Assets held at the Bank where there are competing claims to ownership.

Guidance from elsewhere

The Rubin case

26. Because it is the most highly persuasive authority cited, I will start my analysis of the principles to be applied with the Supreme Court's decision in *Rubin v Eurofinance SA* [2012] UKSC 46. Paragraph 12 refers to the desirability of one universal process of distribution of a bankrupt's property, quoting a passage from the speech of Lord Dunedin in *Galbraith v Grimshaw* [1910] AC 508, 513:

“Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution.”

Paragraph 13 then deals with recognition. However, no one here is suggesting any usurpation of the role of the liquidator in distributing assets of the company in liquidation. Instead, as I have just indicated, the issue at the heart of the present case is where the determination of whether particular assets belong to a company in liquidation, and thereafter fall to be distributed, not the role of the liquidator in respect of those assets once ownership is established.

27. The *Rubin* case then helpfully explained that principle is predicated on fairness between creditors. It made this clear by quoting with approval from the speech of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (at para. 30):

“The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.”

and from the opinion of the Privy Council in Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508 (at para. 16):

“The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated ...”

The distinction in the present case is that the First to Fourth Respondents are not appearing as creditors of the companies whose liquidations are being undertaken by the Ninth Respondents. Had they been, the issues to resolve would have been more straightforward.

28. Although the Rubin case also covered the position under various legislative provisions applicable in England and Wales, in Guernsey the legislature has not intervened in this area, which means that the common law principles are the only ones that can be adopted and applied. These were set out at paragraphs 29-31 of the judgment of the Supreme Court:

“29. ... at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. The underlying principle has been stated in different ways: “recognition ... carries with it the active assistance of the court”: In re African Farms Ltd [1906] TS 373, 377; “This court ... will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11”: Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112, 117.

30. In Credit Suisse Fides Trust v Cuoghi [1998] QB 818, 827, Millett LJ said:
“In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention ... It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”

31. *The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign jurisdiction, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.”*

29. The possibility of staying domestic proceedings was then expanded upon in para. 33:

“One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf In re African Farms Ltd [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in Turners & Growers Exporters Ltd v The Ship Cornelis Verolme [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512 (stay in

Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in CCIC Finance Ltd v Guangdong International Trust & Investment Corp [2005] HKC 589 (stay of Hong Kong proceedings against Chinese owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include In re Impex Services Worldwide Ltd [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.”

However, it is clear from the brief summaries following each reference that none of those cases was concerned with whether the assets in question actually belonged to the company in liquidation. Because in each case the assets were those of the company concerned, the principle of universalism was engaged to enable the court to let the liquidators, and the court to which they were accountable, resolve matters. That outcome is quite understandable but of no direct application in the present case.

30. I can also mention here a passage from the judgment of Lewison J (as he then was) in In re Stanford International Bank Ltd [2009] EWHC 1441 (Ch) on which Advocate Greenfield relied (at para. 104):

“If it is established (as here) that a liquidator has been properly appointed in the place of incorporation of a corporation, with the power and duty to collect assets on behalf of all creditors, then barring exceptional circumstances, the liquidator should be left to get on with his job without outside interference from others. That would promote the general policy of universalism; namely that there should be one collective proceeding in which all creditors are entitled to participate, irrespective of where they are located”.

Whilst there is now no disputing that the Ninth Respondents have been properly appointed in the British Virgin Islands, and those appointments recognised by this Court, bringing with it the duty to give active assistance, the precise form of appropriate assistance remains unresolved. The First to Fourth Respondents, and arguably the Bank in bringing its Interpleader Proceedings, are not interfering with the liquidators’ job of collecting assets, but rather questioning whether the Ninth Respondents’ claim to those assets can properly be sustained. That is potentially a material difference and does not, in my view, amount to the type of interference Lewison J had in mind.

31. I have set out in some detail the statements of principle in the Rubin case because they are helpful guidance as to the approach I am being invited to take. The actual decision in that case related to whether an order or judgment of a foreign court in proceedings to adjust or set aside prior transactions, such as preferences or transactions at an undervalue, would be recognised and enforced in England. It was, therefore, quite a different issue to that raised in the present case and so the ruling is not directly in point.

The HIH case

32. Turning to In re HIH Casualty and General Insurance Ltd (*supra*), which was specifically about remittance of assets, the basis for, and usefulness of, the principle of universalism was described by Lord Hoffmann in the following terms:

“6 Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt’s domicile which receives worldwide recognition and it should apply universally to all the bankrupt’s assets.

7 *This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, 517, para. 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of “modified universalism”; see also Fletcher, Insolvency in Private International Law, 2nd ed (2005), pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.”*

33. In that case, the factual situation was quite different from that in the present case. A provisional liquidator appointed in England had collected the assets of companies in liquidation and the issue was whether to distribute those assets in accordance with the liquidator’s powers under English law or to remit them to the Australian liquidator to distribute. Each course of action produced different outcomes for some creditors. There was, therefore, a choice between those two options, because both liquidators had authority to proceed to distribute the assets collected. At para. 28 Lord Hoffmann explained that:

“The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide.”

The conclusion reached by Lord Hoffmann (at para. 36) was that *“this is a case in which it is appropriate to give the principle of universalism full rein. There are no grounds of justice or policy which require this country to insist upon distributing an Australian company’s assets according to its own system of priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators”*.

34. Once again, the actual decision as to basis on which to permit remittance is irrelevant to the present case. The case is capable of being distinguished because the Ninth Respondents have not applied for remittance with a view to distribution but instead seek remittance to hold the Assets pending whatever steps the First to Fourth Respondents might take, which I strongly suspect are unlikely to be much different to what they propose to assert in the Bank’s Interpleader Proceedings, subject only to the additional procedural hurdle imposed by section 171 of the 2003 Act, under which they will need the court’s leave to commence proceedings. (As an aside, Advocate Greenfield raised that moratorium as being a relevant factor preventing any of the Assets being dissipated and referred to several cases on equivalent English law provision as relevant to how to take that into account (see, eg, Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd [1967] 1 WLR 1017). However, on instructions, he subsequently confirmed that section 175 is not regarded in the British Virgin Islands as having extra-territorial effect, so no more needs to be said about any impact of that provision on the Bank’s Interpleader Proceedings.) The HIH case, therefore, offers no real foundation supporting the Ninth Respondents’ application for the remittance of Assets which have not yet been confirmed as falling within the liquidations they are undertaking.

The Cayman case

35. The post-Rubin case to which Advocate Greenfield referred in his Skeleton Argument, although he did not concentrate on it in his oral submissions, is the decision of the Grand Court of the Cayman Islands in Picard v Primeo Fund (in official liquidation) (unreported, 14 January 2013). This was a Madoff-related action and the judgment contains a helpful analysis of Caymanian statutory provisions on making orders ancillary to a foreign bankruptcy. Whilst reminding myself that the comments made are not of direct application because there has been no similar legislative intervention in Guernsey, I have noted what was said at para. 22:

“The exercise of this Court’s jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. ... the purpose of an ancillary order is not to ensure the constitution of an estate in accordance with the foreign law in question. Its purpose is the more general one of assisting the foreign court to achieve an economic and expeditious administration of the estate in a manner consistent with Cayman Islands policy objectives in respect of the matters reflected in section 242(1) [of Part XVII of what is now the Companies (2012 Revision)].”

36. The decision also rehearses the familiar passages to which I have previously referred about the consequences of recognition, once granted (see paras. 30 and 31), before quoting what Proudman J said in Schmitt v Deichmann [2012] 2 All ER 1217 (at para. 62):

“... Reading together the Cambridge Gas Transport case, Re HIH Casualty and General Insurance Ltd, Re New Cap Reinsurance Corp Ltd and Rubin’s case, I derive the following propositions: (i) there is power to use the common law to recognise and assist an administrator appointed overseas, (ii) assistance includes doing whatever the English Court could have done in the case of a domestic insolvency, (iii) bankruptcy proceedings are collective proceedings for the enforcement (not establishment) of rights for the benefit of all creditors, even when those proceedings include proceedings to set aside antecedent transactions, (iv) proceedings to set aside antecedent transactions are central to the purpose of the insolvency.”

I do not believe that the distillation of these principles is affected by the fact that Proudman J was referring to the Court of Appeal judgment in the Rubin case, rather than the Supreme Court decision. I have paid particular attention to the third of the principles she set out, distinguishing between the enforcement of rights rather than their establishment.

37. Before leaving the Cayman case, I note first what was said at para. 39 that *“the grant of a stay of proceedings or a stay of execution upon the application of a foreign representative merely involves the exercise of a general power in a manner which recognizes the existence of the foreign insolvency proceedings”*. I take this to mean that there is nothing particularly special about the application to stay and that it can be approached through the application of the Court’s general powers, which would, in such a situation, pay particular regard to any argument advanced under the *forum non conveniens* doctrine. The case also considered the decision of Kawaley J in the Supreme Court of Bermuda in Re Founding Partners Global Fund Ltd [2011] Bda L.R. 22, to which I must now turn in some detail, adding the comment (at para. 37) that the learned judge’s analysis may need to be reconsidered in the light of the Supreme Court’s decision in the Rubin case (*supra*) and its effect on the Cambridge Gas case (*supra*).

Founding Partners case

38. In many respects, the Founding Partners case (*supra*) is the closest the Ninth Respondents come to identifying an authority in which a similar situation to the present case needed to be addressed. Joint Provisional Liquidators had been appointed over the company, Founding Partners, by the court in the Cayman Islands, the proceedings in Bermuda being commenced pursuant to a Letter of Request from the Grand Court of the Cayman Islands. The Joint Provisional Liquidators issued proceedings seeking primarily to compel the Bank of Bermuda to pay over funds standing to the account of the company in liquidation to the Joint Provisional liquidators. On the same day, a Receiver appointed by the US District Court for Florida instituted proceedings seeking leave to intervene with a view to determining whether or not he, in his capacity as Receiver, or the Joint Provisional Liquidators had the entitlement to control and take possession of the assets of Founding Partners in Bermuda. Matters then proceeded in a slightly different way, because another entity, Hibistar Pte Ltd raised a proprietary claim to the monies held in the accounts of Founding Partners in Bermuda. There was no adjudication on that application because the parties agreed to refer their dispute to the

Caymanian Court, which then determined the ownership of certain assets and ordered the Joint Official Liquidators, as they had become, to distribute and transfer certain assets to Hibistar Pte Ltd. The Supreme Court of Bermuda thereafter had to determine competing applications by Hibistar Pte Ltd, supported by the Joint Official Liquidators, and the US-appointed Receiver in respect of certain assets held by HSBC Bank Bermuda Limited. Whilst not exactly interpleader-style proceedings, there are sufficient similarities to the position in the present case to make the approach of the Bermudan court of interest.

39. The learned judge proceeded on the assumption that the monies in question belonged solely to Founding Partners (see para. 15) and set out the issue in para. 38:

“Here the true controversy turns, in the first instance at least, on competing claims to control assets belonging to the foreign insolvent company which are located in a jurisdiction where no ancillary liquidation proceedings have been commenced. The dispute centres, in effect, on the more fundamental question of who has the best claim to be recognised as agents or representatives of the company.”

In his conclusion, Kawaley J stated:

- “66. *The JOLs having been duly appointed in the Company’s place of incorporation as its sole representatives and the Company having being [sic] wound-up there, this Court under the applicable common law rules of private international law ought properly to (a) recognise those and the related Orders made by the Caymanian Court in the winding-up proceedings there; and accordingly (b) declare that the JOLs are entitled to control all monies held locally at HSBC Bank Bermuda Limited accounts belonging to the Company. ...*
67. *... In my judgment the starting assumption is that all assets held in accounts belonging to the Company are Company assets. Any claim to such assets can most appropriately be determined in the primary (and currently sole) liquidation forum, broadly following the approach adopted to the question of which court is most competent to resolve adversary claims involving companies in liquidation abroad in Re Eurofinance SA [2010] EWCA Civ 895.”*

40. If there had already been a determination about ownership of the Assets held at the Bank there would be a stronger argument that active assistance would extend to arranging for those Assets to be remitted to the Ninth Respondents to be dealt with in the context of the liquidations. I am not even in the position of making an assumption that the Assets are owned by the respective companies now in liquidation and represented by the Ninth Respondents. Unlike in the *Founding Partners* case, the competing claimants have not agreed to allow the court in the British Virgin Islands (or indeed any other court) to resolve the question of ownership. Instead, the position in the present case is different and so the outcome decided by the Bermudan court is also not of direct application. Accordingly, even putting to one side that this decision relied on the English Court of Appeal’s judgment in the *Rubin* case rather than the Supreme Court decision, this is not a situation in which it is clear that active assistance means leaving claims to be dealt with in the British Virgin Islands. The case is a further example of the application of what is acknowledged to be the established principle of universalism.

Sheldon commentary

41. Many of the cases to which reference has been made are analysed and commented upon in *Cross-Border Insolvency*, 3rd ed., edited by Richard Sheldon QC. Advocate Greenfield placed considerable weight on what is set out in Chapter 10, headed “Consequences of Recognition at Common Law”, in the section headed “Staying actions”, which begins with the following paragraphs:

“10.54 The commencement of foreign insolvency proceedings in relation to a debtor does not result at common law in an automatic stay of any actions brought by

creditors against the debtor in England. In the past, the English cases have tended to concentrate upon a single issue – whether a claimant has attached property prior to the commencement of the foreign insolvency proceedings. However, there is a separate question which relates to the power of the English court to stay actions which have been commenced before it.

10.55 *One way in which the power to stay proceedings may be analysed is by reference to the doctrine of forum non conveniens. This doctrine was highlighted by the decision of the House of Lords in Spiliada Maritime Corpn v Cansulex Ltd. As a general proposition, the English court may stay its own proceedings if:*

‘there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.’

10.56 *However, it is suggested that the basis of the exercise of the power to stay proceedings in favour of a foreign insolvency is not solely, or even mainly, based on the doctrine of forum non conveniens. Rather, the power to stay will be exercised pursuant to the requirement to lend active assistance to a foreign insolvency. Accordingly, a stay may be justified not only where the foreign insolvency is the appropriate forum for the adjudication of the claim, but also where more generally the granting of such a stay would promote and assist the foreign insolvency process. There will usually be strong reasons in favour of granting a stay, given the overall aim of there being a single insolvency process in relation to a debtor in which all creditors participate.”*

In his submission, these passages supported his contention that the primary focus should be on rendering active assistance rather than the application of the doctrine *forum non conveniens*.

42. I have also had regard to what is set out in para. 10.59:

“In Re Olympia & York Developments Ltd, the court stated:

‘In the context of multi-jurisdictional insolvencies the courts of different jurisdictions should strive – to the extent that they can within the parameters of their own fundamental precepts of justice – to ensure that matters are adjudicated in the proper forum with the closest connection to the subject matter. Principles of international comity, including those incorporated in the forum non conveniens test, provide the touchstone to assist them in doing so ...’

The justice and convenience of a case is the governing principle where the insolvent, as defendant, raises the forum non conveniens issue, or where the claimant (creditor) seeks leave under CPR 1996, Part 6. It is perhaps fair to say that there is something of a judicial tide in favour of the forum non conveniens approach in international insolvency cases. This is not surprising, as one of the major objectives of the doctrine is to save unnecessary expense, and international insolvencies have something of a reputation for involving very substantial costs.”

It is the combination of approaches described in these passages that led me to indicate earlier that I considered the singular approaches suggested by both Advocates actually overlap.

43. Having recognised the appointment of the Ninth Respondents and their exercise of powers domestically, the key issue for this Court is what the giving active assistance means in the context of how matters have developed between all the parties to the Bank’s Interpleader Proceedings. Although the references to international comity do not fit squarely into a choice between Guernsey and the British Virgin Islands, both being British jurisdictions with the United Kingdom as the only country with international legal personality for this purpose, I am treating the comments made as being of approximately equal application to inter-jurisdictional choices within the entirety of the territories for the international relations of which the United

Kingdom government, on behalf of the Crown, is responsible. I am particularly conscious of the need to get some certainty about the ownership of the Assets as soon as reasonably practicable so that the costs for everyone do not escalate beyond what is reasonable. I need to have regard to which jurisdiction has the closest connection to the subject matter. The fact that the Assets are held in a Guernsey Bank is a strong factor in that regard but is not, in itself, determinative of that issue.

44. In considering these factors, I have noted a number of other passages in Chapter 10 of Sheldon's work because I have found them of assistance. Para. 10.4 is a reminder that

“It must also be borne in mind that the existence of a foreign insolvency does not prevent the English court from conducting its own proceedings; and, in some cases, it may well be that the foreign office-holder favours opening ancillary insolvency proceedings in England. Nevertheless, the fact that a foreign trustee or liquidator may, through recognition, gain effective control of assets in England (and represent the insolvent debtor or company in English courts) is of itself of considerable practicable importance.”

Para. 10.20 explains the position of foreign liquidators having the ability to engage in litigation in England (or, as here, in Guernsey). That is, of course, one of the powers that has been recognised for the Ninth Respondents under the Court's recognition order in November 2012. This Court has, therefore, already given active assistance pursuant to the Letter of Request from the court in the British Virgin Islands to facilitate those steps already taken. I have, therefore, taken into account that the Ninth Respondents have been actively participating in the Bank's Interpleader Proceedings from the very start. That level of involvement has extended to formulating in some detail the claims they maintain to be entitled to take possession of and realise the assets of the companies in respect of which they are acting, all in accordance with their duty under section 185(1)(a) of the 2003 Act.

45. What appears to be clear, and is the position I would adopt without reference to any authority, is that the existence of the liquidations in the British Virgin Islands and their recognition by this Court, thereby giving rise to the obligation to render active assistance, do not impose an absolute duty on the Royal Court to stay the Interpleader Proceedings. Advocate Greenfield did not go so far as to suggest that, although he did emphasise that there was a duty and submitted that the consequences of that duty are that staying those proceedings and remitting the Assets to permit the court in the British Virgin Islands to resolve questions of ownership should follow. In my judgment, that overstates the principle of active assistance in the context of the principle of universalism. The position summarised in para. 7.51 of Sheldon's work clarifies that *“once it is shown that a liquidation has begun under the law of the place of incorporation and, moreover, that the foreign court is the appropriate forum for the winding up of the foreign corporation, the English court has a discretion in respect of any assistance to be given to the foreign liquidation proceedings”*.

46. I also find support for that conclusion in para. 10.27 of Sheldon's work:

“The fact that an insolvency is already on foot abroad does not prevent the English court from conducting its own bankruptcy or winding up, although the existence of a foreign insolvency is a factor relevant to the exercise of the discretion, in the English court, whether to commence and continue its own insolvency proceedings. The existence of a foreign insolvency will not, at common law, result in an automatic stay of English actions brought against the insolvent. However, the English court, in the exercise of its inherent jurisdiction to regulate its own proceedings, may take into account the foreign insolvency of a defendant and conduct its own proceedings accordingly.”

The first sentence concludes with footnote 58, which refers to Lord Millett's extra-judicial writings in *Cross-Border Insolvency: The Judicial Approach* (1997) 6 IIR 99 at 103: *“The*

English court will renounce jurisdiction if it considers that the interests of justice and convenience require the liquidation to be conducted solely abroad”.

47. Sheldon’s work draws these various principles together in the summary at para. 10.45

“A foreign insolvency does not automatically stay actions brought in England against the insolvent. But the English court, in the exercise of its inherent jurisdiction, will regulate English proceedings to prevent a creditor from gaining an unfair advantage over the general body of creditors or unreasonably frustrating a foreign insolvency proceedings [sic]. Thus, an English attachment will not secure a priority where the foreign bankruptcy or liquidation commenced prior to the date of the attachment. On the other hand, rights acquired by means of an attachment in England prior to a foreign insolvency will not be prejudiced merely on account of subsequent foreign insolvency proceedings.”

This is not, of course, a case in which a creditor is seeking to gain any advantage, nor is it a case about priorities depending on timing. Instead, it is about whether the determination of the question of ownership of the Assets held at the Bank forms an integral part of the universal insolvency proceedings or is something prior to and distinct from that process. In either case, my task is to decide how to regulate the Interpleader Proceedings that have been commenced by the Bank. In doing so, I can properly take into account the fairness and justice of the choice between granting the stay and remittance application and refusing it. I consider it appropriate to bear in mind the position of all the parties before the Court and not just those who have argued for and against the stay and remittance application.

Forum non conveniens

48. Guernsey law follows the principles of the doctrine of *forum non conveniens* laid down in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, as quoted in the passage set out above in para. 10.55 of Sheldon’s work (see *Healthspan Limited v Healthy Direct Limited* [2003-04] GLR 193). The factors to take into account, which were addressed in detail in Advocate Laws’ Skelton Argument, include those set out in headnote of the *Healthspan* case:

“When deciding whether it would be appropriate to grant a stay on the ground of forum non conveniens, the court would consider, inter alia-

- (a) whether the proceedings had been brought in Guernsey as of right;*
- (b) whether the foreign proceedings were brought later and in response to the Guernsey action;*
- (c) whether the Guernsey legal system, given its distinctiveness, was competent to deal with any unfamiliar and complex issues arising;*
- (d) the relative ease of witnesses’ travel to Guernsey or the foreign jurisdiction;*
- (e) if the companies were registered in Guernsey, whether it would be easier to enforce a Guernsey judgment than a foreign one; and*
- (f) whether any outstanding issues were exclusively within the jurisdiction of the foreign court.”*

49. These are the factors that I have borne in mind. They are not divorced from the considerations that need to be weighed in the balance arising from the specific insolvency-related principles to which Advocate Greenfield has referred, but form part of a composite exercise of considering in the round what the proper discretionary outcome of Ninth Respondents’ stay and remittance application should be. Indeed, a full analysis of all these factors may be premature whilst the First to Fourth Respondents’ claims are awaited. This is because, although the types of cause of action have been set out in the evidence and touched on in their Skeleton Argument, until they are fully particularised, the Court cannot determine exactly what may be needed to resolve them and their connection to the subject matter in the Interpleader Proceedings. Accordingly, for present purposes, I am proceeding on the basis that some elements of Guernsey law will arise for determination because the Assets are held

in Guernsey in a Guernsey Bank, albeit that the Bank is not asserting any claim to them and the Assets are clearly also movable.

Principles to apply

50. From the foregoing analysis of authority and commentary, I derive the following principles:

- (a) The existence of foreign liquidation proceedings does not result in an automatic stay of the Guernsey Interpleader Proceedings; this Court retains a discretion to regulate its own proceedings.
- (b) The burden of satisfying the Court that staying the proceedings is a proper and appropriate course of action rests on the applicant.
- (c) In determining how to exercise the Court's discretion, proper regard must be had to the principle of universalism in the insolvency proceedings.
- (d) The Court has an obligation pursuant to inter-jurisdictional comity or co-operation to render active assistance to the liquidation processes taking place in the British Virgin Islands but, in doing so, it has to determine what that assistance amounts to. It is clear that this Court is not bound to accede to any assistance requested; the assistance sought must be what this Court can properly and sensibly do to assist rather than frustrate the foreign insolvency.
- (e) The Court must consider carefully whether the question of determining the ownership of assets is some form of particular relief available in the insolvency process or an ordinary question of resolving the civil rights and obligations of the competing claimants.
- (f) A factor to bear in mind in considering whether to stay the Bank's Interpleader Proceedings is the doctrine of *forum non conveniens* and whether another jurisdiction, here the British Virgin Islands, is clearly and distinctly a more appropriate forum to determine the ownership question than Guernsey is.
- (g) The role of the Royal Court is to assist and certainly not to frustrate the insolvency proceedings underway in the British Virgin Islands and should endeavour to ensure that no one is taking an unfair advantage through litigating issues in Guernsey.
- (h) Ultimately, the discretion available to the Court must be exercised judicially, with a view to achieving fairness and justice as between all parties.

Discussion

51. If the matter turned solely on the doctrine of *forum non conveniens*, the competing arguments, would, in my view, be quite finely balanced. There are clear links to the appropriate forum being Guernsey and other clear links to it being the British Virgin Islands. The decisions about cost and convenience may also be quite finely balanced, although I do bear in mind that the Bank, having quite properly started the process by instituting its Interpleader Proceedings, might be slightly more prejudiced if its claim were to be stayed than the Ninth Respondents are in continuing to litigate in Guernsey on issues that they have already spent some considerable time and effort in progressing as far as they have been to date.

52. I have, therefore, considered theoretically what the position might be if the Ninth Respondents were not involved and the other Respondents represented by them were not in liquidation. Bearing in mind the burden that would have to be discharged by the applicant for the stay, I would conclude that, on such an application, it had not been discharged. The Interpleader Proceedings are already underway and to stop them simply to allow a comparable action between the companies registered in the British Virgin Islands and the First to Fourth Respondents now to be commenced in the British Virgin Islands would not appear to make any sense. Foreign parties frequently engage in litigation in Guernsey. Convenience would, in those circumstances, tip in favour of continuing the Guernsey proceedings.

53. The question, therefore, becomes whether the fact of the liquidations and the duties of the Ninth Respondents as liquidators redress that balance and tip the scales in their favour. In considering that question, I am very conscious of the principle of universalism and that

recognition of the Ninth Respondents (albeit formally only in respect of the Fifth to the Eighth Respondents, but de facto in respect of the other Respondents) carries with it the duty of rendering active assistance.

54. In my judgment, determining whether assets are owned by a company in liquidation or by another person is quite a different question to a creditor wishing to make a claim in the liquidation. The liquidator's duty is to collect and realise the company's assets prior to distribution. If there is a question mark over the company's legal entitlement to an asset, the liquidator can properly engage in litigation to resolve that ownership dispute. That a liquidator can do so before this Court is an element of rendering active assistance. Indeed, by being seized of such a dispute and determining the question in accordance with Guernsey's domestic law including, insofar as it becomes applicable, Guernsey's private international law principles, this is rendering a type of assistance to the insolvency proceedings in the British Virgin Islands that must be contemplated through recognition.
55. I tested with Advocate Greenfield what the position of a liquidator appointed in the British Virgin Islands would be in relation to "ordinary" litigation being conducted in a foreign court. The answer provided was that a straightforward claim to get in assets would be pursued externally but if a counterclaim were made, an application to stay the proceedings in a place outside the British Virgin Islands and to deal with the claims under the auspices of the domestic court in the British Virgin Islands would be made. Such a stay application would, of course, need to be resolved on the same principles as apply in the present case. There is, at least, an element of consistency in the Ninth Respondents' approach, but each case would necessarily have to be determined in the light of its particular facts.
56. I also sought Advocate Greenfield's comments about the terms of the Letters of Request, which expressly "*request the assistance of the Royal Court of Guernsey to act in aid of and be auxiliary to this court in these proceedings*". I do not accept Advocate Greenfield's submission on the meaning of the word "*auxiliary*", which came perilously close to placing this Court in a subservient role and overlooking the clearly established principle that this Court is required to regulate its own proceedings. I am satisfied that a court can both aid and be auxiliary to proceedings elsewhere by doing something itself of use to those proceedings. As noted at para. 7.5 of Sheldon's work, referring to an ancillary winding up, "*The English liquidator's role has been broadly described as that of the 'assistant' of the principal liquidator abroad*". I consider that a similar analysis can apply to the role of this Court. It can potentially assist by playing an active part or it could assist by deferring to the foreign court through renouncing jurisdiction if it considers that the interests of justice and convenience so require.
57. In the present case, I have concluded that it would be wrong to exercise the Court's discretion in the Ninth Respondents' favour. The determination of a question of ownership is a step outside the insolvency process itself. It might be regarded as a preliminary step to the liquidators collecting the company's assets. It involves "ordinary" civil litigation rather than any particular type of insolvency-related litigation and can, in my opinion, be distinguished in that way. Further, resolving the ownership issue in this Court will not frustrate the liquidation processes. If Ninth Respondents are right and the Assets at the Bank belong to one of the companies in respect of which they are the liquidators, those assets will be remitted to the liquidators and available thereafter for distribution in the liquidations underway in the British Virgin Islands. There is no suggestion of any alternative insolvency distribution and the principle of universalism is, in this manner, being upheld and supported. If the Ninth Respondents are wrong, and an adverse claimant establishes ownership to any of the Bank-held Assets, then those assets were never susceptible to fall into the liquidation process.
58. To the extent that assistance is called for, therefore, it is being given by determining the ownership question rather than this Court abdicating its responsibilities to resolve the Bank's Interpleader Proceedings. In doing so, the Court continues to regulate those proceedings brought as of right in accordance with the Royal Court Civil Rules, 2007.

59. In reaching that conclusion, I realise that I am taking a subtly different stance to that spelt out in para. 67 in the *Founding Partners* case. In my judgment, the difference warranting what might be perceived as a departure from that outcome is that, in the *Founding Partners* case, there had already been agreement between those wishing ownership to be resolved for such questions to be dealt with in the Cayman court, which was, of course, the seat of the liquidation. As such, the starting assumption and consequences flowing from it need to be placed in that context. Indeed, as noted by Ward LJ in the *Rubin* case when it was before the Court of Appeal, which was referred to by Kawaley J, it is necessary to distinguish between ordinary claims and “*special bankruptcy claims*” (see para. 49).
60. As I have said, I treat these Interpleader Proceedings as ordinary claims and not special bankruptcy claims available only to an officer duly appointed for that purpose. Accordingly, there is no particular preference to be given to staying the Guernsey Interpleader Proceedings and enabling the seat of the liquidations, namely the British Virgin Islands, to resolve these questions. Indeed, I am satisfied that the balance lies more clearly the other way. That conclusion is also, I believe, consistent with the overriding objective in the 2007 Rules to deal with cases justly where the parties have already been put to considerable expense in relation to the Interpleader Proceedings and, despite the parties’ additional travel costs, continuing in Guernsey is likely to be as, if not more, cost-effective than proceeding elsewhere.
61. Whilst the Interpleader Proceedings may not have progressed as rapidly or as far as everyone would have wished, that is something that can be addressed in relation to other applications pending. At the risk of being overly optimistic, I imagine that the Interpleader Proceedings will reach their conclusion earlier than any fresh proceedings that would be commenced in the British Virgin Islands if the current proceedings were to be stayed. For example, when the First to Fourth Respondents have formulated their claims, the Court will be able to decide how to proceed in accordance with Part V of the 2007 Rules. Those claims may not even extend to all the Assets held at the Bank, in which case summary determination for the balance may be appropriate as being proper active assistance to the Ninth Respondents. The Ninth Respondents will then be relieved from the expense of having to deal with everything in Guernsey and a trial ought to be capable of taking place fairly shortly thereafter. Because it is apparent from the evidence that the Guernsey proceedings are more advanced than anything that would be pursued in the British Virgin Islands, as well as taking into account the additional procedural hurdle put in place by the moratorium under section 175 of the 2003 Act, this question of the timing to reach a conclusion about ownership is a further factor pointing towards dismissing the stay and remittance application.

Disposition

62. It is for these reasons that I consider that fairness and justice as between the parties, as well as convenience, all point towards the Interpleader Proceedings being the best vehicle through which to determine any disputed ownership of the Assets held at the Bank for the benefit of all concerned. This outcome is, in my judgment, entirely consistent with the principles on which Ninth Respondents relied on to persuade me differently and recognises the importance of enabling the Ninth Respondents to complete their statutory duties at the earliest opportunity.