In the matter of Battoo et al, and in the matter of an application by Robb Evans Associates LLC
Court of Appeal
31st March, 2014

JUDGMENT 15/2014

Appeal against a decision not to recognise an order of a United States District Court appointing the Appellant as Receiver of the Entities.

Approved Text
31.03.2014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION
Appeal No 471

On appeal from the Royal Court of Guernsey
(Ordinary Division)

14th March 2014

Before: **The Hon M J Beloff QC**
Sir John Nutting Bt QC
Sir Michael Birt

In the matter of

1. Nikolai Simon Battoo
2. BC Capital Group SA (in voluntary liquidation)
3. BC Capital Group International Limited
(also known as BC Capital Group Limited also known as BC Capital Group Global)
4. BC Capital Management LLP ***(together***
5. BC Capital Group Holdings SA ***"The Entities")***

-and-

In the matter of an application by

Robb Evans and Associates LLC for an order recognising its appointment as Receiver over the Entities ***("The Appellant")***

Advocate T W McGuffin appeared for the Appellant

BIRT, JA

1. This is an appeal against a decision of the Deputy Bailiff on 6th November 2013 (with reasons given in a judgment dated 23rd December 2013) whereby he refused to recognise an order of the United States District Court for the Northern District of Illinois, Eastern Division ("The District Court") appointing the appellant as Receiver of the Entities.

Factual Background

2. On 6th September 2012 the US Commodity Futures Trading Commission (CFTC) commenced proceedings against the Entities in the District Court. It alleged various violations of the US Commodity Exchange Act ("the Act"). A flavour of the proceedings can be obtained from the first alleged violation of the Act (para 53 of the Complaint of CFTC) as follows:-

> ***"From at least October 2008 to the present, in or in connection with futures contracts made or to be made, for or on behalf of other persons, Battoo and the BC Common Enterprise, by and through its employees, agents and principals, including but not limited to Battoo, cheated or defrauded or attempted to cheat or defraud pool participants or prospective pool participants by, among other things, knowingly making material representation or omissions and issuing false accounting statements and reports … all in violation of [the Act]."***

3. In very broad outline, the CFTC alleges that Mr Battoo controlled the other Entities and that the *modus operandi* of the entire enterprise was to solicit funds from investors in the US and elsewhere and to defraud them by making false statements and providing false information. In its complaint, CFTC sought a restraining order, asset freeze and other relief but also sought the appointment of a Receiver of the Entities.

4. The Entities are spread across the globe. BC Capital Group SA (BC Panama) is incorporated in Panama. It managed a number of commodity pools trading under the names Private International Wealth Management and Private International Wealth Management Insurance (collectively referred to as PIWM). BC Capital Group International Limited (BC Hong Hong) is incorporated in Hong Kong. It acted as a financial investment adviser to the PIWM pools. BC Capital Management LLP (BC London) is a limited liability partnership registered with the UK Financial Services Authority under the law of England and Wales. It provided research and development to the PIWM pools under an agreement with BC Hong Kong. BC Capital Group Holdings SA (BC Switzerland) is incorporated in Switzerland. It also provided research, as well as trading and execution, to the PIWM pools under an agreement with BC Hong Kong. According to the CFTC, Battoo is the majority beneficial owner of BC Hong Kong, which in turn is the majority owner of BC Panama, BC London and BC Switzerland.

5. On 27th September 2012, Judge Chang in the District Court granted a preliminary injunction and also appointed the appellant as Receiver of the Entities. The Entities were described in the proceedings before the District Court as "t*he BC Common Enterprise*" and in his judgment (paragraph 4) Judge Chang made a finding of fact on the evidence before him in the following terms:-

> **"*Battoo controlled each entity comprising the BC Common Enterprise and operated them as a common enterprise in connection with the PIWM Portfolios. Although each entity purportedly performed different functions in operating the PIWM Portfolios, Defendants did not differentiate between the various corporations in solicitation materials or in communications with pool participants. Instead, some corporations were mere shell entities with no actual offices. All actual operations of the BC Common Enterprise occurred at Battoo's office in London and his home office in Switzerland.*"**

6. In relation to the appointment of the appellant as Receiver, paragraph 41 of the order of the District Court provides:-

> "***Robb Evans and Associates LLC is appointed Receiver, with the full powers of an equity receiver, over [the Entities] and their affiliates and subsidiaries, and of all the funds, properties, premises, accounts, businesses, partnerships, sole proprietorships and any other kinds of assets directly or indirectly owned, beneficially or otherwise, managed or controlled by [the Entities], whether held in their own names or in the names of others ("Receivership Assets"). The Receiver shall be the agent of this court in acting as Receiver under this order. …"***

7. Paragraph 42 of the order then sets out what the Receiver is directed and authorised to accomplish in twelve sub-paragraphs; other consequences of the order are set out in the following paragraphs. The powers conferred on the Receiver are extremely wide as can be seen from the following five sub-paragraphs:-

> "***42. The Receiver is directed and authorised to accomplish the following:-***
>
> ***A. Assume full control of the Receivership Assets by removing Defendants Battoo, BC Panama, BC Hong Kong, BC London and BC Switzerland, and any officer, independent contractor, director, employee, or agent of the Defendants, from control and management of the affairs of the Defendants;***
>
> ***B. Take exclusive custody, control and possession of all Receivership Assets and other funds, property and assets of, in the possession of, or under the control of the Defendants, wherever situated, the income and profits therefrom, and all sums of money, contracts or other instruments now or hereafter due or owing to the Defendants. The Receiver shall have full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, debts, moneys, effects, land, leases, books, records, work papers, and records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of the Defendants and customers or clients whose interests are now held by or under the direction, possession, custody or control of the Defendants.***
>
> ***C. …***
>
> ***D. Prevent the withdrawal or misapplication of funds entrusted to the Defendants, and otherwise protect the interests of pool participants.***
>
> ***E. …***
>
> ***F. Collect all money, funds or property owed to the Defendants.***
>
> ***G. Initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions or proceedings in state, federal or foreign court that the Receiver deems necessary and advisable to preserve or increase the value of the assets of the Receivership Assets to that the Receiver deems necessary or advisable to carry out the Receiver's mandate under this Order."***

8. The evidence before the Royal Court suggested that the Entities had solicited a total of some US$422.1 million from more than 800 investors, of which 554 (some 69%) were resident in the US.

9. On 12th April 2013, on the application of the appellant, the High Court of Hong Kong Special Administrative Region made an interim order appointing Mr Brick Kane (who is the President and Chief Operating Officer of the appellant and who swore the affidavits which were before the Royal Court in the present application) as interim receiver of BC Hong Kong and two other BC Companies which are not before us. The order was expressed to be made in aid of the proceedings in the District Court.

10. In the Bahamas, there has not been direct recognition of the District Court's order but some element of tacit assistance has been given. BC Panama and another Panamanian company called BC Capital Group International SA have both been placed in liquidation under the supervision of the Supreme Court of the Bahamas ("the Bahamian Court"). By order dated 12th November 2012, the Bahamian Court appointed Mr Kane, together with Mr Kevin Seymour and Mr Kevin Cambridge of PriceWaterhouseCoopers Advisory (Bahamas) Limited as joint official liquidators of these two companies ("the Joint Official Liquidators"). On 5th March 2013, on the application of the Joint Official Liquidators, the Bahamian Court ordered that any evidence obtained in the Bahamas via the Securities Commission of the Bahamas could be used by the Joint Official Liquidators and/or the appellant (as Receiver) in evidence before court proceedings outside the Bahamas.

The interpleader proceedings

11. It is alleged that much of the money obtained by the Entities from investors was ultimately invested in a number of mutual funds which traded in commodity futures on exchanges in the US. Several of these funds were established in the British Virgin Islands (BVI) and hold assets with EFG Private Bank (Channel Islands) Limited (EFG) in Guernsey. EFG is faced with competing claims to these assets ("the Assets") and has commenced interpleader proceedings before the Royal Court seeking a determination as to who is entitled to the Assets.

12. It has convened a number of respondents to those interpleader proceedings. These fall broadly into two groups. The first group consists of the first to fourth respondents in those proceedings. The first respondent is BC Panama. The second respondent is BC Capital Group International SA, the Panamanian company referred to at paragraph 10 above. The third respondents in the interpleader proceedings are the Joint Official Liquidators in that capacity and the fourth respondent is the appellant in his capacity as Receiver of the Entities. The order of the Bahamian Court appointing the Joint Official Liquidators was recognised by the Royal Court in Guernsey on 7th December 2012.

13. The main respondents in the second group are the BVI funds referred to at paragraph 9 above, together with, as ninth respondents, Mr Hadley Chilton and Mr John Greenwood of Baker Tilly (BVI) Limited as joint liquidators of some of the BVI funds ("the BVI Liquidators"). It is apparently expected that they will in due course also be appointed as liquidators of the remaining BVI funds. Although it appears that they were originally appointed by shareholder resolution passed by Mr Battoo as representative of the shareholder, their appointment has been ratified by the Eastern Caribbean Supreme Court, Commercial Division, BVI, which has sent a letter of request dated 15th November 2012 to the Royal Court. By order dated 21st November 2012, the Royal Court recognised the appointment of the BVI Liquidators and authorised them to exercise their powers in Guernsey so far as like powers would be exercisable by a liquidator appointed under the Companies (Guernsey) Law 2008.

14. Although pleadings in the interpleader proceedings are not complete, it would appear that, in very broad terms, the contest as to who is entitled to the Assets will be between the BVI Liquidators on the one part and the appellant as Receiver of the Entities on the other. On the face of it, the Assets belong to the BVI funds in whose name they stand but it is understood that the appellant, as Receiver, intends to plead a proprietary claim alleging that the Assets in fact belong

beneficially to one or more of the Entities and therefore fall within the definition of 'the Receivership Assets'.

15. In the interpleader proceedings, the BVI Liquidators have applied for a stay and for an order that EFG release the Assets to them for the purposes of the conduct of the liquidations they are carrying out. That application was opposed by the Joint Official Liquidators and the appellant as Receiver. In a judgment dated 6th November 2013, the Deputy Bailiff rejected that application and held that the issue as to ownership of the Assets held by EFG should be resolved in Guernsey.

The law

16. It is important first to emphasise that we are not here concerned with receivers appointed in connection with insolvency or the enforcement of security such as a debenture. We are concerned with persons appointed by a court to locate and preserve the assets of a defendant in proceedings before that court. As the order of the District Court makes clear, the Receiver is an agent of that court; it is not an agent of the plaintiff (CFTC) in those proceedings.

17. The position as to the recognition in this jurisdiction of receivers appointed by a foreign court was set out in the judgment of Collas Deputy Bailiff in Terry and Durrette Bradshaw PLC v Butterfield Bank (Guernsey) Limited 2005–06 GLR 327. Advocate McGuffin does not take issue with the principles as there described. His challenge is as to the application of those principles to the facts of this case. However, I think it would be helpful to set out the law before turning to consider the Deputy Bailiff's judgment in this case and the grounds of appeal relied upon by the appellant.

18. In Terry Collas, DB approved of the approach summarised by Goulding J in Schemmer v Property Resources Limited [1975] Ch 273. In that case the Securities and Exchange Commission brought an action in the United States alleging that a number of people controlling VCL, a company incorporated in the Bahamas, were involved in fraudulent practices. The District Court appointed a receiver to take possession of certain assets, including all the shares and assets of another company PRL, which was effectively controlled by VCL, and of the assets of PRL's subsidiaries. PRL, which was also incorporated in the Bahamas, was not a defendant in the American proceedings and there was no evidence that it carried on business in the United States.

19. Goulding J reviewed the jurisdiction of the English court to recognise a foreign receiver and summarised the position as follows at 287:-

> ***"I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction."***

20. Goulding J went on to hold that there was not a sufficient connection in that case because the US court had purported to appoint a receiver over a Bahamian company which was not a party to the US proceedings, had not submitted to the US jurisdiction and had not itself carried on business in the US or been controlled and managed there (although he reserved his position as to whether the last two factors were material). He further held that the fact that certain subsidiary companies of PRL had unsuccessfully contested the orders of the US court did not amount to sufficient connection with PRL itself. Although not relevant for our purposes, he also declined to recognise the receivership on the ground that the proceedings, although technically civil, were concerned with the enforcement of a penal statute.

21. In Terry, Collas, DB, went on to approve a passage from Dicey and Morris, The Conflict of Laws (13th Edition at 30-118), now to be found in Dicey, Morris and Collins, The Conflict of Laws (15th Edition) ("Dicey") at para 30-131 as follows:-

> **"*RECEIVER APPOINTED BY COURT. The two clauses of Rule 180 relate to receivers appointed out of court. The circumstances in which the courts will recognise the powers of a receiver appointed by a foreign court are different. These circumstances seem to obtain where the foreign court had jurisdiction over the defendant whose property is made subject to the receivership. Such jurisdiction has been said to exist if there is a 'sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order'. When a sufficient connection will exist cannot be definitively stated. However, first, it seems that an appointment by a court in the country where the company is incorporated will be recognised. Secondly, it is also likely that the appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English court would recognise the order of the foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by a court in a country where the central management and control of the company is exercised, particularly , perhaps, if there is no likelihood of intervention from the courts of its place of incorporation. Similarly, the relevant connection may be found to exist if the appointment is made by the court of the country where the company carries on business, particularly if that is the only country where business is carried on.*
>
> *30-132. It seems that an English court will not recognise an appointment made in a foreign country on the basis of reciprocity, viz that it was made in circumstances where, mutatis mutandis, an English court would have had jurisdiction to appoint a receiver. Further, even if a relevant jurisdictional nexus is found to exist the appointment will be denied recognition if it is made pursuant to a foreign law which is, by English standards, a penal law."***

22. Collas DB also quoted with approval the following passage from Lightman & Moss, The Law of Receivers and Administrators of Companies, Third Ed, para 25-035:-

> ***"A sufficient connection, for these purposes, ought to include factual connection between the company and the relevant jurisdiction where the appointment is made. Accordingly it is, in principle, possible to support the view that an appointment made by a court in a country where the central management and control of the company is exercised should be entitled to recognition. The claim to recognition on this ground will, perhaps, be stronger if there is no, or little, likelihood of any intervention by the courts of the place of incorporation. A strong factual link justifying recognition may also be thought to exist where the appointment is made by a court in a country where the company carries on business. The strength of this link may be particularly compelling if that is the only country where business is carried on."***

23. The facts in Terry were that a company incorporated in the Bahamas called Vavasseur Corporation ran a Ponzi scheme by selling fictitious securities. The Securities and Exchange Commission brought proceedings in a US court and secured the appointment of the plaintiffs as receivers of Vavasseur. On the evidence presented to the Royal Court, Vavasseur had been controlled and managed in the US by a US resident individual. The court also received expert evidence that the appointment of the plaintiffs as receivers would be recognised in the Bahamas,

as Vavasseur's place of incorporation. Collas DB further found that it was unlikely that the courts of the Bahamas would have reason to intervene in the proceedings. In those circumstances he recognised the appointment of the plaintiffs as receivers even though Vavasseur had not submitted to the jurisdiction of the US court.

24. The approach outlined by Collas DB in Terry has been followed by the Royal Court of Jersey in Re Ablyazov 2012 1 JLR 44. Although the facts of that case were very different, the Jersey court recognised the appointment of receivers by the English High Court on the basis that there was sufficient connection between the High Court and the defendant because the defendant was resident in England.

25. We have not had the benefit of adversarial argument in this case and my judgment must therefore be read with that qualification. The authority given in support of the fourth and fifth categories described in the passage from Dicey, referred to at paragraph 21 above, could be said to be somewhat slender. Furthermore, issues may arise at some date in the future as to the effect of any inconsistency between the criteria for recognition and enforcement of a final and conclusive judgment on the one hand and recognition of the appointment of a receiver on the other. Nevertheless, in company with Collas DB and the Deputy Bailiff in this case, I am content to accept that the passage from Dicey accurately reflects the law in this area.

The decision of the Royal Court

26. The Deputy Bailiff considered first whether recognition of the appellant as Receiver would amount to the enforcement of a foreign penal statute. He accepted that the predominant purpose of the CFTC in bringing the proceedings in the District Court and obtaining the appointment of a receiver was to secure funds with which to compensate the investors for their losses. It was not therefore enforcement of a penal statute. In my judgment, that decision was clearly correct on the evidence and Advocate McGuffin does not seek to challenge it on appeal.

27. The Deputy Bailiff then turned to consider whether the case fell within any of the five categories described in the passage from Dicey. He held that the first two categories were clearly not applicable in that none of the Entities was incorporated in the US nor had any of them, including Mr Battoo, submitted to the jurisdiction of the District Court.

28. As to the third category, namely that the order would be recognised by the law of the place where the defendant company was incorporated, he was prepared to accept that the Hong Kong Court had recognised the order of the District Court in relation to BC Hong Kong. However, the category was not satisfied in relation to any of the other Entities and he concluded that it would be inappropriate simply to recognise the appointment in relation to BC Hong Kong, given its limited role and the complications that this would cause in trying to distinguish between that Entity alone and the other lines of enquiry in relation to the BC Common Enterprise.

29. As to the fourth category, namely that the order is made by a court in a country where the central management and control of the company is exercised, he accepted that Mr Battoo had been resident in the US until 2007 but noted that the allegations generally related to a time after that period. He noted that the evidence showed that Mr Battoo had visited the US on a number of occasions but also noted that, although it was not the place of incorporation of any of the Entities, the Bahamas was used for telephone and mail communication. He felt unable to conclude that the central management and control of any of the Entities had taken place in the US.

30. As to the fifth category, namely whether the Entities were carrying on business in the US, he concluded that they were not. He explained his reasoning at paragraph 29 of the judgment:-

> ***"That potentially leaves the final words in the passage quoted from Dicey, Morris and Collins relating to the place where the company carries on business. The***

> ***findings of the Illinois Court and Mr Kane's own evidence do not go so far as to suggest that the United States of America is the only jurisdiction in which the BC Common Enterprise carried on business. I accept that a good number of the investors or pool participants affected are resident in the United States of America. However, that alone is not sufficient, in my judgment, to warrant recognition of the appointment of the Applicant by this Court. Aspects of the business have been conducted within that country, but the overall impression is that the business, as distinct from the location of the investors placing their funds into that business, was being carried [on] elsewhere."***

31. In summary, he held that, in order to recognise the appellant as Receiver, he would have to go beyond the criteria for recognition summarised in Dicey. He considered whether it would be appropriate to do so but concluded that there was not a sufficient connection with the US because the focus in that country was on the position of the investors rather than the actual way in which the business was carried out. He went on to say that he did not think that this would prevent the opportunity for defrauded investors to recover assets held in Guernsey because the matter could be addressed through the interpleader proceedings.

32. In this respect, we have been referred however to an application dated 15th January 2014 (i.e. made following the decision under appeal) whereby the BVI Liquidators have applied to the Royal Court in the interpleader proceedings for an order removing the appellant as a party to those proceedings on the ground that he is not a proper party to them because, by the decision under appeal, the Royal Court has refused to recognise the appellant as Receiver and he therefore has no standing. The hearing of that application has been deferred pending the outcome of this appeal.

Grounds of appeal

33. The amended grounds of appeal are eleven in number. However, many of them overlap and in his skeleton, Advocate McGuffin helpfully made his submissions under three broad headings.

34. First, he submitted that the Deputy Bailiff had misunderstood the effect of his decision not to recognise the appellant's appointment as Receiver on the appellant's ability to participate as Receiver in the interpleader proceedings. Secondly, he submitted that the Deputy Bailiff had not correctly applied the tests describe in Dicey; in particular, he should have found that there was a sufficient connection between the Entities and the District Court on the ground that the Entities were carrying on business in the US and therefore satisfied the fifth category. Thirdly, he submitted that, even if the Court were against him on the second ground, the Deputy Bailiff should have recognised the appellant's title in relation to BC Hong Kong because its appointment had been recognised by the court in Hong Kong as the place of incorporation and therefore satisfied the third category. I propose to take each of these grounds in turn.

(i) The effect on the interpleader proceedings

35. At paragraph 9 of the judgment, the Deputy Bailiff observed that "*... most, if not all, of what the Applicant sought to have recognised was already available to it through its participation as the Fourth Respondent in the Interpleader Proceedings.*"

36. He returned to the subject at the very end of his judgment in the concluding part of paragraph 32 as follows:-

> ***"Further, because of the Applicant's participation in the Interpleader Proceedings, this is not a case in which the opportunity for defrauded investors to recover assets held in Guernsey is dependent on recognition of the Applicant. I endorse what was said in the <u>Terry</u> case, that 'the courts of this Island will not tolerate those who***

> ***attempt to misuse Guernsey's financial services for illegal or improper purposes', but am satisfied that this issue will be addressed through the Interpleader Proceedings without there being any need to stretch the situations in which the power to recognise a receiver's appointment exists."***

37. Advocate McGuffin submitted that this disclosed a misunderstanding of the position. If recognition were denied, the result would be that the appellant would have no standing to assert any proprietary claim to the Assets on behalf of the Entities and that accordingly the Entities would have no representative to act for them in the interpleader proceedings. He submitted that this misunderstanding influenced the Deputy Bailiff's determination of the recognition application. It was clear that the Deputy Bailiff considered it desirable that the appellant should be able to bring a proprietary claim on behalf of the Entities in the interpleader proceedings (as evidenced by his comments in paragraph 32 of the judgment) and, said Advocate McGuffin, he might well have reached a different decision had he realised the practical consequences of his refusal to grant recognition.

38. In my judgment, Advocate McGuffin is correct as to the effect on the interpleader proceedings of the Deputy Bailiff's decision in the present proceedings.

39. In the ordinary course of events, a proprietary claim can only be brought by the person who claims to be entitled to the asset in question. Thus, in the case of an individual, it must be brought by the individual himself; in the case of a company, it is brought by the company acting through its directors.

40. On occasions, an order of a court will result in some other person being given the right to act for the person concerned. This can happen on bankruptcy, incapacity and other similar events. Thus, upon the bankruptcy of an individual, a trustee in bankruptcy will be appointed by a court and will, as a result, have title to act in all respects on behalf of that individual in the jurisdiction in question. Similarly, upon a winding up of a company, a liquidator may be appointed and thereafter the company may only act through the liquidator.

41. But orders of a court are generally territorial. It follows that a trustee in bankruptcy or a liquidator will only have the authority to act in the jurisdiction of the court making the order. The court order has no effect in a foreign jurisdiction.

42. It follows that, where a person such as a liquidator or trustee in bankruptcy needs to take action in a foreign country, he has to have his title recognised by the courts of that country. It is only the order of that court which will then confer a legal right upon him to claim or deal with assets situated in the foreign country. That is why it is invariably the case that, in a jurisdiction such as Guernsey, a trustee in bankruptcy, a liquidator or similar official appointed under foreign law will seek an order from the Royal Court recognising his title. Indeed this is what happened in the present case. The Joint Official Liquidators and the BVI Liquidators have each obtained recognition of their title from the Royal Court as described earlier in this judgment.

43. A receiver appointed by a foreign court is in exactly the same position. He has no title to claim or deal with assets in the Bailiwick unless or until his title to act in the name of the entity of which he is receiver is recognised by the Royal Court. It follows that the appellant has no right to bring a claim on behalf of the Entities in the interpleader proceedings unless or until his title to do so is recognised by the Royal Court. The Deputy Bailiff's refusal to recognise his title means that he will not be able to participate in the interpleader proceedings. It makes no difference that he was joined to the interpleader proceedings rather than initiating them.

44. Nevertheless, success on this point does not by itself assist Advocate McGuffin. Although the consequence of the Deputy Bailiff's decision may not have been as he believed, the fact remains that the Royal Court may only recognise a receiver (of the type in question) appointed by foreign court if satisfied that the circumstances fall within one of the categories described in Dicey.

Accordingly, if the Deputy Bailiff was correct in his finding that there was not sufficient connection in this case as the facts did not fall within any of the five categories, it does not matter that he was in error as to the consequences of that decision.

(ii) Was there sufficient connection between the Entities and the District Court to justify recognition of the appellant as Receiver?

45. Advocate McGuffin conceded that the only category which he could rely upon was the fifth category i.e. that the Entities were carrying on business in the US. He submitted that the evidence showed this to be the case and the Deputy Bailiff was in error in concluding that it was not. In particular, he submitted that paragraph 29 of his judgment suggested that the Deputy Bailiff had been unduly influenced by the fact that the business was not being carried on solely in the US; a restriction not adverted to in Dicey and one which would appear anachronistic and anomalous given the existence of many commercial entities which carry on business in a variety of jurisdictions.

46. Some assistance as to the level of activity which is necessary to constitute the carrying on of business in a particular jurisdiction can be obtained from the decision of the English Court of Appeal in Financial Services Authority v Fradley & Woodward [2005] EWCA Civ 1183. That case concerned whether the appellant was carrying on a regulated activity under the Financial Services Markets Act 2000 ("FSMA"). Arden LJ had this to say on the issue of whether the appellant Mr Fradley was carrying on a business in the United Kingdom at a time when he had moved to Ireland:-

> **"*51. … Does the position change when Mr Fradley moved his operations to Ireland in April 2003? Mr Fradley contends that he ceased to be subject to the restrictions in the FSA once he moved to Ireland. Miss Stubbs, however, submits that he continued to carry on business in the United Kingdom because he continued to maintain in the jurisdiction a bank account and an accommodation address. Many of the investors were resident in the United Kingdom. There is a dispute of fact as to whether Mr Fradley used bookmakers here when placing bets here although the FSA contends that that is shown by a schedule prepared by the FSA from the records of TBPS. Miss Stubbs submits that the carrying on of any activity within the scheme would be enough to bring the scheme within FSMA. Again, this is an issue of law which can be determined on the limited facts not in dispute.***
>
> ***52. The FSMA does not contain an exhaustive description of what constitutes the carrying on of a business within the United Kingdom. All that section 418 (set out above) provides is that the requirement is to be satisfied in certain specific cases if it would not otherwise be so satisfied. This case is not within those cases. Accordingly, the Court is left with the question whether the activities described above (so far as not disputed), of themselves, constitute the carrying on of business in the United Kingdom. FSMA does not require that the entirety of a business activity be carried on in the United Kingdom. If it did, it would be open to obvious abuse.***
>
> ***53. In my judgment, it is sufficient if the activities in question which took place in this jurisdiction were a significant part of the business activity of running the CIS (if any) constituted by the betting services offered by 147 and TBPS. In this case, the communications with clients and prospective clients, and the maintenance of a bank account and an accommodation address, all of which took place in the United Kingdom, were all business activities. In my judgment they were of sufficient regularity and substance to constitute the carrying on of business here even after Mr Fradley moved his own office to Ireland in April 2003 and gave instructions by post or internet from there……."***

47. That observation by Arden LJ makes it clear, if such were necessary, that a company may carry on business in a jurisdiction even if it is also carrying on business in another jurisdiction. To carry on business in a jurisdiction does not require the entirety of the business to be carried on there. The issue is whether the activities carried on in the jurisdiction (in this case the US) are of sufficient regularity and substance to constitute the carrying on of business there.

48. It seems to me that the following matters may be relied upon in support of the contention that the Entities were carrying on business in the US:-

    (i) One must first identify the business in question. On the evidence, it comprised the solicitation of money to invest in commodity futures by way of pooled funds. We have been shown the solicitation material which is under the name of PIWM, albeit that that was not a legal entity. It is clear that the solicitation material is aimed at inducing persons to invest through PIWM. The material suggests that PIWM will also be managing the pooled portfolios but it seems clear from the evidence that that function was not in fact undertaken by the Entities even if the solicitation material suggested that it would be. I therefore consider that, for the purposes of this application, the business should be treated as being the solicitation of monies for investment.

    (ii) Judge Chang in the District Court held that no differentiation could be made between the various Entities in relation to the solicitation activities (see the finding quoted at paragraph 5 above). In my judgment there was ample evidence before the District Court to justify that finding. It follows that it is not necessary in this case to consider the position separately in relation to each Entity. The Court is entitled to regard the carrying on of business by one Entity as involving the carrying on of business by the others.

    (iii) The Entities carried on the business of soliciting investors from at least January 2003 and were all controlled by Mr Battoo, who was the directing mind of each of the Entities. Mr Battoo was resident in Florida until 2007. Thereafter he maintained a residence in Florida and conducted business from that residence when he was in the jurisdiction.

    (iv) The evidence produced by Mr Kane shows, by reference to the flight records of Mr Battoo's private jet, that he spent considerable periods in the US and frequently flew from Florida to places within the US, to the Bahamas and to other places. More recent evidence from commercial airlines provides further support for the fact that he spent considerable periods in the US after 2007, even if no longer technically resident there.

    (v) It is clear that considerable efforts were made to attract investors in the US. Thus Mr Battoo attended a conference in Las Vegas in January 2009 aimed at attracting investments and attended various tele-conferences with Mr Miller, an investment advisor in the US. A Mr Seabolt acted as the US sales agent for the BC Common Enterprise and is listed in the solicitation material. He gave presentations to investors and met with a large investor in Arizona in June 2009 as well as with others. He arranged for tele-conferences to occur between investment advisors (who would in due course advise their clients whether to invest) and Mr Battoo. Mr Seabolt was a US citizen and resident in Florida.

    (vi) The fact that solicitation was aimed substantially at US investors is shown by the fact that of the 800 investors identified by the appellant in the course of the receivership, 554 (some 69%) are resident in the US. Indeed Mr Battoo was registered with the National Futures Association ("NFA") as a principal of a

registered commodity pool operator and promoted this position in the due diligence questionnaire which was produced by the BC Common Enterprise and which made various references to operations in the US, including the use of US domiciled prime brokers (as referees) and to having US counsel.

(vii) Mr Battoo maintained bank accounts and retained legal counsel in the US even after he had ceased to be resident.

(viii) Mr Battoo was the sole member and manager of a number of companies incorporated in Florida from 2001 to date including Dreamlink Holdings LLC, Dreamlink Investment Group LLC and Dreamlink Enterprises Inc. Dreamlink is mentioned in the contact details for BC Panama in the solicitation material as is the phone number of the residence which Mr Battoo used in Florida. Some of the Dreamlink companies had funds transferred to their US bank accounts from the BVI funds following receipt by those funds of monies from US investors.

(ix) Mr Seabolt, at a conference in Mexico in December 2008, said that PIWM had five offices worldwide, including one in Fort Lauderdale, Florida.

(x) Although Mr Battoo rented an office in the Bahamas with a telephone number, there were no employees or any people working there. All correspondence was simply forwarded unopened to Mr Battoo.

49. This is not a case where the Deputy Bailiff, as first instance judge, had the advantage of hearing oral evidence, nor was it a case where he was exercising a discretion. In both of these cases there are considerable restrictions upon the ability of a court of appeal to interfere with a finding of fact or decision by a trial judge (see Datec Electronic Holdings Limited v UPS Limited [2007] 1 WLR 1325 at paras 46, 47). The material before the Deputy Bailiff was entirely documentary and that same evidence is before us. The decision as to whether the Entities were carrying on business in the US turns on whether the evidence which emerges from the documents satisfies the test for carrying on business.

50. I must respectfully differ from the Deputy Bailiff in relation to the assessment of the evidence. Putting together the various matters which I have listed, I conclude that the Entities were carrying on business in the US in that the activities which were undertaken in the US were a significant part of the business of the Entities and they were of sufficient regularity and substance to constitute the carrying on of business in the US. The business consisted of the solicitation of funds for investment, the majority of investors were situated in the US and significant activities in connection with that business were carried on in the US as described at paragraph 48. The fact that the Entities may also have been carrying on part of their business in other jurisdictions does not detract from that conclusion.

51. In accordance with his duty on an ex parte application to draw the attention of the Court to matters which would militate against his submissions, Advocate McGuffin reminded us of the finding of the District Court (quoted at para 5 above) that "***all actual operations of the BC Common Enterprise occurred at Battoo's office in London and his home office in Switzerland"***. I have of course paid careful attention to that finding by the judge. However, since the order of the District Court, the appellant as receiver has carried out detailed investigations and has unearthed a considerable amount of material and evidence which was not before the District Court; for example, details of the number of visits paid by Mr Battoo to the US after he ceased to be a resident; the fact that there were over twice as many investors in the US (554 compared with 250) as was thought to be the situation at the time of the hearing before the District Court; and the fact that Mr Seabolt admitted to the receiver that Mr Battoo had a home office at his Florida condominium with a telephone line which was listed in the solicitation material. For the reasons given above and having regard to evidence which was not available to the District Court, I am satisfied that the Entities were carrying on business in the US.

52. It follows that there is sufficient connection between the Entities and the District Court to permit the courts of Guernsey to recognise the appointment of the appellant as receiver in respect of the Entities.

53. It then becomes a matter of discretion as to whether the Court should do so. In this respect the Deputy Bailiff was clearly of the opinion that it would have been desirable to do so if possible when he referred to the observation in Terry that: "***The Courts of this Island will not tolerate those who attempt to misuse Guernsey's financial services for illegal or improper purposes"***, a sentiment with which I respectfully agree.

54. Nevertheless, the terms of the receivership order were, as previously stated, in extremely wide terms. It is clear that the Deputy Bailiff was rightly concerned about this aspect and the appellant produced a draft order to the Deputy Bailiff seeking recognition in rather narrower terms. Although in his grounds of appeal, Advocate McGuffin sought an order from this Court in the terms of the draft order presented to the Deputy Bailiff, he agreed before us that the order should be further narrowed and should in effect be confined to recognition for the sole purpose of enabling the appellant as receiver to appear in the interpleader proceedings and argue in those proceedings that the Entities had a proprietary claim to the Assets. He now seeks an order in the following terms:-

> ***"(1) The Royal Court of Guernsey recognizes and accepts the appointment of Robb Evans and Associates LLC, 11450 Sheldon Street, Sun Valley, California, United States of America ("the Receiver") as the receiver of [the Entities] pursuant to paragraph 41 of the judgment of the United States District Court for the Northern District of Illinois, Eastern Division dated 27th September 2012 in proceedings commenced by the Commodity Futures Trading Commission against the Entities;***
>
> ***(2) The recognition of the Royal Court of the Receiver is limited to the Receiver having standing and participating (as the Receiver considers appropriate) in the Royal Court proceedings commenced by EFG Private Bank (Channel Islands) Limited against BC Capital Group SA and others (Civil Action file no. 1776) ("the Interpleader Proceedings") until the final determination of those proceedings and any appeals arising there from (including any proceedings in relation to the taxation of costs);***
>
> ***(3) The Receiver has liberty to apply to the Royal Court to vary this order on seven days notice."***

55. In my judgment, this Court should, in its discretion, recognize the appointment of the appellant as receiver in the limited terms summarized in the preceding paragraph. This is a case where investors have been defrauded and it is said that some of the proceeds have found their way to Guernsey and are held by EFG. It is in the public interest that the appellant should be given the opportunity of seeking to recover those proceeds. Furthermore, this is not a case where it seems likely that the courts of the places of incorporation of the Entities (namely Panama, England, Hong Kong and Switzerland) are likely to intervene in the matter, which is an additional reason for thinking it appropriate to recognize the appointment in Guernsey as discussed in the passage from Dicey.

56. For the reasons which I have given, I would allow the appeal and make an order recognizing the appointment of the appellant as Receiver in the terms set out in paragraph 54.

57. This decision makes it unnecessary to consider Advocate McGuffin's third ground of appeal, which relates to the fact that the Hong Kong court has recognized the appellant's appointment in relation to BC Hong Kong. I agree that this means that the third category is satisfied in relation to

BC Hong Kong. Nevertheless, it is a matter of discretion as to whether to recognise the appointment of a receiver even if one of the five gateways is traversed. Had I concluded that the Entities did not satisfy the fifth gateway by carrying on business in the US, I would have agreed with the Deputy Bailiff, for the reasons he gave, that it would not have been appropriate to recognize the receivership solely in relation to BC Hong Kong. However, that is now academic.

Beloff JA, President

I agree.

Nutting, JA

I also agree.