UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR et al.

Plaintiffs

v.

FAIRFIELD GREENWICH LIMITED et al.

Defendants

DECLARATION OF PROFESSOR JONATHAN HARRIS IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Jonathan Harris, hereby declare as follows:

A. QUALIFICATIONS

1. I am Professor of International Commercial Law at the University of Birmingham, where I specialise in private international law. I was appointed to this position (the equivalent of a US full Professorship) in January 2002. I have written extensively in the area of private international law since beginning my academic career in 1995.

2. I am one of the editors of the 14th edition of England's leading practitioner work on private international law, *Dicey, Morris and Collins, The Conflict of Laws* (2006, with annual supplements) and have responsibility for eight chapters in the book. Two of these chapters are entirely concerned with questions of jurisdiction

and the recognition and enforcement of foreign judgments. I am also an editor of the 8th edition of *Benjamin's Sale of Goods* (2010) and have responsibility for the private international law section of the book.

3. I am also the co-editor (and co-founder) of the *Journal of Private International Law*, which is the world's only English language journal devoted to private international law, and which is supported by an advisory board of leading private international law academics and practitioners from around the world.

4. I am the author of the book "*The Hague Trusts Convention*" and co-author of the book "*International Sale of Goods in the Conflict of Laws*". I am also a major contributor to the books "*Product Liability*" (2nd ed, OUP) and "*Underhill and Hayton, The Law Relating to Trusts and Trustees*" (16th ed and 17th ed). I have written a large number of articles on all aspects of private international law in leading journals, including many on the recognition and enforcement of foreign judgments.

5. I have taught private international law in every year of my career (including the recognition and enforcement of foreign judgments) and supervise a number of doctoral theses on the subject. I give seminars to leading academics and practitioners in England on aspects of private international law (again, including the recognition and enforcement of foreign judgments) and advise on legislative reform proposals in the area of private international law. I have also been extensively involved in the drafting of private international law legislation in the field of international trusts in the British Virgin Islands.

6. I have also previously worked at the University of Nottingham as a Reader in Law (similar to a US Associate Professor). I hold a First Class Honours degree in Jurisprudence from Law at the University of Oxford (at Jesus College) and a B.C.L. degree from the same institution. I was awarded a doctorate by the University of Birmingham on the basis of my published work in private

international law (the examiner was Justice David Hayton, now a judge at the Caribbean Court of Justice).

7. I am also a practising barrister. Since 1 May 2009, I have been a tenant (i.e. full member) at Serle Court Chambers in London, one of the leading sets of chambers in commercial and chancery law. A great deal of my work in chambers is of an international nature. As from 1 October 2009, I have been dividing my time between practice at the Bar and my position at the University of Birmingham, which I now hold on a part-time basis. Prior to that, I practised on a part-time basis as a "door tenant" at Brick Court Chambers in London, one of the leading sets of commercial law chambers in England. In my work at the Bar, I have been involved in high profile litigation raising issues of private international law.

8. I have also acted as specialist advisor to the UK Ministry of Justice on a proposed EU Regulation on Cross-Border Wills and Succession. In that capacity, I have given expert evidence on private international law issues to the House of Lords Select Committee on European Union Law, and presented my proposals to the European Commission in Brussels.

9. As from 1 September 2011, I shall be leaving the University of Birmingham and will be taking up the position of Professor International Commercial Law at King's College, London on a part-time basis (which I will hold in tandem with my tenancy at Serle Court Chambers).

10. My views as to the enforceability of US class action judgments in England are expressed in an article in "The Recognition and Enforcement of US Class Action Judgments in England" [2006] 2 *Contratto e impresa/ Europa* 617.

11. A copy of my CV is attached to this declaration as Exhibit 1.

B. DOCUMENTS REVIEWED

12. I have reviewed the following documents:

- The Second Consolidated Amended Complaint dated September 29, 2009;

- The decision of the Honorable Victor Marrero on the defendants' motions to dismiss dated August 18, 2010;

- The Fairfield Sentry July 1, 2003 Private Placement Memorandum;

- The Fairfield Sentry October 1, 2004 Private Placement Memorandum;

- The Fairfield Sentry August 14, 2006 Private Placement Memorandum Memoranda dated October 8, 2006 for the Fairfield Sentry Fund;

- The Fairfield Sentry Memorandum and Articles of Association;

- Administrative Agreement between Fairfield Sentry Limited and Citco Fund Services (Europe) B.V. dated February 20, 2003;

- Brokerage & Custody Agreement between Fairfield Sentry Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. dated July 17, 2003;

- Brokerage and Custody Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. effective as of September 1, 2003;

- The Custodian Agreement between the Fairfield Sentry Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. dated July 3, 2006;

- Administration Agreement dated 2003 between Fairfield Sentry and Citco Fund Services (Europe) B.V.;

- Administration Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch, and Citco Global Custody N.V., effective dated August 12, 2003;

- Brokerage & Custody Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V., dated August 12, 2003;

- PricewaterhouseCoopers Accountants N.V. engagement letter dated February 7, 2006;

- PricewaterhouseCoopers Chartered Accountants engagement letter dated January 11, 2007;

- PricewaterhouseCoopers Chartered Accountants engagement letter dated October 17, 2007;

- Fairfield Sentry Limited Subscription Agreement;

- Fairfield Sigma Limited Subscription Agreement;

- The Investment Management Agreement between Fairfield Sentry Limited and Fairfield Greenwich (Bermuda) Limited dated as October 1, 2004.

C. ASSUMED FACTS AND QUESTIONS PRESENTED

13. I have been asked to opine on the following questions:

(i) Would a judgment in this action, if certified as a class action, or court-approved settlement be entitled to be recognised and enforced in England with respect to passive members of the class who were not named plaintiffs in the US action and did opt-out of the class when offered the opportunity to do so ("absent class members")?

(ii) Would a judgment in this action, if certified as a class action, or court-approved settlement be entitled to be recognised and enforced with respect to an absent class member in Antigua and Barbuda, Australia, Bahamas, Barbados, Bermuda, BVI, Cayman Islands, Cook Islands, Guernsey, Hong Kong, Ireland, Isle of Man, Jersey and Singapore (collectively "Other Common Law Jurisdictions")? I am also asked to consider the position in Canada.

(iii) Is a U.S. class action likely to be superior in terms of fairness and efficiency to other methods of adjudicating the dispute, including individual actions that might be brought by member of the class in England. and Other Common Law Jurisdictions)?

14. I shall consider the position in England first; before moving on to consider how, if at all, the position might differ in the other Common Law Jurisdictions.

D. SUMMARY OF CONCLUSIONS

15. There is no binding English authority one way or the other as to the entitlement of a United States class action judgment to recognition and enforcement in England. No case, even at trial court level, has had to resolve the point. As such, it would be impossible to conclude there was anything approaching certainty as to the law in this area.

16. I believe, however, that a strong case exists for the recognition and enforcement of a US class action judgment in England on the present facts. The subscription agreements for the Fairfield Sentry Fund and the Fairfield Sigma Fund contain agreements by the subscribers to submit to the courts of New York. In such circumstances, the subscribers have undertaken to accept the competence of the courts of New York. Such competence will be recognised in the eyes of English law. Equally, the defendants have taken steps in the New York proceedings that, in my view, amount to submission to the New York courts. Hence the subscribers to the Fairfield Sentry Fund and the Fairfield Sigma Fund have agreed to submit to the jurisdiction of the New York courts; as have the defendants by their conduct.

17. Even in the absence of a binding agreement to submit to the New York courts by the subscribers to the Fairfield Sentry Fund and the Fairfield Sigma Fund, the English rules on recognition and enforcement of foreign judgments, as stated in the authorities and leading works, have hitherto been formulated in relation to the position of the defendant and not that of the plaintiff.[1] If an English court were to develop rules on recognition and enforcement of foreign judgments to apply to absent class members, I believe that a persuasive case can be made for arguing that the judgment in the present proceedings should be recognised; and that it would not be contrary to English standards of natural justice or public policy to do so. The procedures adopted in the present action take extensive steps to provide notice to members of the class and provide procedural safeguards for class members.

18. Furthermore, it should be noted that there is independent academic support in one of the United Kingdom's foremost academic peer reviewed journals for the view that there is a good prospect of recognition in England. Dixon, "The *Res Judicata*

[1] English terminology now refers to "claimants" rather than "plaintiffs". Nonetheless, for the benefit of the court, the present declaration refers to "plaintiffs", save, of course, where it quotes from sources which use the word "claimant".

Effect in England of a US Class Action Settlement" (1997) 46 *International and Comparative Law Quarterly* 134) (Exhibit 2) summarises his views as follows (at p. 136):

> "I reach the conclusion that the Order [i.e. a court approved class action settlement] has a good chance of supporting a plea of *res judicata* in England. It is a final judgment of a court of competent jurisdiction which disposes of the rights of the parties… The judge, acting under an obligation to protect the absent class members, held a hearing, considered the evidence and made a ruling. That ruling is entitled to be upheld by the English court, and is unlikely to be rejected on the grounds of breach of natural justice."

19. It is, accordingly, my opinion that, on the present state of English law, a good case can be made for the recognition and enforcement of US class action judgments in England (even in the absence of an agreement to submit to the New York courts). That this is the case was, it is respectfully submitted, quite properly recognised in the United States District Court for the Southern District of New York by Judge Holwell in *Re Vivendi Universal SA Securities* 242 F.R.D. 76; 2007 U.S. Dist. LEXIS 21115; Fed. Sec. L. Rep. (CCH) P94,357; affirmed 2009 U.S. Dist. LEXIS 31198); and by Marrero, U.S.D.J in *Re Alstom SA Securities Litigation* 253 F.R.D. 266; 2008 U.S. Dist. LEXIS 67675; 71 Fed. R. Serv. 3d (Callaghan) 570.

20. I also believe that the prospects for the recognition and enforcement of US class action judgments are at least as high in the Other Common Law Jurisdictions which I consider below. Indeed, it is possible that some of those jurisdictions may have, or may develop, rules that recognise foreign judgments in a wider range of circumstances than English law presently does.

21. In my opinion, a US class action offers by far the best prospects of recovery for the absent class members. The prospects that they will be able to fund and

successfully litigate individual proceedings in England or another Common Law Jurisdiction court are remote. They would, in any event, not benefit from US procedural advantages and might, in any event, then need to enforce any resulting judgment overseas.

E. THE RECOGNITION AND ENFORCEMENT OF US CLASS ACTION JUDGMENTS AND SETTLEMENTS IN ENGLAND

(1) Settlements

22. An initial distinction should be drawn between a court judgment and a settlement. I understand that if there were a settlement, the court would then hold a fairness hearing on the settlement. The settlement would include a judgment to be entered by the court. The judgment may include a bar order prohibiting class members, including absent class members, from bringing individual actions against the settling defendants. Hence, there will be a release of the defendants' liability.

23. The settlement will then be the product of a consensual agreement between the parties. If so, then the parties can be viewed as having waived any objections to the instigation of proceedings in the US court, and it would appear to follow that the agreement would be enforceable in England as to any class members participating in the settlement. More involved questions only arise if absent class members receive actual notice of the settlement and decline to submit claims as to whether those absent class members would then be barred from bringing individual claims against the settling defendants.

(2) The present law on the recognition and enforcement of foreign judgments

24. In this declaration, I shall consider whether absent class members would be barred by a US class action judgment from filing suit in a particular jurisdiction. In

answering this question, I consider three possibilities: first, the US class action results in judgment for the defendants; second, the class action results in judgment for the plaintiffs but for a lesser sum that the absent class members had hoped to recover; and third, judgment is given in favour of the plaintiffs for an amount that satisfies the absent class members.

25. I shall begin by outlining briefly the most important rules on the recognition and enforcement of foreign judgments which may relate to this case; before going on to apply the law to the facts of the present case.

(a) The schemes of recognition and enforcement of foreign judgments applicable in England

26. Four major schemes of recognition and enforcement of foreign judgments are applicable in England. The Judgments Regulation, the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the common law. The appropriate scheme depends upon the court which delivered judgment and/or the basis of its jurisdiction. The Judgment Regulation applies only to judgments from courts in the European Union. The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 apply to judgments from certain countries with which the UK has a reciprocal enforcement arrangement. The United States is not one of these countries. Hence, in the case of a judgment from the United States, the common law rules are applicable.

(b) The key requirement for recognition of a foreign judgment at common law: jurisdictional competence in the eyes of English law

27. A judgment will not be recognised in England if the foreign court was not jurisdictionally competent in the eyes of English law. The English court will assess this question for itself, rather than being concerned with whether the foreign court considered itself to have jurisdiction. The English courts will regard

the overseas court as jurisdictionally competent either if the defendant had the requisite territorial connection with the foreign state, or if the defendant submitted to proceedings in that state. We shall consider these alternative requirements in turn.

(c) The defendant was present and/or resident in the overseas jurisdiction:

Individuals

28. It is somewhat uncertain whether the defendant must be resident in the state of origin, or whether his presence at the time of instigation of proceedings will suffice. The judgment of Buckley LJ in *Emanuel v Symon* [1908] 1 KB 302 (Exhibit 3) suggests that residence is required. However, the court in *Adams v Cape Industries* [1990] Ch 433 (Exhibit 4) reviewed the law and suggested *obiter* that presence would also be sufficient.

Companies

29. Where there is a corporate defendant, it was decided in *Adams v Cape Industries* [1990] Ch 433 that there must be a fixed place of business maintained at the company's own expense from which it has carried out its own business in the overseas jurisdiction. It will suffice that its business is transacted at that place through representatives of the company carrying out the corporation's business. (See also *Littauer Glove Corp v FW Millington* (1928) 44 TLR 746 (Exhibit 5)).

(d) Submission

30. A court to which a defendant has submitted will be seen as jurisdictionally competent in the eyes of English law. The most obvious means of submitting is by acceptance of service of a claim form. Submission may also by voluntarily pleading to the merits. If a defendant, having unsuccessfully objected to the jurisdiction, proceeds to file a defence on the merits, then that party will be deemed to have submitted to the foreign court. Equally, if a defendant filed a

filing a motion to dismiss that went beyond challenging the jurisdiction of the court to attack the claims on the merits (in circumstances where local procedure did not require it to file its defence on the merits at the same time as its jurisdiction challenge), then it would be deemed to have submitted to the foreign court.

31. Submission may also occur by agreeing to a jurisdiction clause for the courts of a particular state. This will be the case whether the jurisdiction clause in favour of the foreign court is exclusive or non-exclusive, since, in either case, the parties will have voluntarily accept that the foreign court is one of competent jurisdiction (see *Dicey, Morris and Collins,* 14th ed, para 14-069 (Exhibit 6)).

32. Furthermore, in *Schibsby v Westenholz* (1870-71) LR 6 QB 155, 161 (Exhibit 7), Blackburn J stated that:

> "we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

33. This makes the obvious point that a party who has instigated proceedings overseas cannot then be heard to say that the foreign court lacked jurisdiction. It strongly suggests that that any class member who indicated their consent to the class action would be bound by that judgment. But it does not address the present question, namely whether absent plaintiffs who are members of a class action can object to the jurisdictional competence of a foreign court.

(e) *The rules of jurisdictional competence have been developed in relation to the defendant*

34. No other established basis of jurisdictional competence in a foreign court can be found at common law. The key point to note is that the requirements of

jurisdictional competence, as developed in the authorities, have been focused on the position of the *defendant*.

35. The leading authority of *Schibsby v Westenholz* (1870) LR 6 QB 155 (Exhibit 7) refers to the obligation of the defendant to an action.[2] Blackburn J said (at 159) that:

> "We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth* [9 M. & W. at p. 819; (Exhibit 8)] , and again repeated by him in *Williams v. Jones* [13 M. & W. at p. 633; (Exhibit 9)], that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." (Emphasis added.)

At pp 159-160, he says:

> "Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them." (Emphasis added.)

[2] As indicated in paras 32-33 above, the court in *Schibsby v Westenholz* does make the obvious point that a party who has chosen to instigate proceedings cannot then deny that he is bound by the foreign judgment. But it says nothing about the applicability of rules of jurisdictional competence to absent class action plaintiffs..

And at 160:

> "Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." (Emphasis added.)

36. Likewise, the authors of a leading textbook, *Cheshire, North and Fawcett, Private International Law*, 14th ed (2008) (Exhibit 10), at p 514 explain that:

> "Once the judgment is provided the burden lies on the defendant to show why he should not perform the obligation."

They go on to cite a passage from *Schibsby v Westenholz* in support of this proposition. They then quote Lord Esher's remark in *Grant v Easton* (1883) 13 QBD 302, 303 (Exhibit 11) that:

> "the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment". (Emphasis added.)

37. Moreover, Lindley M.R. remarked in *Pemberton v Hughes* [1899] 1 Ch 781, 791

(Exhibit 12):

> "There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained - i.e., over the subject matter or over the persons brought before them… But the jurisdiction which alone is important in these matters is the competence of the court in an international sense - i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country". (Emphasis added.)

38. Hence, the leading authorities are concerned with jurisdictional competence over the defendant.

(f) Defences to recognition and enforcement

39. Assuming that these requirements of jurisdictional competence are satisfied, the foreign judgment is *prima facie* entitled to recognition and enforcement in England. If so, then the question whether a valid defence to recognition and enforcement of the judgment can be made out should be considered. Two defences appear potentially relevant in the present context: that the foreign judgment is in breach of natural justice; and that it is contrary to English public policy. It is to these defences that I now turn.

The judgment was in breach of natural justice

40. The defendant must have had the opportunity adequately to defend himself. This means that he must have been served with proper notice of the proceedings, been allowed properly to arrange his defence, and that the procedures of the foreign court must have been acceptable. In *Adams v Cape Industries* [1990] Ch 433 (Exhibit 4), the Court of Appeal stated that the court could refuse to recognise and enforce a foreign judgment if the foreign proceedings amounted to a denial of

substantial justice. In that case, the judge in Texas, with the assistance of counsel for the plaintiffs, had assessed damages to be awarded to some 206 plaintiffs on the basis of an average amount per plaintiff, rather than in respect of their individual entitlements. The Court of Appeal held that compensation should be objectively and independently assessed and said *obiter* that this amounted to a breach of natural justice.

41. However, it is important to note that the English courts have generally been reluctant to condemn foreign procedures. In the judgment of Lindley M.R. in *Pemberton v Hughe*s [1899] 1 Ch 781, 790 (Exhibit 12), his Lordship remarked that:

> "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

42. Considerable uncertainty still surrounds the meaning of the term “substantial justice”. But, it must be stressed that it is very rare for a court to deny recognition to a foreign judgment on natural justice grounds. *Cheshire, North and Fawcett, Private International Law,* 14th ed, (2008) 564 (Exhibit 10), observes that:

> “The English courts are reluctant to criticise the procedural rules of

> foreign countries … and will not measure their fairness by reference to the English equivalents…"

They continue:

> "If the foreign court, in proceedings *in personam*, is prepared to dispense with notice of the proceedings, or to allow notice to be served in a manner inadequate to satisfy an English court, it is not for the English court to dispute the foreign judgment…" (citing *Jeannot v Fuerst* (1909) 100 LT 816 [(Exhibit 13)] and *Vallée v Dumergue* (1849) 4 Exch 290, 303 [(Exhibit 14)]).

Thus, the weight of authority supports the conclusion that it will be difficult to establish the natural justice defence in the English courts.

Recognition would be contrary to English public policy

43. This defence is rarely sustained. The mere fact that a foreign judgment was obtained on the basis of laws of which an English court disapproves should be irrelevant, as the defence relates to the judgment itself and not the underlying cause of action. *Dicey, Morris and Collins*, 14th ed, p 629 (Exhibit 6) remark that:

> "There are very few reported cases in which foreign judgments *in personam* have been denied enforcement or recognition for reasons of public policy at common law".

44. In *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 129 (Exhibit 15), the defendant alleged that a New York judgment for the plaintiff was obtained because his father had exercised undue influence over him to make him enter into a contract of guarantee. The public policy defence to enforcement was rejected by the Court of Appeal, on the basis that New York law on undue

influence was substantially similar to English law. Accordingly, the defendant could have raised the issue overseas. Having failed to do so, the defendant could not now raise the defence in the English court.

(3) Application of the law: the effect in England of a US class action judgment in favour of the defendants

45. The most complex situation is where the US class action judgment is in favour of the defendants, who seek to rely upon this in England as a defence to a further action by the plaintiffs. It is normally the case that a decision of a foreign court, between the same parties and concerning the same cause of action, creates a cause of action estoppel in England, preventing the matter from being reopened in England (see *Dicey, Morris and Collins,* 14th ed, pp 579-583) (Exhibit 6). But this, of course, applies only if the foreign judgment is entitled to recognition.

46. On this question, there is no governing English law precedent and accordingly the position in England is uncertain. Nevertheless, a good case for the recognition and enforcement of the judgment can be made. A number of issues need to be considered

(a) Submission to the New York Courts

47. Crucially in the present case, the subscription agreement for the Fairfield Sentry Fund is governed by New York law and includes a non-exclusive jurisdiction clause in § 19 providing that:

> "Subscriber agrees that any suit, action or proceeding ('Proceeding') with respect to this Agreement and the Fund may be brought in New York. Subscriber irrevocably submits to the jurisdiction of the New York courts with respect to any Proceeding and consents that service of process as provided by New York law may be made upon Subscriber in such Proceeding, and may not claim that a Proceeding has been brought in an

inconvenient forum. Subscriber consents to the service of process out of any New York court in any such Proceeding by the mailing of copies thereof, by certified or registered mail, return receipt requested, addressed to Subscriber at the address of Subscriber then appearing on the Fund's records."

48. The Fairfield Sigma subscription agreement also includes a New York choice of law clause (in §19) and consent to jurisdiction of the New York courts (in § 22).

49. Very clearly, therefore, subscribers to the Fairfield Sentry Fund and the Fairfield Sigma Fund have accepted that the New York courts are courts of competent jurisdiction and are contractually bound by their agreement and undertakings to that effect. They would be estopped from denying that the New York courts had jurisdiction. Moreover, subscribers to the two funds agreed that service could be effected by service of process by certified or registered mail to the address of the subscriber appearing on the Fund's records In such circumstances, it would appear to be clear that the New York could will, in the eyes of English law, be regarded as a court of competent jurisdiction and (at least in the absence of any defence) its judgment will be binding on the subscribers to the Fairfield Sentry Fund and Fairfield Sigma Fund and entitled to recognition in England.

50. The Price Waterhouse Coopers (PwC) Netherlands engagement agreement with the Fairfield Greenwich Group for all the Fairfield Greenwich Funds is governed by Dutch law. Importantly, however, PwC Netherlands did not challenge the jurisdiction of the New York court or move to dismiss on the grounds that New York was an inconvenient forum. It is my view that, in such circumstances, PwC Netherlands has submitted to the courts of New York.

51. Similarly, §34 of the standard conditions attached to PwC Canada's engagement letter dated October 17, 2007 provides that it is governed by Canadian law and that the Fairfield Greenwich Funds consent to the non-exclusive jurisdiction of the

Ontario courts. Since the clause is non-exclusive, this does not amount to an agreement that the New York courts do not have jurisdiction. In any event, PwC Canada did not move to dismiss the New York proceedings against them on the grounds of *forum non conveniens* and, therefore, waived this defence and have submitted to the New York courts.

52. The Citco Nederlands agreements are expressly governed by Dutch law and confer jurisdiction on the Dutch courts. Judge Marrero construed this provision narrowly to provide that the Dutch courts had exclusive jurisdiction solely with respect to claims brought by the Fund against the Citco defendants.

53. The investment management agreements between Fairfield Sentry Ltd. and Fairfield Sigma Ltd. and the defendant Fairfield Greenwich (Bermuda) Ltd contain a Bermuda choice of law clause designating Bermuda as the exclusive forum to adjudicate claims arising out of the Agreement. I understand that the Fairfield Greenwich defendants argued that claims against them were governed by Bermuda law, but did not move to dismiss the New York proceedings against them pursuant to the jurisdiction clause. Judge Marrero held that Bermuda law only governed claims made by the Funds themselves, not the plaintiffs as purported third party beneficiaries of the investment management agreements.

54. In all cases, the defendants have failed to object to the personal jurisdiction of the New York court and have waived their defences of inconvenient forum and lack of personal jurisdiction by failing to do so in the motion to dismiss (Fed. R. Civ. Pro. Rule 12(h)(1)). The defendants' motions to dismiss included substantive defences directed to the merits of the claims (e.g., arguments that the complaint should be dismissed for failure to make a claim, as to the plaintiffs' alleged lack of standing to bring claims that purportedly belonged to the Funds, or for failure to plead with sufficient particularity). In my view, these steps are inconsistent with an objection to the jurisdiction and amount to submission to the New York courts by the defendants in the eyes of English law.

55. Hence, in my opinion, the defendants have submitted to the New York courts and, in the eyes of English law, have agreed to be bound by the rulings of those courts.

56. Equally, and critically, subscribers to the Fairfield Sentry Fund and the Fairfield Sigma Fund have, by contractual agreement, accepted the competence of the New York court and it is my opinion that class action members of those funds would be bound by those agreements. They have, at the time of subscription, submitted to the courts of New York.

57. Such subscribers must, therefore, have contemplated that litigation might take place in New York and agreed that they would not object to the jurisdiction of the New York courts. Proceedings in the New York court would, of course, be subject to the various procedures and forms of action existing in New York law. This is a very important reason why they might properly be bound by a class action judgment in the present proceedings.

(b) Should the rules on jurisdictional competence be developed so as to apply to a class action plaintiff?

58. In the light of the agreements in the Fairfield Sentry Fund and the Fairfield Sigma

Fund, it is my view that the absent class members cannot resile from their agreement to submit to the New York courts.

59. Nonetheless, I proceed to consider the situation had there been no agreement to submit to the New York courts; and the question of principle as to whether an absent class action plaintiff might be bound by a class action judgment (in the absence of an express promise to submit to the New York courts).

60. We have seen that the English authorities on the jurisdictional competence of a foreign court have focused upon the position of the defendant. Similarly, English law has a defence that the foreign judgment was in breach of natural justice, which is normally pleaded by the overseas defendant. It is, accordingly, difficult to predict how, if at all, an English court might apply its rules on the recognition of foreign judgments to plaintiffs.

61. Briggs and Rees, *Civil Jurisdiction and Judgments* (5th ed, 2009), pp 583-4 (Exhibit 16) approach the matter by considering what would happen if the parties to foreign proceedings were reversed, so that the person who would ordinarily expect to be the defendant to proceedings (the "natural" defendant) were instead to bring proceedings for a declaration of non-liability against the "natural" plaintiff. They argue that if a "natural" defendant to a US class action, D, were instead to seek a declaration of non-liability against an absent class member, C, the judgment would not be recognised unless the court was jurisdictionally competent over C, the defendant to that action; and that it follows that if the absent class member were instead in the position of a plaintiff in an action against D (as is the case in the present action), it should similarly be the case that jurisdictional competence must be established over D.

62. I do not find this reasoning compelling. The fact is that the English conflict of laws does attach a great deal of weight to the question of which party is the *defendant* in the proceedings in question. So, if C sues D in an English court, the question of

whether the court has jurisdiction is determined by the personal connections of the defendant, D, in the instant proceedings before the English court. If D instead commences proceedings in England against C for a declaration that he is not liable to C, then the court must have *in personam* jurisdiction *over C*, who is the defendant to this particular action. In other words, it is the defendant in the English action over whom the English court must have jurisdiction (in the first example, D; in the second example, C), and it is his situation (the defendant's situation) which is key to whether the court has jurisdiction. In my opinion, one cannot, accordingly, argue that just because a state of affairs is so if C sues D, it should necessarily also be so if D sues C (or if D seeks to invoke a *res judicata* defence in some future proceedings).

63. Moreover, the English rules of jurisdiction are very familiar with the idea that the defendant's situation is paramount. For example, it should be noted that the private international law rules on the jurisdiction of English courts at common law are also about competence *over the defendant*. (*Maharanee of Baroda v Wildenstein* [1972] 2 QB 288 (Exhibit 17); Companies Act 2006, Part 34 and §1139 (Exhibit 18); Civil Procedure Rules ("CPR"), Part 6 and Practice Direction B to CPR Part 6) (Exhibit 19).

64. The decisive significance of the position of the defendant to the rules of jurisdiction of an English court can also be seen by using an example. Take the case of a New York plaintiff instigating proceedings in England against an English defendant in respect of a tort that occurred in New York. Since the *defendant* is domiciled in an EU Member State, Council Regulation (EC) 44/2001 ("the Judgments Regulation") applies, and the English court has jurisdiction under Article 2. Furthermore, the court may not stay its proceedings in favour of the New York court (Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383 (Exhibit 20)). Now take the case of an English plaintiff seeking to sue a New York defendant in England in respect of a tort that again occurred in New York. Since the *defendant* is not domiciled in an EU Member State, this time, the common law

regime of jurisdiction will apply; and it is very likely that the English court would either refuse permission for service of the claim form out of the jurisdiction, or grant a stay of its proceedings at the instigation of the defendant (*The Albaforth* [1984] 2 Lloyd's Rep 91 (Exhibit 21); *Berezovsky v Forbes* [2000] 1 WLR 1004) (Exhibit 22). In each case, the domicile of the plaintiff is *irrelevant* to the analysis.

65. Barnett, the author of the only book devoted to the preclusive effect of foreign judgments in England, *Res Judicata, Estoppel, and Foreign Judgments* (2001), comments at p 73, n. 81 (Exhibit 23) in relation to class actions that

> "'…jurisdiction in the international sense' emphasizes jurisdiction over the *defendant* and does not refer to the situation where the foreign *claimant* may deny submission to the jurisdiction…"

.

66. Just one English case at trial court level has considered the *res judicata* effect of a US class action judgment. In *Campos v. Kentucky & Indiana Terminal Railroad Company* [1962] 2 Lloyd's Rep 459, 473 (Exhibit 24), McNair J commented that:

> "…in accordance with English private international law a foreign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment."

67. However, this remark did not form part of the holding of the case, since the claim failed on other grounds. Moreover, the context of the decision shows that this comment was induced partly by the prior finding that even in the United States, the claim in *Campos* was not thought to be a class action capable of binding the plaintiffs. Some sentences previously (at p 473), McNair J had said that:

> "…the defendants…. have not satisfied me that the… action was a true

class action or that in accordance with American law the judgment in that case bound anyone who was not an original party or did not intervene".

68. The present case is clearly distinguishable, in that the intention of the United States action is to bind all members of the class. Thus, *Campos* is by no means a clear or binding authority.

69. I do not think that the decision in *Rossano v Manufacturers Life Insurance Co* [1962] 1 Lloyd's Rep. 187 (Exhibit 25) adds anything to the *Campos* case. Although the English court referred to the need for the Egyptian court to have jurisdiction over the "plaintiff", Rossano, it was referring to him as the "plaintiff" in the *English* proceedings now before it. In respect of the proceedings in Egypt, Rossano was alleged to owe money to the would-be garnishor, the Egyptian revenue authorities, who sought to recover payment from Rossano's insurers. In other words, he was not a plaintiff in Egypt; to the contrary, as an alleged debtor in Egypt, he was, effectively, in the position of a defendant in that country, and as such, the English court insisted that the Egyptian court should have jurisdiction over such a party.

70. Hence, there is simply no binding authority as to the enforceability of class action judgments in England. The English courts have barely had to consider the circumstances in which an absent class member can be bound by a foreign judgment.

71. Indeed, I am not aware of a binding case in which the rules of jurisdictional competence have been explicitly applied to a plaintiff who did not opt out of a class action.

72. One can only speculate as to what an English court might do if faced with such a situation and whether it might extend its rules on jurisdiction competence to apply to the absent plaintiff. This is uncharted territory. In my opinion, this simply

cannot be demonstrated in the absence of authority.

(c) *Privity of interest*

73. Even if the English courts were to decide that the requirements of jurisdictional competence developed in relation to defendants should be applied to absent plaintiffs, a further possibility is that there is a privity of interest between the absent plaintiffs and other class action plaintiffs over whom the court has jurisdictional competence, such as to render the absent plaintiffs bound by the US class action judgment. There is uncertainty as to the scope of the privity of interest doctrine.

74. In *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510 (Exhibit 26), the court applied the following test (at p 515):

> "having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'"

75. It should be observed that the very existence of this doctrine is an example of an obligation being imposed on a plaintiff who did not choose to instigate his or her own proceedings.

76. In *House of Spring Garden v Waite* [1991] 1 QB 241 (Exhibit 27), the English Court of Appeal considered the effects of an Irish judgment against three joint tortfeasors. The first two tortfeasors had applied to set the judgment aside in Ireland on the grounds of fraud and had failed. The Court of Appeal found that as the Irish judgment was a judgment against the defendants jointly and severally, the third defendant, who was aware of the Irish proceedings and was privy to

them, was similarly estopped from contesting the recognition of the judgment.

77. Furthermore, the Court of Appeal in *House of Spring Garden v Waite* considered that it would be an abuse of process for the third defendant to litigate the fraud issue in England. As Stuart-Smith LJ said (at 254-5) (Exhibit 27):

> "In my opinion the same result can equally well be reached by this route, which is untrammelled by the technicalities of estoppel. The categories of abuse of process are not closed: see *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, 536 [(Exhibit 28)]…
>
> The principle has recently been applied in this court to analogous cases, where issues of fact have been litigated exhaustively in sample cases; it is an abuse of process for a litigant, who was not one of the sample cases, to re-litigate all the issues of fact on the same or substantially the same evidence: see *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338 [(Exhibit 29)].
>
> The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to re-litigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves… Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause." (Emphasis added.)

78. In a decision of the Privy Council in *Nana Ofori Atta II v Nana Abu Nonsra II*

[1958] AC 95, the court observed (at 101-2) (Exhibit 30) that:

> "English law recognizes that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *In re Lart, Wilkinson v. Blades* [1896] 2 Ch. 788 (Exhibit 31). Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v. Andrews* [(1871) L.R. 2 P. & D. 327, 328 (Exhibit 32)].The full passage is in these words: "There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. <u>That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened</u>." (Emphasis added.)

79. More recently, in *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) (Exhibit 33), the court observed that whether privity of interest exists turns on the facts of each case. It noted that: "Deciding what it is just to hold requires consideration of a number of relevant factors and a determination of where, looking at the matter overall, justice lies" (at para 414). On the facts, it found that such privity existed between a company and shareholder. The test applied suggests a significant element of flexibility to determine what the ends of justice require.

80. Barnett writes in his book *Res Judicata, Estoppel, and Foreign Judgments* (2001), comments at p. 73 (Exhibit 23)that:

> "The trend in the common law world has been that *all* members of the class whom a party purports to represent will be deemed parties and thus bound by an order of the court, provided that the representative party has acted *bona fides* in the interests of the class." (Underlining added; italics in original.)
>
> (Citing *Wytcherley v Andrews* (1871) LR 2 P&D 327(Exhibit 32); ; *Cox v Dublin City Distillery Co (No 3)* [1917] 1 IR 203 (Exhibit 34); *Naken v General Motors of Canada Ltd* (1983) 144 DLR (3d) 385 (Exhibit 35); and *Carnie v Esanda Finance Corp* (1995) 183 CLR 398, 423-4 (High Court of Australia) (Exhibit 36)).

81. He goes on to suggest that the English courts might additionally require that:

> "(i) the claimant in the subsequent proceedings had notice of the foreign class action and had the chance to withdraw or object; and (ii) the foreign court, acting under an obligation to protect absent class members, held a hearing, considered the evidence and made a ruling as to membership".

82. My understanding is that the US court would not certify the present class action unless the interests of the various plaintiffs were sufficiently similar as to merit such an action. Under these circumstances, the English courts could conclude that there was sufficient privity of interest so as to bind the absent plaintiffs. However, it should be reiterated that this point would only become relevant if the English courts were to conclude that they should apply their rules of jurisdictional competence to absent members of a class action.

(d) If a natural justice argument could be asserted by the plaintiff, would it be sustained on the facts of the case?

83. This defence has developed in the authorities so as to protect the position of defendants. Even if a natural justice argument could, in principle, be asserted by an absent member of a US class action in subsequent proceedings in England in response to a *res judicata* defence asserted by the defendants, it is my opinion that it would not be successfully made out on the facts. The leading private international law commentators in England recognise that that the natural justice defence is narrowly construed and that examples of its successful establishment are very few and far between

84. Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 *International and Comparative Law Quarterly* 134 (Exhibit 2), concludes (at p. 150):

> "Accordingly, a defendant should be able to maintain in any English litigation that as the manner in which the judgment was obtained does not offend English concepts of substantial justice or, more positively, that as the US Order comports with natural justice, it ought to be upheld…This is particularly true because, in the US class action context, irrespective of the ability of a class member with notice of the action to take steps to protect

his or her own interests… the judge is under an obligation to protect the interests of the absent class members".

85. There is no suggestion of a lack of procedural proprietary in the US courts in this case. I understand that notice will be provided to the absent class members in the class action and that they will be informed of their right to opt out, in clear language, using a number of different media. Moreover, I understand that the plaintiffs have registered addresses for the shareholders of the offshore Funds. Consequently, the plaintiffs will send notices of the opt-out election and the details of any proposed settlement to each of the shareholders at the address given on the books and records of the Funds. I further understand that many of the accounts have multiple addresses on the registry, and notices will be sent to all of the addresses listed for each account. Institutions will be asked to provide copies of the notice to the beneficial owner where the institution is merely acting as a custodian or nominal holder. Hence, in the present case, the plaintiffs can identify and provide notice to the plaintiffs with a high degree of confidence that the plaintiffs will receive actual notice.

86. Ample opportunity will also given to absent class members to participate in the action and, at a later stage, to object to any proposed settlement. There is no reason to suppose that the action on behalf of the class will not be fairly and rigorously heard by the US court, or any reason to believe that it will reach a decision that is substantively unfair to any plaintiffs who do not opt out. I am also advised that the damages awarded will be allocated on the basis of the plaintiffs' recognisable damages pursuant to a plan that will require approval by the US court.

87. In all the circumstances, it is my opinion that absent class members would not be able to sustain an argument in the English courts that recognition of the class action judgment in the present case would be contrary to natural justice.

(e) *Public policy*

88. It has been shown that successful invocation of the public policy defence in English courts is extremely rare. Briggs and Rees, *Civil Jurisdiction and Judgments*, 5th ed, 764 (Exhibit 16) comment that: "The usual colourful examples are an order to pay damages for breach of a contract to kidnap or to sell narcotics, or those based on openly racist laws". It is clear that, on the facts of the present case, we are very far from the typical, extreme cases where the public policy has successfully been used.

89. Moreover, this defence normally relates either to the award itself, or, occasionally, to the substance of the law applied in the foreign court. In the instant case, there is no reason to object to the law applied in the foreign court, and certainly no reason at this stage to believe that any ensuing court judgment will be repugnant to an English court on its substance. The only arguments are procedural; and we have already seen that English courts are loathe to make comparisons between the procedures of different states. It is suggested that the public policy defence adds nothing in the present context to the defence of natural justice. If the foreign judgment is unobjectionable on natural justice grounds, there is no reason to think that it will be objectionable on public policy grounds.

90. If all other requirements for recognition of the US class action judgment are met, I do not consider that recognition would be withheld on the ground of public policy.

(f) *Recognition and enforcement of class action judgments in Canada: Currie v McDonald's Restaurants of Canada Ltd and Canada Post Corporation v. Lépine*

91. It is also worthy of note that in *Currie v McDonald's Restaurants of Canada Ltd* (2005) 250 DLR (4^{th}) 224 (Exhibit 37), the Court of Appeal for Ontario indicated

that it would, in principle, be prepared to recognise a court-approved settlement in a class action before the US courts, where the plaintiff had not opted-out of the class. As Share JA explained:

> "1 The plaintiff Greg Currie brings a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. ("McDonald's Canada"). He is met with an Illinois judgment approving the settlement of a class action brought on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada (the "Boland judgment"). The Illinois court directed that notice of the class action to Canadian class members be given by means of an advertisement in Maclean's magazine. Currie did not participate in the Illinois proceedings but Preston Parsons, the named plaintiff in another Ontario class proceeding, represented by the same law firm and purporting to rep-resent the same class, appeared in the Illinois court to challenge the settlement.
>
> 2 The central issue on this appeal is whether the Boland judgment is binding so as to preclude Currie's pro-posed class action in Ontario."

92. The Court of Appeal went on:

> "9…. It is also common ground that the issue of whether the Ontario courts should recognize and enforce the Illinois judgment approving the settlement turns upon the application of the principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) (Exhibit 38) and *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.) (Exhibit 39).
>
> 10 In *Morguard*, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for

the assessment of the propriety of conflict of laws jurisdiction. As La Forest J. explained at p. 1102, ‘order and justice militate in favour of the security of transactions’, an interest fostered in the modern world of increased trans-border activity by freer recognition and enforcement of judgments from other jurisdictions. But embedded in the principles of order and fairness is also the notion of jurisdictional restraint. The interest of security of transactions gained by the party seeking enforcement must be balanced with the need for fairness to the party against whom enforcement is sought. As La Forest J. put it at 1103: ‘it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit...Thus, fairness to the [party against whom enforcement is sought] requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.’…

13 The novel point raised on this appeal is the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident plaintiffs in international class actions….

16 Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction. The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.

17 Here, the tables are turned. It is the defendant who is seeking to enforce

the judgment against the unnamed, non-resident plaintiffs."

93. Importantly, the Court went on to cite the article by Dixon on recognition of class actions in England with approval (Exhibit 2):

> 20 … I am not persuaded that a model entirely based upon the position of the defendant in a traditional two-party lawsuit can adequately capture the legal dynamics and complexity of the situation of an unnamed plaintiff in modern cross-border class action litigation. The position of the class action plaintiff is not the same as that of a typical defendant. Rules for recognition and enforcement of class action judgments should reflect those differences. The class action plaintiff is not hauled before a foreign court and required to defend him or herself upon pain of default judgment. As stated by Rehnquist J. in the leading American decision, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (U.S. Kan. 1985), at 809 "[un]like a defendant in a civil suit, a class-action plaintiff is not required to fend for himself." Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately represented and protected. This is a factor favouring recognition and enforcement against unnamed class members: see John C.L. Dixon, "The *Res Judicata* Effect in England of a U.S. Class Action Settlement" (1997) 46 I.C.L.Q. 134 at 136, 150-51. (emphasis added) (Exhibit 2).

94. Since it was impossible to apply a traditional analysis of jurisdictional competence to the class action proceedings, the court saw the matter in terms of ensuring that the rights and interests of the unnamed class members were protected by sufficient safeguards. It held that "it is my opinion that the notice issue does bear upon jurisdiction" (at [31]). The court specifically rejected the argument that only foreign proceedings operating on an "opt in" basis could be recognised, noting (at [29]) that this would negate the whole notion of a class action:

> "An order requiring members of the plaintiff class to opt in would, as a practical matter, effectively negate meaningful class action relief."

95. Of course, the decision in *Currie v McDonald's* (Exhibit 37) cannot be of binding effect in England. Nonetheless, it is notable that the court referred to Dixon's article on the preclusive effect of class action judgments in England. The development in *Currie* might be thought to be reflective of a desire to support collective litigation as a means to promote the expediency of the litigation process.

96. Indeed, whilst the decisions in *Morguard* (Exhibit 38) and in *Beals* (Exhibit 39) provided the foundation for the rules of recognition and enforcement of foreign judgments in Canada, notably, the court considered that traditional rules on the recognition and enforcement of foreign judgments *simply did not accommodate the situation of class actions members*. It was this that led it to devise a method to determine the enforceability of class actions; and to conclude that the relevant concern was that the procedural rights of the class members were adequately protected. The court did not, however, see any reason why a class action judgment binding an absent class action member should not be recognised in Canada. English law equally needs to determine, as a matter of principle, whether absent class members can be bound by a US judgment or settlement; and the suggestion that the key concern is for the safeguard of their procedural rights as is perfectly sensible.

97. Importantly, a similar conclusion has been upheld by the Supreme Court of Canada in *Canada Post Corporation v. Lépine* (2009) 304 D.L.R. (4th) 539 (Exhibit 40), in the context of recognition of a judgment of one Canadian province in another. A motion was filed by *Lépine* in the Quebec Superior Court for authorisation to institute a class action against the Canada Post Corporation on behalf of all natural persons residing in Quebec who had purchased an internet

package sold by Canada Post Corporation that was subsequently withdrawn. In March 2002, a representative, PM, commenced a class proceeding against the Corporation in the Ontario Superior Court of Justice on behalf of everyone who had purchased the Corporation's service, except Quebec residents. Then, in May 2002, representative JC commenced a class proceeding in the British Columbia Supreme Court on behalf of residents of that province. A settlement was reached in Alberta in December 2002, and the Corporation agreed to refund the purchase price of a CD-ROM to Canadian consumers who returned the CD-ROM to it. The applicants for certification of the class proceedings in British Columbia and Ontario accepted the Corporation's offers; but the applicant in the Quebec action, ML, rejected them. The Corporation obtained a judgment from the Ontario Superior Court of Justice declaring that the claims against it had been settled, including the claims of Quebec residents.

98. It was held that the Ontario Superior Court of Justice had jurisdiction since the corporation had its head office in Ontario. Provided that the notice of the class action was worded sufficiently clearly, it was capable of binding Quebec purchasers. On the facts, it was found that the notices were not sufficiently clear, since separate Quebec proceedings had already been instigated and parties receiving notice might reasonably have concluded that proceedings elsewhere in Canada did not affect them. But outside the rather particular facts of that case, the principle that a class action judgment could be recognised so as to bind absent class members was reaffirmed.

(g) Conclusion

99. I therefore conclude that although no English case has authoritively determined the matter, a good case can be made for the recognition and enforcement in England of a judgment in the US class action against the defendants in respect of passive members of a class who did not opt out of the class action. This was also the view adopted by the United States District Court for the Southern District of

New York. Judge Holwell in *Re Vivendi Universal SA Securities* 242 F.R.D. 76; 2007 U.S. Dist. LEXIS 21115; Fed. Sec. L. Rep. (CCH) P94,357; affirmed 2009 U.S. Dist. LEXIS 31198); and by Marrero, U.S.D.J in *Re Alstom SA Securities Litigation* 253 F.R.D. 266; 2008 U.S. Dist. LEXIS 67675; 71 Fed. R. Serv. 3d (Callaghan) 570

100. Such an opinion may be supported by the fact that the English authorities have been concerned with the jurisdictional competence of a foreign court over defendants and have not been developed in relation to plaintiffs; by the procedural safeguards existing in the US courts; by the possible finding of privity of interest between the parties; and by the academic literature considering the matter. It may further be supported by the fact (considered in section F below) that English law has itself developed group and representative actions.

(4) Application of the law: the effect in England of a US class action judgment in the plaintiff's favour for a sum with which he/ she is not satisfied

101. Of course, it is possible that the judgment might be delivered in the plaintiff's favour, but for a lesser sum than he had hoped to recover.

102. A first point is that I understand that a class member in the United States who accepts the benefit of a settlement is typically required to sign a release of his or her claims. Suppose, however, that the absent class member seeks to disregard the United States court's judgment and instead to sue afresh in England.

103. Normally, a successful plaintiff overseas is estopped from doing so by section 34 of the Civil Jurisdiction and Judgments Act of 1982 (Exhibit 41), which provides that:

> "no proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has

been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court in an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, Northern Ireland."

104. However, in the case of a class action where the plaintiff did not know of the action overseas (which, given the limited number of plaintiffs in the present case and the notice arrangements set out above, is a significantly reduced prospect on the present facts) and was awarded a sum of money with which he is not content, the foreign judgment might be seen effectively as a burden on the plaintiff. Accordingly, in such circumstances, it is my opinion that the same principles should apply as where the judgment is given in the defendants' favour. For the reasons given above, there is a strong argument that such a judgment would be entitled to recognition and enforcement in England. This is particularly so in the present case, given that the subscribers to the Fairfield Sentry Fund and the Fairfield Sigma Fund have agreed to submit to the New York courts.

(5) Application of the law: the effect in England of a US class action judgment in the plaintiff's favour for a sum with which he/ she is satisfied

105. Of course, if the judgment were to be delivered in the plaintiff's favour for a sum with which he is satisfied, it might not be necessary for the plaintiffs to seek enforcement in England, insofar as the *Anwar* defendants *have* substantial assets in the US which can be foreclosed upon. I understand that there is no reason to believe that they have assets located in England that can be seized to satisfy a judgment in favour of the class. In such circumstances, the plaintiffs are unlikely to seek to enforce a judgment against the defendants in England or in the Other Common Law Jurisdictions because there may well be sufficient assets in the U.S. to satisfy a judgment.

106. If efforts were made to enforce the judgment in England, it would be my opinion that a strong case for enforcement would exist. If an absent class member chooses to accept a sum awarded in a US class action, he has effectively waived any objections to that judgment.

F. MULTI-PARTY LITIGATION IN ENGLAND: ABSENCE OF A US STYLE CLASS ACTION PROPERLY SO-CALLED; IMPLICATIONS FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

(1) Introduction

107. English courts have various procedures for multi-party litigation, which I consider in this section. These procedures share a number of features with class actions. This renders it intrinsically less likely that they would consider the class action in US law to be repugnant and so contrary to its standards of natural justice or public policy.

108. Nonetheless, English law lacks a class action properly so called, still less a US class action procedure. It is, accordingly, my view that a class action in the US would be in the best interests of the proposed English class members and tend to provide them with a more effective means of redress than is available in the English courts.

(2) Representative actions

109. The Civil Procedure Rules ("CPR"), Part 19.6 (Exhibit 19) allows for representative actions. It states that:

> "19.6 (1) Where more than one person has the same interest in a claim –

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –

(a) is binding on all persons represented in the claim; but

(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court..."

110. A representative action will normally bind those on whose behalf the claim is brought and hence have a *res judicata* effect on the represented class. (Compare *Moon v Atherton* [1972] 2 QB 435, 441) (Exhibit 42).

111. The representative must have the same interest as the members whom he represents. Such actions would not be available where damages would have to be proved individually (*Markt & Co v Knight Steamship Co* [1910] 2 KB 1021) (Exhibit 43).

112. It should be noted that the possibility of an obligation being imposed on a party through his or her silence does exist in CPR 19.6(4), which states that "Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule… (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court." This

shows that the concept of an opt-out procedure is known in English law.

113. Given the limitations of the representative procedure, I do not, consider that a representative action would be available on the present facts. But the very existence of a representative action in English law, and CPR 19.6(4) in particular, supports the view that there is nothing intrinsically objectionable about an opt-out procedure which might be adopted in a foreign legal system. The approach taken in the United States may be viewed as a legitimate, albeit different, method of dealing with actions involving multiple plaintiffs.

(3) Group Litigation Orders

114. English law now also recognises the concept of the Group Litigation Order ("GLO"), where actions raise common issues of fact or law, but where the interests of the parties concerned are not identical. This is the principal form of proceeding in multi-party disputes.

115. CPR Part 19.12 (Exhibit 19) states that:

> "19.12(1)
> Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –
> (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and
> (b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register."

116. As Lord Walker explained in *Autologic Holdings plc v Commissioners of Inland Revenue* [2005] UKHL 54; [2006] 1 AC 118 at pp 144-5 (Exhibit 44):

> "The key features and normal effect of any GLO are that it identifies the common issues which are a precondition for participation in a GLO; it provides for the establishment and maintenance of a register of GLO claims; it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead solicitor for the claimants or the defendants, as appropriate; it provides for judgments on test claims to be binding on the other parties on the group register; and it makes special provision for costs orders."

117. Each party must opt-in to the action. English law would require a person to issue a claim against the defendant and to request to be added to the registered group of litigants.

(4) ***Further implications for recognition of foreign judgments***

118. Both the English and United States multi-party procedures are concerned with seeking to promote the efficient handling of multiple plaintiffs' actions against one or more common defendants. Both are concerned, in different manners, with trying to take reasonable steps to ensure that the action is brought to the attention of potential plaintiffs, and that he is given sufficient time to decide whether to opt out with respect to a class action or opt in with respect to the English representative action

119. Dixon, (1997) 46 *International and Comparative Law Quarterly* 134 comments on the enforceability of a US class action settlement (at p. 146) (Exhibit 2)that:

> "Accordingly, because English law allows absent represented parties to be bound, it is likely that an English court would hold that a US court was a court of competent jurisdiction over the parties. This element of the plea of *res judicata* is thus satisfied."

120. The article appears in one of the United Kingdom's leading academic journals and is peer reviewed by leading private international lawyers. It is, in my opinion, a careful consideration of the English rules on the recognition of foreign judgments and their application to US class actions.

121. Of course, the availability of English procedures in litigation before the English courts does not determine the effect to be given to a foreign judgment in an English court. An English court need not necessarily adopt identical, or even similar, rules in the conflict of laws when recognising and enforcing foreign judgments to those applied in the domestic context of litigation in England. But the approach of English courts in the domestic setting is strongly indicative of the English court's views concerning acceptable standards of procedural protection, and acceptable methods of efficiently bringing multi-party litigation. At the very least, the English court's view in the domestic context is persuasive as to the standards of procedural fairness and natural justice of foreign courts which are likely to be accepted from foreign courts. The standards applied in English domestic law are a benchmark by which an English court may assess the standards applied in a foreign court. This point is accepted by Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (2001) (Exhibit 23), who observes (p. 74) that:

> "The addition of these rules offers, at least, a template for assessing *foreign* rules governing group litigation…"

122. Indeed, the English multi-party procedures were introduced following the fundamental review of English civil procedure by Lord Woolf. In his report, "Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales" (1996), chapter 17, para.2 (Exhibit 45), Lord Woolf observed that:

> "The new procedures [on multi-party actions] should achieve the following objectives:
>
> (a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
>
> (b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;
>
> (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."

123. The United States Supreme Court has asserted similar justifications for the class action device:

> > "The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." (*US Parole Commission v Geraghty*, 445 U.S. 388, 402-03 (1980)).

124. As to the latter objective - the facilitation of the spreading of litigation costs- the US Supreme Court has also said:

> "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." (*Deposit Guaranty Nat. Bank, Jackson, Miss. v Roper*, 445 U.S. 326, 339 (1980). *See also* 1 Alba Conte & Herbert Newberg, Newberg on Class Actions § 1:6 (4th ed. 2002)).

125. It is in the very essence of private international law, and the recognition of foreign judgments in particular, that English courts will be faced by procedures, and substantive rules, applied in foreign courts which are different to those that an English court might have applied. Something more is needed before the judgment can be denied recognition. Briggs and Rees, *Civil Jurisdiction and Judgments*, 5th ed, p 443-4 (Exhibit 16), comment that:

> "All civilised systems of civil procedure strike their own balance to protect the rights of the parties and to get at and expose the truth. It is, therefore, inappropriate to point to an isolated difference between the corresponding rules of English and foreign law, each wrenched out of their context, and to contend that the comparison shows that the claimant is exposed to the risk of an injustice if not permitted to proceed in England."

126. *Dicey, Morris and Collins*, para 14-152 (Exhibit 6), state that a:

> "…foreign judgment… is not impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England".

127. In a different, but relevant context, Lord Goff had this to say of the English common law rules on taking jurisdiction, and the question whether an English

court should refuse to stay proceedings where the centre of gravity of a case lies overseas but the plaintiff alleges that he would not obtain justice in the foreign court (*Spiliada Maritime Corp* v *Cansulex Ltd* [1987] AC 460, 482) (Exhibit 46):

> "The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried suitably for the interests of all the parties and for the ends of justice… Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas."

128. All of this suggests that a US class action would not be regarded as repugnant to English law.

(5) <u>The limits of English multi-party procedures; the lack of a U.S. style class action</u>

129. Furthermore, it is important to note that an author who has specialised in the study of representative actions in English courts and the law relating to class actions around the world, has written two articles recently in the leading English

journal devoted to civil procedure, *Civil Justice Quarterly*, arguing that the rules on representative actions in English courts have been applied sufficiently liberally in more recent cases as to share many common attributes with class actions, and advocating the introduction of a class action procedure in England: see Mulheron "Some Difficulties with Group Litigation Orders- and Why a Class Action is Superior" (2005) 24 *Civil Justice Quarterly* 40 (Exhibit 47) and "From Representative Rule to Class Action: Steps Rather than Leaps" (2005) 24 *Civil Justice Quarterly* 424 (Exhibit 48). She notes that in, *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch) (Exhibit 49), the court applied the representative rule to an alleged copyright infringement and acknowledged the possibility of separate defences, and separate claims for damages for account of profits, being brought by different class members. Indeed, she notes that a representative action was permitted even though "The court indeed accepted that these representative proceedings had not been specifically authorised by all class members."

130. The *Independiente* decision was followed in *Howells v Dominion Insurance Co. Ltd* [2005] EWHC 552 (QB) (Exhibit 50). Mulheron observes ((2005) 24 *Civil Justice Quarterly* 424, p. 442) (Exhibit 48) that:

> "Thus, the *Independiente* and *Howells* decisions affirm that silence cannot be taken to infer disagreement with the representative action instituted. This is precisely the same situation as occurs in class action regimes elsewhere."

131. Another author, Sorabji, argues in "The Hidden Class Action in English Civil Procedure" (2009) 29 *Civil Justice Quarterly* 498, 500 (Exhibit 51) that:

> "... the claim that the class action is unknown to English civil procedure is a truth lacking in veracity."

He seeks to:

> "trace CPR r.19.6's origins, origins which show that it is, and that English civil procedure has always contained within it, class actions as... [US] r.23 encapsulates."

132. Later, he contends (at p 513) that

> "Insofar as [US] r.23(b)(3) damages class actions are concerned an opt-out mechanism operates. The same is true, both as to it being a mandatory action and in some circumstances an opt-out action, under the representative rule as the court has the power to permit an opt-out under CPR r.19.6(4); cf. *The Irish Rowan* [footnote: *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1990] 2 Q.B. 206; [1990] 2 W.L.R. 117 at 237-239] (Exhibit 52) . The requirement to permit class members to opt-out is further bolstered now as a consequence of the introduction of art.6 of the European Convention on Human Rights (ECHR), through the Human Rights Act 1998, into English law and the requirement that the courts interpret and apply legislation consistently with the Convention right. It is inconceivable that CPR r.19.6 (4) could not but be interpreted now as providing an opt-out power per the interpretative approach exemplified by *Cachia v Faluyi* [2001] EWCA Civ 998; [2001] 1 W.L.R. 1966 [(Exhibit 53)] and *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828 [(Exhibit 54)]. Such an art.6 ECHR compliant interpretation of the jurisdiction could not but require the court to operate a sufficient notice requirement prior to certification here as in the United States."

133. Such statements suggest that English law would not regard an opt out class action judgment as contrary to its public policy or natural justice.

134. But English law goes only so far. Mulheron concludes that English law should go further and explicitly adopt the class action procedure. Mulheron concludes with the following observations ((2005) 24 *Civil Justice Quarterly* 424, p. 448)) (Exhibit 48):

> "Various judicial statements have sought to interpret the English representative rule as containing elements of a class action, a wider device than the strict representative action, under which a commonality, rather than identicality, of interest is sufficient, and where separate contracts, separate defences and different claims for damages are easily tolerated. It is highly arguable that the less restrictive class action criteria which the English judiciary have struggled to fit over the rubric of the representative action should be expressly implemented in this jurisdiction. This would serve to lessen the artificiality of judicial interpretations which strain the boundaries of the language used in r.19.6. Secondly, it is not a huge leap from the representative rule, as judicially interpreted, to the class action as legislatively drafted. Somewhat similar superiority assessments, numerosity tests, attitudes toward class description and members' identities, adequacy of representation, recognition of sub-classes, and the absence of any requirement for an express mandate from class members, are evident under both representative rule and class action."

135. Similar views are expressed in her book *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004). See also Mulheron, "*Research Paper for the Civil Justice Council of England and Wales: Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council, February 2008) available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf (Exhibit 55) where she considers nineteen "building blocks" which provide "overwhelming evidence of the need for a further collective redress mechanism, in order to supplement presently-existing procedural devices available to claimants." (page vii).

136. Indeed, there is clearly dissatisfaction in some quarters as to England's current law on multi-party procedures. Unless and until that law is improved, it may properly be thought that the best prospects for the proposed US class action plaintiffs is indeed to be members of the US class.

137. In 2008, the Civil Justice Council published "*Improving Access to Justice through Collective Actions, Developing a More Efficient and Effective Procedure for Collective Actions. A Series of Recommendations to the Lord Chancellor"* (July 2008) available at:

http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf .

The report was compiled by a team of experts, consisting of three editors (John Sorabji ; Michael Napier CBE QC and Robert Musgrove) and seven contributing editors (Michael Black QC; Ingrid Gubbay; His Honour Judge Graham Jones; Alistair Kinley; Professor Rachael Mulheron; Robert Musgrove; and John Sorabji).

138. The recommendations of the report included that:

> "**RECOMMENDATION 1 –** A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the generic civil collective action.
>
> **RECOMMENDATION 2 –** Collective claims should be capable of being brought by a wide range of representative parties: individual representative claimants or defendants, designated bodies, and ad hoc bodies.

> **RECOMMENDATION 3 –** Collective claims may be brought on an opt-in or opt-out basis. Where an action is brought on an opt-out basis the limitation period for class members should be suspended pending a defined change of circumstance."

139. This Report concluded that:

> "9. These three themes – access to justice, proportionality & efficiency, fairness – remain valid benchmarks to be applied when considering the various consultations and approaches to collective redress since Lord Woolf. One of the fundamental drawbacks of the GLO regime which has been identified since its introduction is that it fails to facilitate effective access to justice for individuals whose claims fall within the first of the three goals. Because the GLO... requires individual citizens to take positive steps to commence litigation or join the claim register there has been little take up or use of it where claims are individually small even though the totality of the claim when aggregated is extremely large."

140. And at para 16, the Report says of GLOs:

> "They are not, however, ideal vehicles for the prosecution of collective claims. Claimants must opt-in through issue of a claim form, rather than opt-out. Barriers to entry, to access to justice, remain therefore a part of the GLO regime, which cannot provide effective access to justice for those individuals whose claims are of limited individual quantum and where the litigation (cost) risk far outweighs the potential value of a successful judgment. Moreover simply being party to a GLO remains in itself a relatively expensive exercise for individual litigants in any event, not least

> because, as an opt-in mechanism, it still requires, as was evident from *Taylor v Nugent* significant front-loading of litigation cost. The GLO does not therefore mitigate, but on the contrary, institutionalises the inability of those litigants, with relatively small claims that give rise to common issues, to prosecute them effectively. The GLO does nothing to satisfy the first of Lord Woolf's three principles which collective actions are required to meet."

141. A register of GLOs can be found online at: http://www.hmcourts-service.gov.uk/cms/150.htm . But this shows that since the introduction of the GLO in 2000, just 75 actions have been brought. Moreover, very few, if any, of these cases appear to involve allegations of securities fraud.

142. It bears reiteration that there is no direct equivalent in English law to the US class action, which would operate on an opt-out basis and allow parties with similar (but not identical) interests to form a class of plaintiffs and seek compensation for their respective losses. By contrast, a US class action device allows common issues of fact and law to be litigated in one place, rather than there being multiple law suits in different jurisdictions that could lead to conflicting and inconsistent rulings. In the absence of an English class action procedure capable of accommodating all members of the proposed class, it may properly be thought that the interests of plaintiffs would be better served by a US class action judgment.

G. OTHER ADVANTAGES OF A US CLASS ACTION OVER ENGLISH PROCEEDINGS

143. In my opinion, in the absence of class action properly so-called in England, the proposed New York class action represents the best prospects for the absent class

members to obtain effective recovery and, as such, is superior to other possible methods for adjudicating the matter.

144. Moreover, there are a number of further reasons why I believe this to be the case, which I shall examine briefly in this section.

(1) Jurisdiction and expediency of the litigation

145. I understand that the Fairfield Greenwich defendants reside in, and have their principal places of business, in the U.S. The PwC defendants are located in the Netherlands and Canada. Moreover, most of the defendants do not reside in or have their principal place of business in the U.K. or the Other Common Law Jurisdictions. In such circumstances, considerable difficulties will exist in establishing jurisdiction over all the defendants in the English courts, since they are very unlikely to submit to the jurisdiction of the English courts. Moreover, as explained above, the various agreements contain foreign jurisdiction agreements. A jurisdiction agreement would normally upheld by the English courts (at least where the defendant has not submitted to the courts of another State, as the defendants in the present action have done in New York).

146. In relation to defendants domiciled in EU Member States, an exclusive or non-exclusive jurisdiction clause for the courts of another Member State will normally be upheld (Article 23 of the Brussels I Regulation). In the absence of a jurisdiction agreement, the general rule is that a defendant should be sued in the Member State where it is domiciled (Article 2 of the Brussels I Regulation); and the plaintiffs would need to be able to identify an applicable derogation from that rule. In respect of the so-called rules of "special jurisdiction" in Articles 5 and 6 of the Regulation (which create alternative bases of jurisdiction to the defendant's domicile), the European Court of Justice said in *Falco Privatstiftung v Weller-Lindhors*t (Case C-533/07; [2010] Bus. L.R. 210, at [37]) (Exhibit 56) that:

147. “The broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special jurisdiction..."

148. In relation to defendants domiciled in non-EU Member States (and also not domiciled the European Free Trade Association States of Norway, Iceland or Switzerland), permission to serve the defendants outside the jurisdiction with permission of the court would need to be sought. This “exorbitant” common law basis of jurisdiction requires the plaintiff to prove that a basis of jurisdiction exists in CPR, Practice Direction B to Part 6, para 3.1. Even if the plaintiff can do that, he must also, *inter alia*, satisfy CPR 6.37(3), which states that:

> “The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.”

In other words, the plaintiff must demonstrate that England is the “natural forum” in which to pursue the claim (see *Spiliada Maritime Corp* v *Cansulex Ltd* [1987] AC 460, 482 (Exhibit 46); *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438) (Exhibit 57). In view of the fact that the defendants are mostly resident outside of the jurisdiction, and that the various agreements set out above contain foreign jurisdiction clauses (some of which are exclusive jurisdiction agreements), it is likely to be very difficult for the absent class members to satisfy this test, since the English court would be asked to summon defendants who are mostly located outside the jurisdiction to the English courts, in circumstances where the defendant may have a right to be sued overseas and not in England. By contrast, the defendants have not contested the jurisdiction of the New York courts and there is patently a great advantage in having all those defendants before a single court.

149. The strong advantages of a composite hearing in New York, rather than fragmented English proceedings, were recognised by the House of Lords in

Donohue v Armco [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425 (Exhibit 58). It declined to issue an anti-suit injunction to restrain the respondent from litigating in New York, in circumstances where the applicant had the benefit of an exclusive jurisdiction clause for the courts of England. The primary reason for this was that a composite trial including other parties to the litigation (who were not bound by an English jurisdiction clause) was possible in the New York proceedings and, if the injunction were granted, this would result in a fragmentation of proceedings. Lord Bingham said of the New York proceedings (at [34]):

> "It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice."

150. In all the circumstances, the fact that the New York court is able to hear a composite class action is a very significant advantage compared to the difficulties that the absent class members would face in bringing proceedings in the English courts.

151. I would expect similar difficulties of bringing all the parties before the court to exist in the Other Common Law Jurisdictions (which I consider below) and, accordingly, consider that a US class action represents the best prospect of effective redress for the absent class members.

(2) Difficulties in enforcing an English judgment

152. It is my understanding that the defendants (who are not resident in England) do not have assets in England that can be levied against. This will be a serious disadvantage for the plaintiffs, since they will then have to bring enforcement

proceedings overseas; with the obvious risk that the English judgment will not be recognised and enforced. It would, by contrast, be much more expedient for plaintiffs to litigate in a forum in which they can enforce any resulting judgment within the jurisdiction.

153. A related difficulty is that English proceedings may also require the absent class members to compete with the BMIS Trustee, the liquidators and administrators of the Fairfield Greenwich Funds in settlement discussions and in executing against available assets.

154. Again, it is my opinion that a US class action is more efficient than proceedings in England, since I understand that there are assets in the US against which a US judgment could be enforced.

(3) Costs in English proceedings

155. The question of costs will be crucial to a prospective plaintiff in the England courts. In this respect, CPR Part 44.3 applies. It confers a broad discretion on the courts as to how to apportion costs. But it is rooted in a firm presumption, which is contained in CPR 44.3(2)(a):

> "(2) If the court decides to make an order about costs –
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party" (Emphasis added.)

156. In *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055 (Exhibit 59), Lord Phillips MR noted (at [23]) that:

> "A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has caused the

defendant to incur."

157. The effect of this may be to create a significant disincentive for plaintiffs to instigate and pursue proceedings in the English courts. In particular, an individual plaintiff who seeks to recover a relatively modest sum of money may face the risk of paying extremely high legal costs of the defendant in the event that the plaintiff loses, which may exceed the value of the dispute itself. Even if the plaintiff wins, the court has the discretion to order him to pay some or all of the costs of the proceedings. This may well be sufficient to deter a plaintiff from seeking to assert his rights in England.

158. Zuckerman, *Civil Procedure- Principles of Practice,* 2nd ed, 2006 (p 999) (Exhibit 60)notes the practical difficulties to which the English system of costs give rise:

> "The subject of costs, which would deserve only modest attention in a well balanced system, requires extensive treatment in England… There is probably no other country where litigants devote so much time, effort and money to litigation over who should bear the costs of proceedings… Today the fear of costs is no longer confined to private litigants of modest means, it affects even the rich and the mighty Government department… Paradoxically, practice under the CPR has made disputes over costs more frequent and time consuming."

(4) ***Limits on pre-trial discovery***

159. In English law, the general principle is that disclosure does not take place before the instigation of proceedings. The leading work on the English Civil Procedure Rules, *Civil Procedure,* (which is normally referred to as "the White Book") provides the most authoritative commentary on the CPR. It states that

“31.5.2

Stage at which disclosure occurs

Normally disclosure is ordered at the first case management hearing, after the defence is filed and on the allocation of the case to a track, but prior to service of witness statements: CPR r.26.3 . In *Parker v C S Structured Credit Fund Ltd* [2003] EWHC 391; [2003] 1 W.L.R. 1680 (Ch) [(Exhibit 61)] the court declined to bring forward disclosure ahead of the normal stage in litigation in which it occurs. “

160. A limited exception is contained in CPR 31.16, which may enable a court to order restricted pre-trial disclosure. This power is only available where the applicant and respondent are likely to be a party to subsequent proceedings and where, if proceedings had started, the respondent's duty by way of standard disclosure would extend to the documents or classes of documents of which the applicant seeks disclosure. “Standard disclosure” is restrictively defined in CPR 31.6 as follows:

> “Standard disclosure requires a party to disclose only –
>
> (a) the documents on which he relies; and
>
> (b) the documents which –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party’s case; or
>
> (iii) support another party’s case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction.”

161. Furthermore, a court may order pre-trial disclosure pursuant to CPR 31.16 only

where:

> "(d) disclosure before proceedings have started is desirable in order to:
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs."

162. In particular, English law does not allow broad requests for pre-trial disclosure such as might assist the proposed plaintiff to develop a case against the proposed defendant. Hence, so-called "fishing expeditions" for pre-trial discovery are not permitted in English law and the evidence sought must be in support of proceedings which have been commenced, or are reasonably contemplated.

163. The difference between the approach in the US and in England is seen most graphically where requests are made by the US courts to obtain evidence form English courts. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (the Hague Convention) is implemented in the UK by the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act") (Exhibit 62). Section 1 of the 1975 Act requires, *inter alia*, that:

> "(b) that the evidence to which the application relates <u>is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated".</u> (Emphasis added)

164. *Dicey, Morris and Collins* note (at para 8-061) (Exhibit 6)that:

> "Under Art.23 of the Convention, inserted at the proposal of the United Kingdom, a reservation is permitted. A Contracting State may declare 'that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'…

> The phrase "pre-trial discovery of documents as known in Common Law countries" obscures significant differences between the procedures available in countries following the practice contained in what was RSC Order 24 and is now Pt 31 of the Civil Procedure Rules 1998 and the much more extensive procedures available in many jurisdictions in the United States which can include wide-ranging requests for non-parties to the action to make oral depositions or to produce documents which may not necessarily be relevant to the issues but could possibly assist the plaintiff to formulate allegations against the defendant. The United Kingdom's reservation under Art.23 contains a statement of its intended scope, which is reflected in the Evidence (Proceedings in Other Jurisdictions) Act 1975 [section 2(4)]."

165. In relation to the disclosure of documents, section 2(4)(a) of the 1975 Act prohibits the English courts from making an order against a stranger to the proceedings requiring him to make general disclosure of documents as a "fishing" expedition. Section 2(4) states that:

> "An order under this section shall not require a person—
>
> > (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
> >
> > (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

166. The White Book notes (para 34.21.7):

> "The House of Lords has explained in R*e Asbestos Insurance Coverage*

Cases [1985] 1 W.L.R. 331; [1985] 1 All ER. 716 [(Exhibit 63)] that (1) 'particular documents' means individual documents separately described; a compendious description of several documents (e.g. 'monthly bank statements for August to December') may be used provided that the exact document in each case is clearly indicated. (2) A second test of 'particular documents' is that they must be actual documents shown by evidence to exist or to have existed. Conjectural documents which may or may not exist, or have existed, do not satisfy this test (per Lord Fraser at 720–722). On the other hand, documents to be produced under letters rogatory need not be ancillary to the oral evidence of witnesses (*Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] A.C. 547) [(Exhibit 64)].

167. *Dicey, Morris and Collins* observe (at para 8-086) (Exhibit 6) that:

> "Under the Act, the court may not require a person to state what documents relevant to the foreign proceedings are in his possession, custody or power, or to produce any documents other than particular documents specified in the court's order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power. 'Fishing' arises where what is sought is not evidence as such, but information which may lead to a line of enquiry which would disclose evidence; it is a search, a roving enquiry, for material in the hope of being able to raise allegations of fact. For this reason, the statutory reference to 'particular documents specified in the order' is to be given a strict construction

168. In all the circumstances, I believe that the absent class members will be able to benefit from more extensive, and more readily available, pre-trial discovery procedures in the proposed US class action than in English proceedings.

(5) Inability to rely on US Federal Securities Law

169. The absent class members would be unable to rely upon US Federal Securities Law in the English courts. Whilst English law provides some statutory redress in the Financial Services and Markets Act 2000 (as amended) it lacks a comprehensive Securities Law.

170. The common law claims for deceit and misrepresentation require detrimental reliance to be demonstrated in every case. There is no doctrine of fraud on the market. As Lightman J stated in *Possfund v Diamond* [1996] 1 WLR 1351 (at 1363) (Exhibit 65):

> "For the purpose of the torts of deceit and negligent misrepresentation, it is necessary to establish a material misrepresentation intended to influence, and which did in fact influence, the mind of the representee and on which the representee reasonably relied."

171. A Discussion Paper produced by the *Davies Review of Issuer Liability: Liability for Misstatements to the Market* (2007) noted in its discussion of the tort of deceit (at para 26) that:

> "The claimant must in fact rely on the statement, as part of which requirement the claimant would have to be aware of the statement. This requirement is taken to rule out the theory of 'fraud on the market,' whereby a misstatement which has an effect on the market price can be said to cause an investor loss, even though that particular investor was not aware of the misstatement." (Emphasis added).

(6) Conclusion

172. It is, therefore, my view that the proposed US class action represents the best means of recovery for the absent class action members. There is no class action in

England properly so called. The class members have suffered net losses. In practical terms, it will be considerably more difficult for them to bring proceedings in the English courts, particularly against defendants who are all outside the jurisdiction (and in circumstances where there are jurisdiction agreements for foreign courts); and any judgment would need to be enforced against assets outside the jurisdiction. Should the plaintiffs in an English action be unsuccessful, they face the prospect of paying prohibitively expense costs.

173. Above all, the prospect that absent class members who reside in England. or Other Common Law Jurisdictions might decide to bring individual actions against the defendants, notwithstanding a class action settlement or judgment, which the courts might decline to strike out as barred by the doctrine of *res judicata*, is, in my opinion remote. In such circumstances, this remote possibility does not seem to me to be a sound basis for precluding the plaintiffs from participating in a class action against the Anwar defendants.

H. OTHER JURISDICTIONS

174. I set out below my understanding of the extent to which the laws of a number of Other Common Law Jurisdictions are likely to reach a similar conclusion to English law in respect of the enforceability of a US class action judgment. In view of my detailed treatment of the position in England above, I shall address these jurisdictions relatively briefly since, in summary, I consider that the prospects of enforcement are no weaker in any of the jurisdictions set out below; and, in some case, may be stronger.

175. Again, it bears reiteration that the subscription agreements for the Fairfield Sentry and Fairfield Sigma Funds contain express undertakings to submit to the jurisdiction of the New York courts and consent to service of process as provided by New York law. In such circumstances, it may be said that the subscribers are

estopped from denying that the New York courts are courts of competent jurisdiction in the eyes of the Common Law Jurisdiction where recognition of the judgment is sought,. Equally, the defendants will, in my view, be regarded as having submitted to the New York courts in the eyes of the Common Law Jurisdictions considered below and so will equally be bound by any resulting judgment.

176. Furthermore, for the reasons explained above, it is my view that a class action in the US courts provides a far better means of redress for the absent class members than proceedings in England or the Other Common Law Jurisdictions considered below. The absent class action plaintiffs would face real practical difficulties in bring an individual action in another jurisdiction after judgment had been rendered in the New York court. As a practical matter, the best option for an absent class member would be to file a claim where there has been a US settlement in favour of the class.

Australia, Hong Kong, Ireland, Singapore

Australia

177. Australia is, of course, a Commonwealth jurisdiction. The statutory regime in the Foreign Judgments Act 1991 (Cth) is inapplicable to judgments from the United States; so too is the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth), which may apply in relation to antitrust proceedings.

178. Rather, the common law rules in the various States and Territories would apply. Hence, the foreign court must have jurisdiction in the eyes of the state where recognition is sought (see *Nygh's Conflict of Laws in Australia* (8th ed, 2010), chapter 40) (Exhibit 66). The Australian common law is largely based upon the application of English common law principles. Hence, as in England, a foreign court will be considered to be jurisdictionally competent if the defendant was

present or resident in the foreign state, or submitted to the courts of that state.

179. Recently, however, in *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218 (Exhibit 67), the Equity Division of the Supreme Court of New South Wales has apparently extended the grounds for recognition of a foreign judgment somewhat further. It held that it could recognise and enforce a foreign judgment in circumstances where the defendant was a national of the state where judgment was given, even though the English common law would not appear to regard this as a basis for the recognition of foreign judgments (see *Dicey, Morris and Collins*, para 14-078 (Exhibit 6), referring to the doubts expressed by the English High Court in *Blohn v Desser* [1962] 2 Q.B. 116, 123 (Exhibit 68); *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 Q.B. 352, 382-383 (Exhibit 69); and *Vogel v RA Kohnstamm* Ltd [1973] Q.B. 133 (Exhibit 70)).

180. Moreover, the judge went further, ordering not just payment but an account to determine the equitable liability of the defendant. Although the orthodox position in the English common law is that only a judgment for a fixed sum of money can be enforced (see *Dicey, Morris and Collins*, Rule 35), the court did not consider that this precluded enforcement of the foreign judgment. Bryson AJ held that:

> "30... The order which I am now asked to make is 'an order that an account be taken before an Associate Justice, on the basis of wilful default, of the dealings by the defendant his servants and agents with the £52,000,000 paid out of the Impacted Schemes referred to in Order 1 of the High Court of Justice, Chancery Division of 1 July 2010 and the traceable proceeds thereof'.
>
> 31 If the declarations and order to account had been made by this Court and there had not been compliance, such an order would be made as a matter of course to give effect to the earlier decision. The English declaratory orders establish finally that there have been dishonest assistance and knowing receipt, and the interlocutory character of the order

for the now defendant to give an account does not diminish the final character of those determinations.

32 Still, the orders do not have the concrete form of money judgments addressed in the authorities I have so far referred to. Rather this Court is asked to take up the controversy determined as far as it has been in England and take the next steps, as it were, in the same litigation.

33 Counsel have referred me to authorities which show that a Court of Equity will lend assistance to the enforcement of a foreign judgment also in a Court of Equity, without requiring as a prerequisite of enforcement here that the foreign order be made a judgment of the court here, but requiring that the court here be satisfied that there is a sufficient connection between the defendant and the jurisdiction in which the foreign order was made to justify recognition of the foreign court's order. The law was, in my view, satisfactorily restated in *White v Verkouille* [1990] 2 Qd R 191 [(Exhibit 71)] by Justice McPherson. His Honour made a characteristically careful review of instances in case law where equity courts had acted in this way. The case law is derived, not altogether clearly, from the decision of the House of Lords in *Houlditch v Marquis of Donegal* (1834) 2 Cl & F 470; 6 ER 1232 [(Exhibit 72)].

34 In effect Justice McPherson decided to recognise the appointment by a court in Nevada in the United States of a receiver and to allow that receiver to pursue enforcement in Queensland of rights determined by the court in Nevada.

35 The concept of a sufficient connection to justify recognition is not at all a well defined concept but I have no doubt that it is satisfied in the present case where the now defendant is usually to be found in New South Wales and has been able to conduct legal business here for a limited purpose while the substantial merits of the litigation have been determined fully and carefully in the United Kingdom, a country whose citizenship he claims, actually has and at times relied on. I regard it as appropriate to take up enforcement of the decision already reached."

181. The decision in *Independent Trustee Services Ltd v Morris,* therefore, at least shows signs of the potential for the development of the law on recognition and enforcement of foreign judgments in New South Wales, beyond the confines of the English common law.

182. It should also be noted that, in contrast to England, Australia has established domestic class actions procedures. In particular, the Federal Court of Australia Act 1976 (Cth), Part IVA (Exhibit 73) contains provisions on an opt-out class action. Section 33C provides:

> "(1) Subject to this Part, where:
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.
>
> (2) A representative proceeding may be commenced:
>
> (a) whether or not the relief sought:
>
> (i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding:

(i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or

(ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members."

Section 33E states that:

" (1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.

(2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:

(a) the Commonwealth, a State or a Territory;

(b) a Minister or a Minister of a State or Territory;

(c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or

(d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer. “

Section 33J states:

“(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.

(3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.

(4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

183. Hence, Australia does have an opt-out class action procedure. As Legg, (2011) 30 *Civil Justice Quarterly* 52 (Exhibit 74) explains:

“Pt IVA of the Federal Court of Australia Act 1976 (Cth) (“ FCA Act”) was enacted with the objective of providing access to justice, resolving disputes more efficiently, avoiding respondents facing multiple suits and the risk of inconsistent findings, and reducing costs for the parties and the courts. To achieve those goals the FCA Act sought to adopt an opt out form of the class action which is commenced by a representative party or parties on behalf of, but without the express consent of, those entities that fall within the group definition. The group members receive an

opportunity to exclude themselves, or opt out of the class action, at a later point."

184. Hence, whilst I do not think that Australian courts would be likely to approach the question of whether to recognise and enforce a US class action judgment differently to the English courts, the fact that an opt out class action is embedded in Australian law suggests that it inherently unlikely that it would consider a U.S. class action judgment to be contrary to natural justice or public policy. In my view, therefore, it is at least as likely that a U.S. class action judgment would be recognised and enforced in Australia as in England.

Hong Kong

185. The Hong Kong Special Administrative Region of the People's Republic of China ceased to be a Commonwealth State on 1 July 1997. Nonetheless, as Smart, "Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong" (2005) 5 Oxford U. Commw. L.J. 301, 301-2 (Exhibit 75) states:

> "Hong Kong conflict of laws rules have always borne, both before and after the end of the colonial era, - a marked similarity to their English law equivalents. This 'English model' is noticeably present when it comes to the enforcement of foreign judgments. Thus, as is also the case in many Commonwealth jurisdictions, the Hong Kong courts may enforce foreign judgments by one of two routes: first, a foreign judgment may be enforced by reference to the common law; and, secondly, enforcement may occur under statutory rules, in particular the Foreign Judgments (Reciprocal Enforcement) Ordinance.' In practical terms, enforcement under the common law is more important than under the Foreign Judgments (Reciprocal Enforcement) Ordinance, for not only does the latter cover only some fifteen jurisdictions, but also Hong Kong's major trading partners, including the United States… The Hong Kong rules relating to

the enforcement of foreign judgments under the common law will be immediately familiar to conflicts lawyers in any Commonwealth jurisdiction: the foreign judgment must be pronounced by a court of competent jurisdiction, be for a definite sum of money, and be final and conclusive."

186. Hence, English principles of the recognition and enforcement of foreign judgments will be applied in Hong Kong (see, for instance, *Mercedes Benz A.G. v Leiduck* [1996] A.C. 284 (Exhibit 76)).

187. Hong Kong currently has a procedure for representative actions. Order 15, rule 12 of the Rules of the High Court (Cap 4A) (RHC). Order 15, rule 12(1) (Exhibit 77) provides that:

> "Where numerous persons have the same interest in any proceedings … the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

188. In 2009, the Law Reform Commission published a consultation paper on class actions in which it recommended the adoption of a class action in Hong Kong: see http://www.hkreform.gov.hk/en/docs/classactions_e.doc. In particular, the report comments on the current restrictions in both English and Hong Kong law.

> "1.7 The defects of the current provisions have been summarised by the Chief Justice's Working Party on Civil Justice Reform [*Chief Justice's Working Party on Civil Justice Reform*, Civil Justice Reform Interim Report and Consultative Paper (2001), paras 385 to 387 at 148-9] as follows:
>
> 'The limitations of these provisions are self-evident. While they are

helpful and merit retention in the context of cases involving a relatively small number of parties closely concerned in the same proceedings for such cases, they are inadequate as a framework for dealing with large-scale multi-party situations.

In the first place, the availability of representation orders is narrowly defined and subject to considerable technicality. Secondly, even where a representation order has been made and the case has proceeded to judgment, finality is not necessarily achieved. Individuals affected by the representation order are still free to challenge enforcement and to re-open the proceedings on the basis that facts and matters peculiar to his case exist. Thirdly, the rule makes no specific provision for handling the special problems of multi-party litigation (discussed further below).

Without rules designed to deal specifically with group litigation, the courts in England and Wales and in Hong Kong have had to proceed on an *ad hoc* basis, giving such directions as appear appropriate and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases. Such limited expedients have met with varying degree of success.'

189. The Consultation Paper proposes that Hong Kong should introduce an opt-out procedure as the default position:

"We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically considered to be bound by the litigation, unless within the

time limits and in the manner prescribed by the court order a member opts out."

190. This tends to suggest that the it is unlikely that Hong Kong would consider a U.S. class action judgment to be contrary to natural justice or public policy.

191. Again, I consider that the recognition and enforcement of a U.S. class action judgment is at least as likely in Hong Kong as it is in England.

Singapore

192. At present, the law of Singapore is largely rooted in the English common law: see e.g. *RMS Veerappa Chitty v. MLP Mootappa Chitty* [1894] II S.S.L.R. 12 (Straits Settlements. S.C.) (Exhibit 78); *The Asian Plutus* [1990] 2 M.L.J. 449 (Sing. H.C.) (Exhibit 79); Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1 (Exhibit 80). Briggs notes (at p 2):"The opportunity for the courts of Singapore... [is] to consider how to develop the commercial common law of a modern state."

193. It may be noted that Order 15 Rule 12 of the Rules of Court made under the Supreme Court of Judicature Act (Cap 322) (Exhibit 77), applies to representative proceedings (see, for instance *Tan Chin Seng & Others v Raffles Town Club Pte Ltd* [2002] SGHC 278 (High Court); [2003] 3 SLR 307 (Court of Appeal) (Exhibit 81)). The Committee to Develop the Singapore Legal Sector has expressed concerns that the representative procedure is unduly limited. It has recommended that Singapore considers the introduction of a class action procedure (Final Report of the Committee to Develop the Singapore Legal Sector (September 2007), at para 3.28, available at: http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=0hntSJbxck4%3D&tabid=252).

194. I consider that the Singaporean position on the recognition and enforcement of a

U.S. class action judgment is unlikely to be any different to the English common law position.

Ireland

195. In Ireland, common law principles would apply to the recognition and enforcement of a U.S. judgment. In this respect, the grounds for recognition of a foreign judgment are essentially the same as in England. These principles were established in *Rainford v. Newell-Roberts* [1962] I.R. 95 (Exhibit 82) (see also Binchy, *Irish Conflicts of Law*, (1988), chapter 33 (Exhibit 83)). The court held that a foreign judgment would be entitled to recognition where the defendant was present in the foreign jurisdiction or submitted to the foreign courts. In *Re Flightlease (Ireland) Limited (in Voluntary Liquidation)* [2006] IEHC 193 (Exhibit 84), the court reaffirmed the correctness of Rule 36 of *Dicey, Morris and Collins, The Conflict of Laws* (Exhibit 6). The court declined to follow the Canadian developments in the law on foreign judgments (considered above; and further below in the discussion of Bermuda, the British Virgin Islands, the Cayman Islands, the Isle of Man, Guernsey and Jersey), though the court did also state that:

> "5.14 It is inherent in the common law that it will necessarily evolve to meet new circumstances and that, in the course of any such evolution, new principles may, in time, be developed to reflect the changing world in which the law has to operate. To that extent a gradually evolving common law system can, in certain circumstances, have advantages over a more rigid statutory regime where change can only occur after a full statutory process and may be too late to meet the needs of individual cases…"

196. Rule 9 of the Rules of the Superior Courts 1986 sets out rules and procedures for representative actions in Ireland. Ireland also has a procedure for so-called test cases. The possibility of a broader set of rules for managing multi-party litigation

expediently was considered by the Law Reform Commission, who made proposals for the introduction of a "Multi-Party Action" (see Law Reform Commission of Ireland, Report on Multi-Party litigation (2005, Report LRC 76-2005) (Exhibit 85). It noted that:

> "the Commission recommends the introduction of a procedure along the lines of the class action procedures currently operating in Canada and Australia… The Commission has, however, left open for further debate… the question of whether the procedure should be defined as an 'opt-out' or an 'opt-in' procedure. The issue is whether injured parties who wish to join a class action should be required to opt-into the proceedings or, alternatively, whether injured parties who do not wish to join a class action should be given an opportunity to opt-out of the proceedings. While it is considered that on balance the arguments in favour of an opt-out system (such as increased efficiency and a more coherent resolution of claims resulting in a fairer distribution of the funds available to meet the claim) outweigh those favouring an opt-in procedure, the Commission does not seek to make a recommendation on this critical issue at this juncture." (Emphasis added)

197. This contemplation of an opt-out Multi-Party action in Ireland tends to suggest that an Irish court is unlikely to conclude that recognition and enforcement of a foreign class action judgment is contrary to its standards of natural justice or to its public policy.

198. In my opinion, the Irish courts are at least as likely as the English courts to recognise and enforce a U.S. class action judgments.

Bermuda, the British Virgin Islands, the Cayman Islands, the Isle of Man, Guernsey and Jersey

Introduction

199. The law in the remaining jurisdictions that I have been asked to consider (which I shall term "the offshore jurisdictions") is also broadly similar to the English common law. To that extent, the recognition and enforcement of a US class action judgment in all the jurisdictions considered below is at least as likely as in England.

200. Kawaley, Bolton and Mayor (eds), *Cross-Border Judicial Cooperation in Offshore Litigation* (2009) (heareafter "Kawaley") (the relevant portions cited herein are appended as Exhibit 86) considers a number of these questions. Writing about six offshore jurisdictions- Bermuda, the British Virgin Islands, the Cayman Islands, the Isle of Man, Guernsey and Jersey- it states:

> "... there are considerably more similarities than differences in the principles applied, even in the face of some different approaches by way of procedure. This is because the legislation dealing with this topic is based on English (or British) statutory precedents, which in turn results in the body of English precedent dealing with substantially similar rules having particularly significant persuasive force" (at p 109).

201. It continues:

> "The overriding principles to be derived from [the review of these six jurisdictions]... are as follows: (1) there is no direct enforcement of foreign judgments; and (2) there is a growing tendency to cooperation between sovereign nations such that it is becoming increasingly clear that jurisdictional boundaries are becoming less clearly defined and more open to reflect the global removal and commercial and political boundaries. In this regard the subject jurisdictions, despite their shared legal heritage, may be seen as not simply slavishly following British judicial precedents

but also creating new law of their own". (at p 110) (Emphasis added).

202. None of these six jurisdictions has statutory rules in relation to judgments from the United States- hence the rules of the common law are applicable. In this respect:

> "all six provide for the application of common law principles derived from England and Wales for enforcement... Provided that there is no defence of fraud, failure of jurisdiction and it is not contrary to natural justice or to domestic public policy, the domestic courts will lean heavily toward giving summary judgment and will not seek to reopen the issues and have a fresh trial on matters that have already been determined by a competent foreign court." (Kawaley, at p 111).

The impact of Canadian developments

203. In *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077 (Exhibit 38), the Supreme Court of Canada cast off the restrictions of the English common law rules in relation to the recognition of judgments between Canadian provinces. It held that, in addition to the grounds for recognition developed by the English common law (set out above), a court would also recognise a foreign judgment if the foreign jurisdiction had a real and substantial connection with the claim. The decision was extended to judgments from outside Canada by the Supreme Court of Canada in *Beals v Saldanha* [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1 (Exhibit 39).

204. *Dicey, Morris and Collins, the Conflict of Laws,* summarises the development as follows (Exhibit 6):

> "14-083
> In 1990 the Supreme Court of Canada held in *Morguard Investments Ltd v*

De Savoye ([1990] 3 S.C.R. 1077) that, as regards the enforcement of judgments between the Canadian provinces, it was no longer appropriate to apply the nineteenth century rules developed in England for the recognition and enforcement of wholly foreign judgments. It was held that courts in one province should give full faith and credit (a phrase borrowed from the United States Constitution) to judgments given by a court in another province or territory "so long as that court has properly, or appropriately, exercised jurisdiction in the action". That condition was met when the defendant was present in the foreign jurisdiction at the time of the action, or submitted to its judgment by agreement or appearance: in other cases, the test to be applied was… whether the foreign jurisdiction had a real and substantial connection with the claim.

14-084

The decision of the Supreme Court of Canada involved the enforcement of an Alberta judgment in British Columbia, and rested in part on the federal structure of the Constitution, including the strong need for the enforcement throughout the country of judgments given in one province; the fact that there were no concerns about differential quality of justice in the various provinces; and the existence of the Supreme Court of Canada as a court of final review, which could determine when the courts of one province have appropriately exercised jurisdiction. Despite these doubts, in *Beals v Saldanha* [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1. the Supreme Court extended the principle to permit the recognition of a judgment from the courts of Florida entered in default of defence. It thereby confirmed that this test will be applied to the recognition of foreign judgments generally, though this will be in addition to the traditional grounds of presence and submission, rather than as replacement of them."

205. Hence, the Canadian courts extended the grounds for recognition of foreign judgments beyond those found in the English common law. As explained above,

this subsequently led the Court of Appeal for Ontario to rule in *Currie v McDonald's Restaurants of Canada Ltd* (2005) 250 DLR (4th) 224 (Exhibit 37) that it could, in principle, recognise and enforce US class action judgments on the "real and substantial connection" basis. The Supreme Court of Canada also declared, in principle, that a class action judgment of one Canadian province could be enforced in another: *Canada Post Corporation v. Lépine* 304 D.L.R. (4th) 539 (Exhibit 40).

206. Thereafter, and building upon these developments, the Supreme Court of Canada in *Pro Swing Inc v Elta Gold Inc* (2006) SCC 52 (Exhibit 87) cast off the English common law that only judgments for a fixed monetary sum could be enforced and held that the rules of enforcement could be extended to non-monetary judgments, on a discretionary basis. The Supreme Court held that:

> "86 The possibility of enforcing foreign non-money judgments would represent an incremental change in the common law of Canada. The principled approach to recognition of foreign monetary judgments in cases such as *Morguard* and *Beals* invites application of the same principles to non-money judgments in order to preserve the consistency and logic of this body of the law. Lower courts have discussed the need to modify the traditional ban on enforcement of foreign non-money judgments or have suggested that the law may have already moved in that direction: *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc*., [1998] 9 W.W.R. 688 (B.C.S.C.) [(Exhibit 88)]; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para 77 [(Exhibit 89)]. Provincial law reform agencies have done detailed studies on the issue and the Province of Quebec already permits recognition and enforcement. Loosening the common law strictures on enforcement is arguably a small and necessary step in the development of the common law in this area. On the other hand, the matter is complex and difficult, as attested to by the fact that reform proposals have not produced legislative reform. Acceptance of the

possibility of recognizing and enforcing foreign non-monetary judgments is an incremental step. At the same time, care must be taken to ensure that recognition is confined to cases where it is appropriate and does not create undue problems for the legal system of the enforcing state or unfair results for the parties. Caution is in order.

87 The time has come to permit the enforcement of foreign non-money orders where the general principles of *Morguard* are met and other considerations do not render recognition and enforcement of the foreign judgment inadvisable or unjust." (Emphasis added)

207. Importantly, a number of offshore jurisdictions have followed the Supreme Court of Canada's ruling in *Pro Swing* and now permit the enforcement of non-monetary judgments. For instance, in both Jersey (*Brunei Investment Agency and Bandone Sdn BHd* v *Fidelis Nominees Ltd* [2008] JRC 152) (Exhibit 90) and the Cayman Islands (*Miller v Gianne and Redwood Hotel Investment Corp* [2007] CILR 18) (Exhibit 91), the traditional English common law rule that only monetary judgments can be enforced has been discarded, so that non-monetary judgments can also be enforced on a discretionary basis. The courts in both jurisdictions were inspired by developments in Canada and the decision in *Pro Swing Inc v Elta Gold Inc* (2006) SCC 52 (Exhibit 87).

208. The question that may arise in these six offshore jurisdictions is whether they might also follow the Canadian developments on the law of recognition of foreign judgments and recognise foreign judgments on the *Morguard* basis of a "real and substantial connection" between the claim and the foreign court. If so, this would further increase the prospects that a U.S. class action judgment would be recognised in those jurisdictions. In *Pro Swing*, the Supreme Court had said that the enforcement of non-monetary judgments would "represent an incremental change in the common law of Canada," building upon the decisions on recognition of foreign judgments in *Morguard* and in *Beals.* It is conceivable that

certain offshore jurisdictions will also adopt the prior Canadian authorities and incremental steps that culminated in the *Pro Swing* decision.

209. Importantly, Kawaley (pp 111-112) (Exhibit 86) suggests that this is indeed likely to be the case:

> "The following passage from a Canadian case perhaps best reflects the way in which the courts of the subject British-based systems will likely follow."

210. Kawaley goes on to quote a well known passage from the Supreme Court of Canada's ruling in *Morguard Investments Ltd v De Savoye* (1993) SCR 1077 (Exhibit 38):

> "The world has changed since... the rules [concerning the recognition of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the case of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal."

211. That passage, it may be noted, was cited with approval by the majority in *Pro Swing Inc v Elta Gold Inc* (2006) SCC 52, at [78] (Exhibit 87); and, in turn, *Pro Swing* formed the backbone of the reasoning of the Jersey and Cayman Islands' courts in *Brunei Investment Agency and Bandone Sdn BHd* v *Fidelis Nominees Ltd* (Exhibit 90) and in *Miller v Gianne and Redwood Hotel Investment Corp* [2007] CILR 18 (Exhibit 91).

212. Kawaley goes on (at p 112):

> "It would be surprising indeed if the decisions of the Privy Council (Isle of Man) [in *Pattni v Ali* [2006] UKPC 51, [2007] 2 A.C. 85, considered below], the Cayman Islands decision and the *Brunei* (Jersey) case were not viewed in all six territories as highly persuasive authority for the general proposition that in the modern commercial world that we currently occupy, it is unrealistic not to extend the common law principles of recognising and enforcing foreign judgments to non-monetary judgments in certain circumstances." (Exhibit 92).

213. This suggests that, at the very minimum, it is at least as likely that a U.S. class action judgment would be recognised in these offshore jurisdictions as in England. To the extent that such jurisdictions follow the Canadian developments on the recognition of foreign judgments, this would further increase the prospects that a much greater range of foreign judgments would be entitled to recognition in these jurisdictions. Some of these jurisdictions may, in due course, follow the decisions of the Canadian courts in *Currie v McDonald's* and in *Canada Post Corporation v. Lépine*, which have expressly sanctioned the recognition of class action judgments, provided that adequate procedural safeguards to protect absent class members exist.

Bermuda

214. Bermuda is a British Overseas Territory, for which the highest appellate court is the Privy Council.

215. The reciprocal enforcement regime contained in the Judgments (Reciprocal Enforcement) Act 1958 does not apply to judgments from the United States and the common law rules would be applicable. Generally speaking:

> "The principles of English private international law governing the recognition and enforcement of foreign judgments at common law have been followed and applied by the Bermuda courts" (Kawaley, p 126) (Exhibit 86).

216. Although it is necessary for a judgment creditor to start fresh proceedings in Bermuda on the basis of the US judgment, summary judgment will normally be issued (see the leading case of *Ellefsen v Ellefsen* Civil Jurisdiction 1993, No 202, 22 October 1993 (Ground J) (Exhibit 93); and *Muhr v Ardra* [1997] Bda LR 36) (Exhibit 94). In *Ellefsen,* Ground J enforced a judgment from the Superior Court of New Hampshire by summary judgment. In *Muhr,* Ground J stated that "I consider that the statement of [the law in *Ellefsen*] still represents the law of Bermuda".

217. Although Bermuda has hitherto adopted the English approach that only judgments for fixed sums of money are enforceable:

> "There may be scope for an argument in Bermuda, however, as to whether recent, innovative Canadian, Isle of Man, Cayman Islands and Jersey case law as to the enforcement of foreign judgments should be followed and applied" (Kawaley, pp 125-6) (Exhibit 86).

218. Hence, in general terms, the English common law rules are equally applicable in Bermuda; but there is scope for arguing that the Canadian case law would influence the future shape of Bermuda law on the enforcement of foreign judgments. For the reasons set out above, it is possible that, if the Bermuda courts follow Canadian developments on the enforcement of foreign judgments, they will also follow Canadian developments on the recognition of foreign judgments. If so, this would further increase the prospects of recognition of a foreign judgment in Bermuda.

219. Indeed, Kawaley states:

> "It appears, however, as if the commercial judges currently sitting in the Supreme Court are flexible, commercial, and internationalist in their approach. It is thought likely that they would be willing to develop the common law of Bermuda in order to meet the justice of any particular case, as appropriate" (at p 136) (Exhibit 86).

220. Hence, there is a possibility that the Bermuda courts might follow Canadian development in the future, or otherwise demonstrate flexibility than in the development of the law. In any event, in my opinion, the courts of Bermuda are at least as likely to recognise a US class action judgment as the courts of England.

British Virgin Islands

221. The British Virgin Islands is a British Overseas Territory, for which the highest appellate court is the Privy Council.

222. The statutory regimes of the Reciprocal Enforcement of Judgments Act (Cap 65) and the Foreign Judgments (Reciprocal Enforcement) Act 1964) are inapplicable to US judgments. Hence, the common law regime of recognition and enforcement are applicable. Generally, English common law principles are applied in the BVI.

223. A judgment can be enforced in the BVI by starting an action on the basis of the foreign judgment and applying for summary judgment under the Eastern Caribbean Supreme Court Rules 2000, Part 15 (see *PB Neumatic Partnership v Hobarthe & National Commercial Bank* Claim No 2003/ 99, St Vincent and the Grenadines) (Exhibit 95).

224. In *Credit Suisse v Hentsch Henchoz & Cie* Claim No BVIHCV2001/0077

(Exhibit 96), the court refused to allow Capital Suisse to commence a fresh action in the British Virgin Islands in respect of various subscription agreements where a similar claim had already been litigated in Utah and an adverse finding to Credit Suisse had been made. Rawlins J said (at [26]), that:

> "The result is that, on the basis of comity, this Court recognizes the Order of the Utah Court... The effect of this is that, on the doctrine of issue estoppels, Capital Suisse is estopped from litigating any issues concerning the validity of the subscription agreements... The Utah Order operates to bar Capital Suisse from further pursuing its Claim in this action." (Emphasis added)

Indeed, the reference in the *Credit Suisse* case to recognition on the grounds of comity may be indicative of a willingness flexibly to develop the law on the recognition of foreign judgments in the British Virgin Islands (see also the discussion of comity in relation to Jersey, below).

225. In the present case, the Fairfield Sentry Fund was established under BVI law. The subscription agreement nonetheless contained an undertaking to submit to the New York courts. Accordingly, the subscribers agreed that the New York courts were courts of competent jurisdiction. The same is true in respect of the Fairfield Sigma Fund, in respect of which subscribes agreed to submit to the jurisdiction of the New York courts..Furthermore, for the reasons explained above, I believe that the defendants have submitted to the New York courts. Hence, the New York courts are courts of competent jurisdiction in the eyes of the law of the BVI.

226. I am not aware of any judgments of the British Virgin Islands' courts specifically on the enforceability of a class action judgment. But the principles applicable in the British Virgin Islands would certainly be no less favourable than those in England; and, on this basis, similar conclusions to those expressed above apply.

Cayman Islands

227. The Cayman Islands is a British Overseas Territory, for which the highest appellate court is the Privy Council.

228. In the Cayman Islands, the statutory regimes for enforcement of foreign judgments are found in the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) and the Judgments and Awards (Reciprocal Enforcement) Act 1923 of Jamaica (which continues to apply even though the Cayman Islands are no longer a dependency of Jamaica). However, these does not apply to judgments from the United States and hence the common law rules of recognition and enforcement would apply.

229. An action on the judgment would be commenced by writ. Summary judgment may be sought under the Grand Court Rules, Order 14. Furthermore,

> "The potential defences against enforcement of a foreign judgment at common law in the Cayman Islands are limited and therefore summary judgment will normally be granted thereby providing a swift and economic means of enforcing the foreign judgment in the Cayman Islands." (Kawaley, p 160) (Exhibit 86).

230. The English common law rules for determining whether a foreign court was one of competent jurisdiction are equally applicable in the Cayman Islands- see *Banco Mercantil Del Norte SA (Grupo Financiero Banorte) v Cabal Peniche* [2003] CILR 343, Grand Court (Exhibit 97).

231. Crucially, however, (as explained above) the Cayman Islands courts have departed from English law recently to allow judgments other than for fixed monetary sums to be enforced. In *Bandone v Sol Properties Ltd* (Grand Court,

May 2008, unreported) (Exhibit 98), the Grand Court in stated that:

> "The ability to enforce directly foreign judgments and orders made in personam is no longer confined in the Cayman Islands to judgments for a debt or definite sum of money."

232. Smellie CJ in *Gianne and Redwood Hotel Investment Corp* [2007] CILR 18 (Exhibit 91) relied upon the decision of the Privy Council in *Pattni v Ali* [2006] UKPC 51 (Isle of Man), [2007] 2 AC 85 (discussed in relation to the Isle of Man below), as well as the Supreme Court of Canada's decision in *Pro Swing v Elta Golf* [2006] SCR 612 (SCC), to reach that conclusion that the restrictive shackles of the English rules on enforcement should be cast off and non-monetary judgments should be capable of enforcement in the Cayman Islands. Since the *Pro Swing* judgment was, according to the Supreme Court of Canada, itself "an incremental change in the common law of Canada", then it is conceivable that the Cayman Islands will also adopt the prior Canadian rulings in *Morguard* and in *Beals,* which extend the recognition of foreign judgments to those from a court of real and substantial connection.

233. Hence, the rules on recognition and enforcement of judgments in the Cayman Islands are certainly no less favourable than the English common law rules. I am not aware of relevant authority specifically on the enforceability of class action judgments. However, the willingness of the court to follow the Canadian lead in *Gianne and Redwood* and to enforce non-monetary judgments may yet lead to a willingness also to follow the *Morguard* line of reasoning and to recognise judgments which come from a state of real and substantial connection to the matter in hand, in addition to judgments traditionally recognised under common law principles.

Isle of Man

234. The statutory regime in the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 is inapplicable to judgments from the United States and, instead, the common law rules would need to be invoked. Those rules are essentially the same as the English common law rules.

235. The rules on the enforcement of foreign judgments were extended to a non-monetary judgment in *Pattni v Ali* [2006] UKPC 51[2007] 2 A.C. 85 (Exhibit 92). The Privy Council, on an appeal from the Isle of Man, held that the courts of the Isle of Man could recognise and enforce a foreign judgment directing the defendant to transfer shares in an Isle of Man company. They ruled that the judgment was *in personam* since it did not seek to transfer title in shares but imposed *in personam* obligations on the defendant to do so. The judgment could be enforced even though the judgment did not impose liability to pay a sum of money but was an order for specific performance.

236. Again, I believe that the grounds for recognition and enforcement of judgments of a United States class action judgment are at least as favourable as those applied in England.

Jersey

237. Jersey is a British Crown Dependency, for which the highest appellate court is the Privy Council.

238. The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 is inapplicable to judgments from the United States. Instead, the common law rules apply.

239. It has been noted that:

> "Whilst English judicial authority is not binding on the Royal Court, Jersey has, generally, in matters touching the conflict of laws, followed the

position under English common law" (Kawaley, p 200) (Exhibit 86).

240. However, in *IMK Family Trust* [2008] JRC 136 (Exhibit 99), the court suggested *obiter* that Jersey law is more flexible than the English common law. It noted (at [39]) that:

> "If we have correctly understood the position under English law, it may be that Jersey law has gone somewhat further."

> (See also *Lane v Lane* 1985–86 JLR 48 (Exhibit 100), *Compass Trustees Ltd. v. McBarnett*, 2002 JLR 321(Exhibit 101); *Re Fountain Trust* 2005 JLR 359 (Exhibit 102); *re A Trust* [2006] JRC 020A (Exhibit 103); *Re B* 2006 JLR 562 (Exhibit 104); *Re H Trust*, 2006 JLR 280 (Exhibit 105) and *Re Turino Consolidated Ltd Retirement Trust*, 2008 JLR N 27 (Exhibit 106)).

241. In *IMK*, the Deputy Bailiff considered *Lane v Lane* as authority for the proposition that the court had the discretion to enforce non-monetary judgments, though he did not need to decide the point. In *Brunei Investment Agency and Bandone Sdn BHd v Fidelis* [2008] JRC 152 (considered by Birt "Trusts and Divorce Courts- An Offshore Perspective" (2009) 13 Jersey and Guernsey Law Review 1) (Exhibit 107), the Royal Court held that this was indeed the position in Jersey law. Importantly, however, the court's observations were not confined to the enforcement of non-monetary judgments. They considered this to be an example of a wider principle that required a more open internationalist perspective:

> "28 According to *Dicey* [*Dicey, Morris and Collins, The Conflict of Laws*], the restriction… on the enforcement of non-money judgments is derived from the case of *Sadler* v. *Robins* [(1808), 1 Camp. 253; 107 E.R. 948 (Exhibit 108)] some two centuries ago… The world has changed

considerably since then and the restriction has been the subject of reappraisal by the Canadian and Cayman courts. In *Pro Swing Inc.* v. *Elta Golf Inc.* ([2006] S.C.R. 612; 2006 SCC 52), the Supreme Court of Canada held that there was a compelling case for adapting the common law rule that prevented the enforcement of foreign non-money judgments. Quoting from the majority judgment (2006 SCC 52, at para. 1):

> 'Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalisation of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously.'

The court recognized that departing from the fixed sum component of the traditional common law rule would open the door to equitable orders such as injunctions which are crucial to effective modern-day remedies (*ibid.*, at paras 14–15)."

242. Crucially, the court also cited with approval the Supreme Court of Canada's decision in *Morguard v De Savoye,* and regarded both *Morguard* and the later judgment in *Pro Swing* as illustrations of a wider desire to recognise and enforce foreign judgments:

> "30 Prince Jefri submitted that the decision in *Pro Swing* should itself be viewed with caution because in Canada comity is treated as a basis for the enforcement and recognition of judgments, whereas it has been explicitly

rejected as such by the courts of Jersey and England. It cites the Canadian case of *Morguard Invs. Ltd.* v. *De Savoye* as authority for that proposition. *Morguard* was concerned with the recognition and enforcement of judgments within the provinces of Canada. It is clear from the judgment ([1990] 3 S.C.R. at 1091) that the Canadian courts have until recent years unanimously accepted English authority when dealing with the recognition of foreign judgments, which was inevitable until 1949, when appeals to the Privy Council were abolished. It pointed out that those rules were developed in 19th-century England and flew in the face of the obvious intentions of the Canadian constitution to create a single country where there is a strong need for the enforcement throughout the country of judgments given in one province. In the view of the majority judgment in *Pro Swing*, *Morguard* led the way to developing common law to better serve the interests of all litigants, foreign and domestic, and it quoted from the following passage in *Morguard* (*ibid.*, at 1098):

> The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

31 It seems to us that the Canadian court was not treating comity as a basis for the enforcement and recognition of foreign judgments but as a tool for adapting or reshaping the common law rule (see *Dicey*, [*Dicey, Morris and*

Collins], para. 1–011, at 7).” (Emphasis added)

243. The Royal Court went on to cite with approval the decision of the Privy Council in *Pattni v Ali* and the Cayman Islands decision in *Miller v Gianne and Redwood Hotel Investment Corp* [2007] CILR 18.

> “In effect, what is said is that the world is now a smaller place- a community.” (Kawaley, p 201)

244. In such circumstances, it can be said that the Jersey courts are clearly at least as likely to recognise and enforce a US class action judgment as the English courts. To the extent that Jersey courts can invoke the doctrine of comity “as a tool for adapting or reshaping the common law rule” and are not bound by the limits of the English common law rules of recognition of foreign judgments, then the prospects of a US class action judgment being recognised in Jersey may increase further.

Guernsey

245. Guernsey is a British Crown Dependency, for which the highest court of appeal is the Privy Council.

246. The statutory regime of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, as amended, is inapplicable to judgments of US court. Instead, the common law would apply. This “draws heavily upon English precedent” (Kawaley, p 182) (Exhibit 86). The grounds for recognition of foreign judgments are the same as in England and it is my view that the question of whether a foreign judgment would be recognised and enforced would be answered in a very similar manner.

247. It remains to be seen whether Guernsey will follow the lead of its fellow

Channel Island, Jersey, in its willingness to enforce non-monetary judgments. On any view, however, it is at least as likely that a U.S. class action judgment would be recognised and in enforced in Guernsey as in England.

Other Offshore Jurisdictions

Bahamas

248. The Bahamas is a Commonwealth jurisdiction, for which the highest appellate court is the Privy Council. The law of the Bahamas is based on English common law. So, for instance, in *Commercial Innovation Bank Alfa Bank v Victor Kozeny A.K.A. Viktor Kozeny* [2002] UKPC 66 (Exhibit 109), the Privy Council, on appeal from the Bahamas, considered the enforceability of a Russian default judgment and the question of whether summary judgment should be granted in the Bahamas in respect of that judgment where allegations of fraud and breach of natural justice was made. The Privy Council applied English common law principles and the relevant Rule in *Dicey and Morris, The Conflict of Laws* to these two defences. It went on to hold that the defences were not made out and that summary judgment should be awarded in respect of the Russian judgment.

249. In my view, the courts of the Bahamas are at least as likely to recognise and enforce a US class action judgment as the courts of England.

Cook Islands

250. The Cook Islands is a Commonwealth jurisdiction, for which the highest appellate court is the Privy Council. I would expect the courts in the Cook Islands to apply similar principles to those applied at common law in England. So, for instance, in *United States v A Ltd* (2001-02) 4 I.T.E.L.R. 797 (Exhibit 110), the High Court of the Cook Islands applied English law principles concerning the prohibition on enforcing foreign penal laws; and relied upon the decision of the

House of Lords in *Attorney General of New Zealand v Ortiz* [1984] A.C. 1 (Exhibit 111); as well as the decision of the High Court of Australia in *Attorney General v Heinemann Publishers Australia Pty Ltd* [1989] 2 F.S.R. 631 (Exhibit 112).

251. Again, in my view, the courts of the Cook Islands are at least as likely to recognise and enforce a US class action judgment as the courts of England.

Antigua and Barbuda

252. Antigua and Barbuda is a Commonwealth jurisdiction. Antigua and Barbuda are Member States of the Eastern Caribbean Supreme Court; though they still refer appeals to the Privy Council. The Eastern Caribbean Supreme Court Civil Procedure Rules 2000, Rule 72 lays down procedures for the enforcement of foreign judgments.

253. I would anticipate that similar principles for the recognition of foreign judgments would be applied as in England. For instance, in a recent case, the court applied English common law principles of issue estoppel in relation to a foreign judgment: see *Re Stanford International Bank Ltd (in Liquidation)* (Eastern Caribbean Supreme Court- judgment of 8 June 2010) (Exhibit 113).

254. Again, in my view, Antigua and Barbuda are at least as likely to recognise and enforce a US class action judgment as the courts of England.

Barbados

Barbados is a Commonwealth state. As with the other offshore jurisdictions which I have considered, I would anticipate that a US class action judgment would be at least as likely to be recognised and enforced in Barbados as in England.

Conclusion on Other Common Law Jurisdictions

255. For all these reasons, it is my view that the prospects of recognition of a US class action judgment in the Other Common Law Jurisdictions which I have considered are at least as high as in England. Indeed, it is possible that some jurisdictions will recognise, or will develop their law to recognise, a wider range of judgments than the English common law.

256. Equally, I consider that it is impractical and undesirable for absent class members to commence separate actions in the Other Common Law Jurisdictions. As well as needing to fund such litigation, the would-be plaintiffs would need to establish the jurisdiction of the courts, and might need to enforce any resulting judgment overseas. Nor will they benefit from the application of US Securities Law. The defendants have submitted to the New York courts in the eyes of the Common Law Jurisdictions. In all the circumstances, it is my opinion that a US class action provides by far the best means of redress for absent class members.

I. CONCLUSION

257. I therefore conclude that one cannot be certain on the existing state of English law whether a judgment in a U.S. class action judgment would be recognised and enforced in England in respect of absent plaintiffs who did not opt out of the class action. In my view, there is a good case that such a judgment would be recognised and enforcement in England. The authorities in English law have been developed with regard to jurisdictional competence over a defendant and not over a plaintiff. Even if an English court were to develop rules of jurisdictional competence for class action plaintiff, it could well conclude that there is privity of interest between the class action members, so that they are all bound by the foreign judgment. In my opinion, a U.S. class action judgment would also not be held to be contrary to English standards of natural justice or public policy.

258. Importantly, however, there is an additional element to the facts of the present case which strengthens the prospect of recognition. The subscription agreements for the Fairfield Sentry Fund and the Fairfield Sigma Fund state that subscribers agree that any proceeding with respect to this Agreement and the Fund may be brought in New York and irrevocably submit to the jurisdiction of the New York courts. In such circumstances, the subscribers have clearly accepted the New York courts to be courts of competent jurisdiction. The binding force of that agreement will be upheld in England and the Other Common Law Jurisdictions.

259. I also note that English law permits representative actions and Group Litigation Orders. The existence of these multi-party procedures adds further support to the view that recognition of a US class action would not amount to a denial of natural justice or be contrary to public policy. But, importantly, English law does not have a U.S. style class action properly so-called and hence does not afford the same scope for the bringing of a composite action on an opt-out basis on behalf of parties who have similar interests.

260. There are other potential difficulties for an absent class member that sought to litigate in the English courts. The would-be plaintiff would have to establish that the courts had jurisdiction; and, even then, would need to enforce any resulting judgment overseas, insofar as the defendants do not have assets in England. They also face exposure to very substantial costs should they be unsuccessful in their action. They will also not obtain the benefit of US Securities Law. In my view, it would be very difficult in a practical sense for the proposed class action members to bring individual actions in England.

261. In my opinion, the absent class members would also face great practical difficulties in bringing a separate action in the Other Common Law Jurisdictions which I have considered.

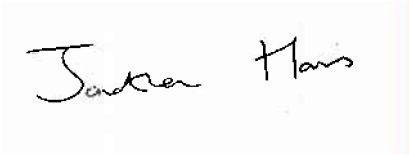
262. I believe that similar principles to the English common law rules on recognition

of foreign judgment will also be applied in the Other Common Law Jurisdictions that I have considered. Such courts will recognise that, in agreeing to submit to the New York courts, the subscribers have accepted that the New York courts are courts of competent jurisdiction.

263. Indeed, I have explained that some of the Other Common Law Jurisdictions (including the Cayman Islands and Jersey) have been inspired by developments in Canada to adopt more liberal rules which permit the enforcement of non-monetary judgments. It is conceivable that some of these jurisdictions will also extend their common law rules to recognise foreign judgments in a wider range of circumstances. Moreover, some jurisdictions already have an opt-out class action in their domestic law, or are considering adopting one. Such jurisdictions may be inherently unlikely to consider that the recognition and enforcement of a U.S. class action judgment in respect of class members who did not opt out of the class offends their standards of natural justice or public policy. In any event, I believe that the prospects that a U.S. class action will be recognised are at least as strong in all the other jurisdictions that I have considered as in England. I also consider that a US class action clearly provides far better prospects for absent class members to recover their losses than an action in another

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of February 2011, in London, England.



Professor Jonathan Harris