EXHIBIT 109

Privy Council Appeal No. 5 of 2002

Commercial Innovation Bank Alfa Bank *Appellant*

v.

Victor Kozeny a.k.a. Viktor Kozeny *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 11th December 2002

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Millett
Lord Rodger of Earlsferry

*[Delivered by **Lord Steyn**]*

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1. The question is whether a default judgment, which was entered on 30 April 1999 by the Meshansky Inter-Municipal Court of Moscow against the respondent ("Mr Kozeny") in favour of the appellant ("Alfa Bank"), is enforceable in the Commonwealth of the Bahamas. In the Bahamian courts the issue arose whether the Alfa Bank was entitled to summary judgment against Mr Kozeny on the Russian judgment. The trial judge thought the answer was clearly Yes and granted summary judgment. The Court of Appeal thought differently, reversed the decision of the trial judge and remitted the matter for a further hearing at first instance. By leave the Alfa Bank now appeals to the Privy Council. Exceptional as it is for the Privy Council to consider such an interlocutory issue, the fact is that the matter is now before the Board and their Lordships must examine it.

2. In outline the chronology is as follows. By a Credit Facility Agreement dated 2 October 1997 the Alfa Bank provided Mr Kozeny with a credit facility in the sum of US$50 million at an interest rate of not less than 18 per cent per annum. The stipulated date for repayment was 30 December 1997. The Agreement was governed by Russian law and provided that "the Parties shall settle ... disputes in Meshansky Inter-Municipal Court of Moscow". A Contract of Guarantee dated 2 October 1997 was entered into between Alfa Bank, Mr Kozeny and Audia Investments Limited, the latter guaranteeing the obligations of Mr Kozeny. Audia Investments Limited ("Audia") was a company incorporated in the Virgin Islands. The due performance of Audia was secured by a further written agreement.

3. On 14 September 1998 Alfa Bank made a demand against Mr Kozeny for repayment of sums advanced under the Credit Facility Agreement. On 28 September 1998 a demand for repayment was made under the Contract of Guarantee. No payment was received by the Alfa Bank.

4. On 26 November 1998 Alfa Bank brought a claim against Mr Kozeny to recover the principal sum of US$5,784,261.80 and interest of US$994,893.03 (totalling US$6,779,154.83) owing under the credit facility in the agreed Moscow court. The claim was served in late January or early February 1999 upon Mr Kozeny by sending a copy of the proceedings in the post to Usteristrasse 14, CH-8021, Zurich, Switzerland, the address given in the Credit Facility Agreement. This was the address of Von Meiss Blum & Partners, the Swiss lawyers acting for Mr Kozeny. By a letter dated 15 February 1999 to the Moscow Court the Swiss lawyers stated that they could not confirm that notice of the proceedings had been or could be communicated to Mr Kozeny.

5. On 30 April 1999 the Moscow Court heard the proceedings. Mr Kozeny did not appear at the hearing. The Moscow Court held that Mr Kozeny had been duly notified of the date of the hearing and that he had failed to submit his objections about the merits of the claim. The Court entered judgment in default against Mr Kozeny in favour of the Alfa Bank for US$6,779,154.83 and Court fees and duty in the amount of Roubles 1,776,477 (US$67,520.98).

6. Under Russian law Mr Kozeny had the opportunity to appeal against the judgment within 10 days and as a party not present at court he had the right to file a petition for review of the judgment

within 15 days. Mr Kozeny decided not to lodge an appeal or petition for review.

7. Alfa Bank then took proceedings to enforce the Russian judgment in The Bahamas where Mr Kozeny resides. On 15 November 1999 Alfa Bank issued a writ of summons. Mr Kozeny entered an appearance. On 24 January 2000 Alfa Bank applied for summary judgment pursuant to Order 14, Rule 1 of the Rules of the Supreme Court 1978.

8. When the application for summary judgment came before the trial judge, there were four affidavits before him, namely a formal affidavit exhibiting the Russian judgment, a first affidavit of Gerald O'Mahoney (solicitor for the appellant), which described the background, an affidavit by Mr Kozeny in opposition to the summary judgment application, and an affidavit in reply by Mr O'Mahoney. Numerous exhibits were attached to the affidavits.

9. Before the judge the application for summary judgment was resisted on a number of grounds which have since been abandoned. The principal ground, which has survived, was that Alfa Bank obtained the Russian judgment fraudulently in that they had dishonestly withheld a material document. A Letter of Understanding executed on the same date as the Credit Facility Agreement provided that Audia "takes over the position of the borrower as of finalisation of this registration process" for the opening of a bank account for Audia in Russia. It was alleged that these requirements had been fulfilled by 22 December 1997. Secondly, it was argued that Alfa Bank could and should have arranged for personal service of the Russian proceedings on Mr Kozeny. Thirdly, Mr Kozeny applied for an adjournment to prepare evidence of Swiss law about the effect of the Letter of Understanding.

10. The judge observed about the principal ground:

> "Clutching at straws, the defendant falls back on the device of asserting that he was not really the borrower, Audia Investments Limited having taken over as borrower; the plaintiff knew this and therefore the plaintiff intentionally misled the Moscow court. In my view such assertion cannot be regarded as sustainable in the real world ..."

About the second ground he said:

> "I cannot believe that he did not know of the proceedings, and, in any event, due service occurred under Russian procedural law, with service on the defendant at the address (given in the Agreement) of his Swiss lawyers."

He rejected the application of Mr Kozeny for an adjournment to file evidence of Swiss law, saying no further affidavit was called for. The judge gave judgment in the sum asked for and ordered interest to be paid.

11. Mr Kozeny appealed to the Court of Appeal. By a judgment given on 7 February 2001 the Court of Appeal allowed the appeal and remitted the matter for a fresh hearing. The Court of Appeal did not analyse the issues and the evidence. The thrust of the Court of Appeal's reasoning on the principal ground was as follows:

> "Whatever may have happened in the Russian proceedings, the appellant was certainly entitled to raise this issue of fraud in these proceedings and to assert facts based on Swiss law that the letter of understanding did have the effect that he was contending for and was an answer to the claim in this jurisdiction."

The Court of Appeal did not address the other arguments which were advanced by Mr Kozeny before the judge.

12. On appeal to the Privy Council it was common ground that the Russian judgment was *prima facie* enforceable in The Bahamas. The principal question was whether the judgment is impeachable for fraud: *Dicey and Morris, The Confict of Laws,* 13th ed. 2000 Vol 1, Rule 43, at 518. Mr Kozeny's case was that the judgment was impeachable for fraud not by the Moscow court but on the part of Alfa Bank. Bearing in mind that the Bahamian proceedings were for summary judgment, the question is whether there was a triable issue whether fraud had been committed in the obtaining of the judgment.

13. Counsel for Mr Kozeny submitted that Alfa Bank dishonestly concealed the Letter of Understanding from the Moscow Court. He said it amounted to a fraud on the Moscow Court since it amounted to a misrepresentation that it was Mr Kozeny instead of Audia who was liable to be sued as borrower for repayment of the loan. He said that Audia had in fact replaced Mr Kozeny as the borrower under the Credit Facility transaction with the consent and knowledge of Alfa Bank. Counsel treated as his trump card a letter

dated 22 December 1997 from Mr Kozeny's Swiss lawyers to Alfa Bank. It read as follows:

> "In captioned matter I have been informed by our correspondent attorney Mr Igor Kondrashov that the company Audia Investments Limited is now registered in Moscow and has opened an I-account and an USD-account. Therefore and as agreed when signing the Credit Facility agreement, please arrange for the change of debtor of the Credit Facility agreement from Mr Viktor Kozeny to Audia Investments Limited, the company which gave you the securities as collateral until today. It might be a good idea to arrange for this now when we extend the maturity date. You have told me on the phone a few days ago that you will compile the various drawings and will draft a single Credit Facility Agreement for the whole amount drawn until to date."

He stated that this letter shows that Audia had replaced Mr Kozeny as borrower by 22 December 1997.

14. This argument must now be put in context. Audia was not a party to the Credit Facility Agreement. Audia was also not a party to the Letter of Understanding. It can be accepted that it was the intention of Alfa Bank and Mr Kozeny that Audia would in due course become the borrower instead of Mr Kozeny. The question is whether it happened. The only way in which Mr Kozeny could have been "replaced" (to use counsel's terminology) by Audia was by a subsequent tripartite agreement between Alfa Bank, Mr Kozeny and Audia. No written agreement to this effect exists. There is also no evidence of an oral agreement of such a nature. The letter of 22 December 1997 on which counsel placed such heavy reliance was not written on behalf of Audia. Moreover, it does not record an impression that Mr Kozeny had already been replaced as borrower: it contemplates future action.

15. It is argued that such replacement had taken place by 22 December 1997. Yet on 29 December two agreements were executed which are entirely inconsistent with that case. The first was an extension of the Credit Facility Agreement until 30 June 1998. Mr Kozeny continued to be the borrower. Secondly, there was also an extension of the Guarantee of Audia. Moreover, a letter dated 25 September 1998 from the Swiss lawyers of Mr Kozeny to Alfa Bank revealed that there were negotiations to "prolong" the credit line in favour of Mr Kozeny until the end of

1998. All this is entirely inconsistent with the suggestion that Mr Kozeny had been replaced as borrower by 22 December 1997.

16. Against this background one poses the question: is there anything whatever to cast doubt on the honesty of Alfa Banks' statement that for the purposes of the Russian proceedings they regarded the Letter of Understanding as irrelevant? The answer must be No. The Court of Appeal was in error in concluding that there was a triable issue.

17. The second argument on behalf of Mr Kozeny was based on the undoubted principle that a foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice: *Dicey and Morris, op cit,* Rule 45, at 527. Counsel argued that the defendants should have arranged for Mr Kozeny to be personally served. This defence could only avail Mr Kozeny if there was an injustice in that judgment went against him in proceedings of which he had no knowledge. Mr Kozeny and his Swiss lawyers have carefully avoided saying that he was unaware of the Russian proceedings. Like the trial judge their Lordships are satisfied that Mr Kozeny was in fact informed of the proceedings by his Swiss lawyers. This argument therefore fails.

18. That leaves the last argument advanced by counsel for Mr Kozeny. He submitted that the trial judge erred in refusing the application for an adjournment to file evidence of Swiss law. He concedes, however, that only a new contractual agreement in the nature of a novation could have relieved Mr Kozeny of his personal liability as a borrower. The argument that the conclusion of such an agreement by 22 December 1997 can arguably be inferred has already been rejected. In these circumstances the judge was right in concluding that there was no need for a further affidavit on Swiss law. This argument must also be rejected.

19. Their Lordships are satisfied that the Court of Appeal erred in allowing the appeal from the decision of the trial judge. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal of 7 February 2001 set aside and the order of the trial judge of 26 July 2000 reinstated. The respondent must pay the appellants' costs in the Court of Appeal and before their Lordships' Board.

EXHIBIT 110

INTERNATIONAL TRUST AND ESTATE LAW REPORTS

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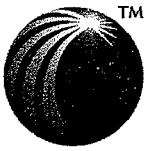

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United States of America v A Ltd

Plaint no 57/1999

HIGH COURT OF THE COOK ISLANDS (CIVIL DIVISION), RAROTONGA
GREIG CJ
JUDGMENT DATE: 4 DECEMBER 2001

Conflict of laws – Cook Islands – Public laws rule – Foreign statute allowing recovery, restitution and reparation at instance of public agency potentially in excess of unjust enrichment – Agency obtains judgment in US, then sues for restitution of funds in Cooks Islands trust – Whether 'public law' and unenforceable in foreign jurisdiction – Federal Trade Commission Act 1914 (US), s 45(a)(2)

The Federal Trade Commission (FTC) obtained judgment against a business in the US on the ground that it had defrauded numerous customers. The US court made an order for the business to pay over $US 20m to the FTC. This was to be used primarily for providing compensation to defrauded customers. Customers were not necessarily to be deprived of any other avenue of redress, criminal or civil. In the event that reparation proved impractical or the amount awarded proved to exceed what was required for reparation, the balance was to be paid into the US Treasury as an 'equitable discourage remedy'. The FTC sued in the Cook Islands for some $US 2·25m held in a trust fund to be paid to the FTC as money acquired fraudulently and disposed of to the trust. The trustee objected that this amounted to the enforcement of a public law of a foreign state.

HELD:

The Federal Trade Commission Act 1914 (US) was a regulatory provision to prevent and control trading that was fraudulent or otherwise illegal. Wide powers were given to the FTC to enforce those regulations including by obtaining judgments for sums in excess of any appropriate redress and for the payment of funds in whole or in part into the US Treasury. It was the substance of the interest sought to be enforced which determined whether this was a public law rather than the form of action. The action taken by the FTC was taken to enforce the law and was at least in part penal. It was also a public law sought to be enforced by a foreign state for regulatory purposes and it was not to be enforced in the Cook Islands (see p 802 *e* to 803 *e*, post). *Attorney-General v Ortiz* [1984] AC 1 and *Attorney-General v Heinemann Publishers* (1988) 165 CLR 30 applied.

EDITORS' NOTE

This is an important decision on the rule that one state will not enforce the penal (including revenue) laws of another country. It is a useful review of what else besides criminal laws is included in the rule. Here a regulatory matter concerning fraudulent trading was held to fall within this rule.

Cases referred to in judgment

A-G for the United Kingdom v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86, 75 ALR 353, NSW CA; *affd* (1988) 165 CLR 30, 78 ALR 449, Aus HC.

A-G for the United Kingdom v Wellington Newspapers Ltd [1988] 1 NZLR 129, NZ HC and CA.

A-G of New Zealand v Ortiz [1984] AC 1, [1982] 3 All ER 432, CA; *affd* [1984] AC 1, [1983] 2 All ER 93, HL.

Huntington v Attrill [1893] AC 150, PC.

Moore v Mitchell (1929) 30 F (2d) 600, US Ct of Apps (2nd Cir).

Wisconsin v Pelican Insurance Co (1888) 127 US 265, US SC.

Counsel:
A M Manarangi for the US government.
B Gibson for the trust company.

GREIG CJ.

This is an application to strike out the plaintiff's action. It is made pursuant to Rule 131 of the Code of Civil Procedure of the High Court 1981 on the grounds that the proceedings disclose no reasonable cause of action. The principal foundation for this application is based on conflict of laws and private international law principles and in particular how the principle or rule, which is stated as follows (see Dicey and Morris *Conflict of Laws* (12th edn, 1993) Rule 3 p 97), is applied:

> 'English courts have no jurisdiction to entertain an action:
> (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or
> (2) founded upon an act of state.'

A secondary ground is based on s 13D of the International Trust Act 1984.

By agreement of counsel this matter was dealt with by submissions, the last submission being filed in the court on 24 October 2001. The defendant is the trustee of a trust settled by two American citizens (the settlors) by a deed of trust dated 10 July 1995. By its amended statement of claim dated 29 June 2001, the plaintiff makes its claim on behalf of the US Federal Trade Commission (FTC) established in 1914 under the provisions of the Federal Trade Commission Act. It is alleged that the FTC enforces that Act which prohibits

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false, fraudulent and deceptive acts of or practices in commerce, and the Telemarketing Sales Rule. That rule prohibits deceptive or abusive telemarketing acts or practices in commerce. It is alleged that the FTC may initiate Federal or District Court proceedings to enjoin violations of the Act or the rule and to secure equitable relief as is appropriate in seeking redress and restitution.

On 23 April 1998 the FTC commenced an action in the US District Court in Nevada against the settlors and others for contravention of the Act and the rule. It was alleged that since May 1997 the settlors and others had made false, fraudulent and misleading representations in a telemarketing scheme in which media units were sold allegedly to provide an opportunity for receipt of profits generated from supposed and potential sales of some products to television commercials. The scheme as a whole is described as a Ponzi scheme, named after a Charles Ponzi of Boston who in 1920 offered promissory notes which depended on the trading of international postal reply coupons. Although the underlying marketing aspect of the scheme was unsustainable, and the receipt of money continued, it seems that some payments were made to investors out of the moneys received by new investors.

The plaintiff alleged against the settlors that they had received a 45% commission from each investment its telemarketers procured. The bank records indicated that some $US 9,278,417·75 was received by way of these commissions. It was thus calculated that the total sales for which the settlors were allegedly responsible amounted to $US 20,618,823. It was said that was a conservative estimate but the plaintiff sought a monetary judgment against the settlors and others concerned in that part of the scheme. Further, it is alleged that $US 2·25m was transferred to the settlors' trust in the Cook Islands on 2 March 2000. The District Court in Nevada entered a final order for judgment and permanent injunction against the settlors and other entities involved in that part of this Ponzi scheme (see *FTC v Affordable Media LLC* CV-98-00669-LDG (RLH) (17 June 1998, unreported)). That order was upheld in the United States Court of Appeals for the 9th Circuit (see *FTC v Affordable Media LLC* (1999) 2 ITELR 73, 179 F 3d 1228).

The final order for judgment and permanent injunction granted in the District Court in Nevada makes a number of findings and orders. The findings include the finding that the settlors among others had made false representations, and had engaged in deceptive acts or practices in violation of s 5(a) of the Federal Trade Commission Act and had violated provisions of the telemarketing rule.

The court found that it had power to issue injunctive and other relief against violations of the Federal Trade Commission Act, and in the exercise of its equitable jurisdiction to award redress and restitution to remedy the injured consumers, to order disgorgement of profits resulting from the defendants'

unlawful acts or practices and issue other ancillary equitable relief. The court entered a monetary judgment against the settlors and others for $US 20,618,623 with post-judgment interest 'for equitable monetary relief, including but not limited to consumer redress, and for paying any attendant expenses of administering any redress fund.' Any funds collected by the FTC were to be paid into a redress fund for potentially eligible consumers entitled to the fund. The order provided however as follows:

> 'If, however, the Commission, in its sole discretion, determines that redress is wholly or partially impractical any funds not so used shall be deposited into the United States Treasury as an equitable disgorgement remedy. The enjoined defendants shall have no right to contest the manner of distribution chosen by the Commission or its designated agent.'

There were then further provisions, order and injunctions for orders described as the turnover of assets and repatriation of funds overseas including in particular funds in the Cook Islands and various other injunctions and authorities to enforce compliance with the orders and the obtaining of the control over all the assets of the settlors and others.

The plaintiff in these proceedings in the Cook Islands seeks to enforce these orders made in the United States District Court and in particular that the defendant deliver up to the plaintiff 'for redress and restitution to the settlors' defrauded investors, custody, possession and control of the assets and moneys acquired fraudulently by the settlers [sic] and disposed of to the trust together with all accumulation thereto held in custody possession and control of the defendant'.

The Federal Trade Commission Act of 1914 which is titled 15 United States Code ss 41 to 51, established a commission of five commissioners appointed by the President by and with the advice and consent of the Senate. It was provided that not more than three of the commissioners were to be members of the same political party. Under s 45(a)(2) the FTC is empowered to prevent persons, partnerships or corporations except certain specified entities from using unfair methods or competition in or affecting commerce. The FTC was entitled to take proceedings if it appeared to the FTC that such a proceeding would be in the interest of the public. The jurisdiction of the courts in granting temporary restraining orders and other orders was on the basis of the interest of the public rather than on any stricter ground such as reasonable cause. This was noted in an earlier appeal on the grant of the preliminary injunction in the United States Court of Appeals for the 9th Circuit decision of June 15 1999 No 98-16378. This section places a lighter burden on the FTC than that imposed on private litigants by the traditional equity standard. The FTC need not show irreparable harm to obtain a preliminary injunction.

The defendant claims that in this case the enforcement of the judgment and of the law of the United States will amount to the enforcement directly or indirectly of a penal or other public law of a foreign state as described in rule 3 in *Dicey and Morris*. That is not a rule of statute but is, under the system adopted in that textbook, a principle which has been recognized over time in the courts of England, Australia and New Zealand. It is I think, a principle which applies equally in the Cook Islands. In *Dicey and Morris* (p 101) it is said:

> 'In *Huntington v Attrill* [1893] AC 150 at 156 the Privy Council defined penal to include not only crimes in the strict sense, but "all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or someone representing the public", and (adopting the test laid down by the United States Supreme Court [in *Wisconsin v Pelican Insurance Co* (1888) 127 US 265 at 292]) "all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."'

So in *Attorney-General of New Zealand v Ortiz* [1984] AC 1 at 34–35, [1982] 3 All ER 432 at 467 the statutory provisions in New Zealand for forfeiting historic articles illegally exported was held to be penal though not part of the Criminal code. The category of other public law referred to in the rule is described in *Dicey and Morris* (p 103):

> 'The expression "other public law" refers to all those rules (other than penal and revenue laws) which are enforced as an assertion of the authority of the central or local government.'

That part of the rule has been subject to discussion and criticism and there have been conflicting dicta in various courts in the Commonwealth. The existence of that subrule was accepted by Davison CJ in his judgment in the High Court in *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1981] 1 NZLR 129. In the New Zealand Court of Appeal the issue in the case was decided on the basis that a secret service agent's duty of secrecy arose from the relationship of employment and that the rule was not designated to meet the sort of problems that arises out of the international imperatives of secrecy. There is no rejection of the rule so far as it might apply to public laws. But the court refused to extend the rule to the particular circumstances. Cooke P who gave the leading judgment in the Court of Appeal referred ([1988] 1 NZLR 129 at 173–174), it appears with approval, to an article by Dr F A Mann entitled 'The International Enforcement of Public Rights' (1987) NY Univ Journal of International Law and Politics 604 in which

he writes 'the decisive question is whether the plaintiff asserts a claim that, by its nature, involves the assertion of a sovereign right'. Quoting Grotius, Dr Mann suggests that claims are capable of international enforcement, 'if they arise from acts that may be done not only by the King but also by anyone else.'

The application of the rule to public laws was clearly endorsed by Lord Denning MR in *Attorney-General of New Zealand v Ortiz*. The rule was also endorsed by Kirby P in *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 75 ALR 353 and by a majority in the High Court of Australia in *Her Majesty's Attorney-General in and for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 78 ALR 449.

The explanation of the rule is set out by Lord Denning MR in the *Ortiz* case [1984] AC 1 at 21, [1982] 3 All ER 432 at 457 as follows:

> 'Applied to our present problem a class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects whereever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.'

In the leading judgment in the High Court of Australia in *A-G v Heinemann* there is an extensive discussion as to the explanation of the principle as it applies to the enforcement of public laws. There is a quotation from Judge Learned Hand in *Moore v Mitchell* (1929) 30 F (2d) 600 at 604 (see (1988) 165 CLR 30 at 43, 78 ALR 449 at 457):

> '"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which will seriously embarrass its neighbour ... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."'

And later the judgment of the High Court goes on (see (1988) 165 CLR 30 at 46, 78 ALR 449 at 459):

> 'For the purposes of the principle of unenforceability under consideration the action is to be characterized by reference to the substance of the interest sought to be enforced, rather than the form of the action ... Thus, to

concentrate on the private law character of the causes of action or to grounds for relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operations of the British Security Service by enjoining disclosure of information relating to those operations and by discouraging revelations by others.'

I accept that those principles and observations and explanations apply here. The Federal Trade Commission Act is a regulatory provision to prevent and control fraudulent and other trading which is contrary to the Act and other Acts. Wide powers are given to the FTC and to the courts to enjoin conduct which is said to be contrary to the Act or Rules and to take steps for the enforcement of these regulations and preventative measures both personally and otherwise throughout the world. Power is given to give judgments in moneys which may exceed any appropriate redress and which in the end may in part or whole become part of the general public funds of the US Treasury.

The action taken here by the plaintiff is to enforce these regulatory rights and powers. They are or have a flavour of punishment and I conclude that these are, at least in part, penal provisions and fall within the relevant principle. It is also a public law which is sought to be enforced by the state or the sovereign alone for regulatory purposes and is one which ought not to be enforced here.

As I mentioned at the outset the defendant also claims the benefit of s 13D of the International Trust Act. However it did not make any claim other than that applied to the enforcement directly or indirectly of the penal or public laws of the foreign state. It is not therefore a ground which is separate or independent of the principal ground already dealt with.

In the result then there will be an order striking out the claim of the plaintiff. Costs will follow the event. I will receive submissions from the counsel as to the quantum.

Claim struck out.

Acknowledgment

The editors and publishers would like to express their thanks to Adrian Taylor, Asiaciti Trust Pacific Ltd, Level 2, BCI Building, Rarotonga, Cook Islands, tel 00 682 23387, for submitting this decision.

EXHIBIT 111

[1984] A.C. 1 [1983] 2 W.L.R. 809 [1983] 2 All E.R. 93 [1983] 2 Lloyd's Rep. 265 (1983) 133 N.L.J. 537 (1983) 127 S.J. 307 [1984] A.C. 1 [1983] 2 W.L.R. 809 [1983] 2 All E.R. 93 [1983] 2 Lloyd's Rep. 265 (1983) 133 N.L.J. 537 (1983) 127 S.J. 307
(Cite as: [1984] A.C. 1)

[1983] 2 W.L.R. 809

***1 Attorney-General of New Zealand Appellant v Ortiz and Others Respondents**

House of Lords

M.R. Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill, Lord Brandon of Oakbrook, Lord Brightman, Lord Denning, Ackner, and O'Connor

1983 March 7, 8, 9; April 211982 March 29, 30, 31; April 1, 2; May 21

Conflict of Laws—Jurisdiction—Forfeiture—Goods unlawfully exported from New Zealand—Provision that unlawfully exported goods "shall be forfeitde" to Crown—Whether forfeiture automatic—Historic Articles Act 1962 (No. 37 of 1962) s. 12

Section 12 (2) of the Historic Articles Act 1962 of New Zealand provided:

"An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913."***2** Section 5 (1)1 provided that it was unlawful for any person to remove an historic article from New Zealand, knowing it to be an historic article, without written permission. As from January 1, 1967, the Customs Act 1913 was replaced by the Customs Act 1966.

The plaintiff, suing on behalf of the Crown in right of the Government of New Zealand, brought an action alleging that a Maori carving that was found in New Zealand in about 1972 and was an "historic article" within the meaning of the Act of 1962, was removed from New Zealand with no certificate of permission as required by the Act by the third defendant, who knew that the carving was an historic article, and that the third defendant later sold the carving to the first defendant who in turn offered it for sale by auction by the second defendants in London. The plaintiff claimed that the Crown was the owner and entitled to possession of the carving, and he sought an injunction restraining the sale and an order for delivery up of the carving. A trial was ordered of two preliminary issues, namely, whether on the facts alleged the Crown was the owner and entitled to possession of the carving pursuant to the Historic Articles Act 1962 and the Customs Acts 1913 and 1966, and whether in any event the provisions of those Acts were unenforceable in England as being foreign penal, revenue and/or public laws. Staughton J., giving judgment for the plaintiff, held that the Customs Acts 1913 and 1966 provided for forfeiture of goods only when the goods were seized, but that section 12 (2) of the Act of 1962 was ambiguous, and that having regard to the purpose of that Act, namely to secure the enjoyment of historic articles for the people of New Zealand, forfeiture, and hence the passing of title to the Crown, under section 12 (2) occurred automatically when goods were exported or attempted to be exported illegally. On the second preliminary issue, he held that section 12 was enforceable in England. The Court of Appeal allowed an appeal by the first and third defendants on the ground that forfeiture under section 12 (2) was not automatic. The court also indicated, in relation to the second preliminary issue, that that section was unenforceable in England.

On appeal by the plaintiff, on the question raised by the first preliminary issue: -

dismissing the appeal, that on the true construction of section 12 of the Historic Articles Act 1962 and the relevant provisions of the Customs Act 1966, forfeiture under section 12 (2) of the Act of 1962 took effect only when the historic article was seized by the New Zealand customs or police, and not automatically immediately the article was exported;

and that since no seizure had taken place, the Crown was neither the owner nor entitled to possession of the carving (post, pp. 41C-F, 42D-E, 48D-E).*Per curiam.* No conclusion is expressed as to the correctness or otherwise of the Court of Appeal's opinions, which were obiter, on the second preliminary issue (post, pp. 46C-E).Decision of the Court of Appeal, post, p. 13E; [1982] 3 W.L.R. 570; [1982] 3 All E.R. 432 affirmed.

No cases are referred to in the opinion of Lord Brightman.***3**

The following cases were cited in argument in the House of Lords:

- Daganayasi v. Minister of Information [1980] 2 N.Z.L.R. 130.
- Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyd's Rep. 223, C.A..
- Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251; [1980] 3 W.L.R. 209; [1980] 2 All E.R. 696, H.L.(E.).
- Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1923] 2 K.B. 630, C.A.; [1925] A.C. 112, H.L.(E.).
- Smith v. McArthur [1904] A.C. 389, P.C..

The following cases are referred to in the judgments in the Court of Appeal.

- Annandale, The (1877) 2 P.D. 179; 2 P.D. 218, C.A.
- Apollon, The (1824) 9 Wheat. 362
- Attorney-General v. Parsons [1956] A.C. 421; [1956] 2 W.L.R. 153; [1956] 1 All E.R. 65,H.L.(E.).
- Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140.
- Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476; [1971] 2 W.L.R. 791; [1971] 2 All E.R. 98,C.A.
- Cable (Lord), decd., In re [1977] 1 W.L.R. 7; [1976] 3 All E.R. 417.
- Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064 H.L.(E.).
- Don Alonso v. Cornero (1611) Hob. 212; 2 Brownl. 29.
- Foster v. Driscoll [1929] 1 K.B. 470,C.A.
- Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251; [1980] 3 W.L.R. 209; [1980] 2 All E.R. 696, H.L.(E.).
- Huntington v. Attrill [1893] A.C. 150,P.C.
- India (Government of) v. Taylor [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.(E.).
- Isaack v. Clark (1615) 2 Bulst. 306.
- Italy (King of) v. Marquis Cosimo de Medici Tornaquinci (1918) 34 T.L.R. 623.
- Kahler v. Midland Bank Ltd. [1950] A.C. 24; [1949] 2 All E.R. 621, H.L.(E.).
- Lockyer v. Offley (1786) 1 T.R. 252
- Loucks v. Standard Oil Co. of New York (1918) 120 N.E. 198
- Paley Olga (Princess) v. Weisz [1929] 1 K.B. 718, C.A.
- Regazzoni v. K.C. Sethia (1944) Ltd. [1956] 2 Q.B. 490; [1956] 3 W.L.R. 79; [1956] 2 All E.R. 487, C.A.;

[1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286,H.L.(E.).

- Rex v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128, P.C.
- Skylark, The [1965] P. 474; [1965] 3 W.L.R. 759; [1965] 3 All E.R. 380

The following additional cases were cited in argument in the Court of Appeal:

- Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A..
- Austria (Emperor of) v. Day and Kossuth (1861) 3 De G.F. & J. 217; C.A..
- Folliott v. Ogden (1789) 1 Hy.B1. 123.
- Frankfurther v. W.L. Exner Ltd. [1947] Ch. 629.
- Hellenes (King of the) v. Brostrom (1923) 16 L1.L.Rep. 167.
- Jabbour (F. & K.) v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

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- Lepage v. San Paulo Coffee Estates Co. [1917] W.N. 216.
- Oppenheimer v. Cattermole [1976] A.C. 249; [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538, H.L.(E.).
- Schemmer v. Property Resources Lid. [1975] Ch. 273; [1974] 3 W.L.R. 406; [1974] 3 All E.R. 451.

INTERLOCUTORY APPEAL from Staughton J.

By writ dated June 26, 1978, as subsequently amended, the plaintiff, the Attorney-General of **New Zealand**, suing on behalf of Her Majesty the Queen in right of the Government of **New Zealand**, sought against the first defendant, George **Ortiz**, the second defendants, Sotheby Parke Bernet & Co., and the third defendant, Lance Entwistle, a declaration that a Maori carving as further particularised was the property of Her Majesty the Queen; against the first and second defendants, an order for the return and delivery up to the plaintiff of the carving and an injunction restraining those defendants from selling, exposing or offering for sale, disposing of or otherwise dealing with the carving; and against the third defendant, damages for conversion. By the first six paragraphs of his statement of claim as amended, the plaintiff alleged as follows:

"(1) The plaintiff brings this action on behalf of Her Majesty the Queen in right of the Government of New Zealand. Her Majesty the Queen is the owner and entitled to possession of a valuable Maori artefact being a series of five Maori carved wood totaro wood panels that formed the front of a food store carved in the Taranaki style. The said artefact is hereinafter referred to as 'the carving.' (2) The carving was found by one Manukonga in a swamp near Waitara in the province of Taranaki, New Zealand, in or about 1972. (3) In or about March 1973 the said Manukonga sold the carving to the third defendant, who was at all material times a dealer in primitive works of art. (4) At all times material hereto there was in force in New Zealand the Historic Articles Act 1962. The carving is an historic article within the meaning of the said Act. Accordingly by virtue of section 5 (1) of the said Act it was unlawful for any person to remove or to attempt to remove the carving from New Zealand, knowing it to be an historic article, otherwise than pursuant to the authority and in conformity with the terms and conditions of a written certificate of permission given by the Minister of Internal Affairs for New Zealand under the said Act. (5) On a date which the plaintiff is unable to specify precisely before discovery herein the carving was removed from New Zealand by or on behalf of the third defendant, who knew that the carving was an historic article within the meaning of the said Act and that the carving was being exported or attempted to be

exported. (6) No certificate of permission authorising the removal of the carving from New Zealand had been granted by the Minister of Internal Affairs. Accordingly, by virtue of section 12 of the said Act the carving became and was forfeited to Her Majesty."

On February 25, 1980, Master Warren ordered that the following questions be determined as preliminary issues:***5**

"(1) Whether on the facts alleged in paragraphs (1) to (6) inclusive of the statement of claim herein Her Majesty the Queen has become the owner and is entitled to possession of the carving as therein defined pursuant to the provisions of the Historic Articles Act 1962 and the Customs Acts 1913 and 1966; and (2) whether in any event the provisions of the said Acts are unenforceable in England as being foreign penal, revenue and/or public laws."

On appeal, Comyn J. set aside the order of the master, but on the first and third defendants' appeal, the Court of Appeal restored the master's order but varied it so that the first issue referred to the statement of claim "as amended." On the trial of the preliminary issues, Staughton J. [1982] Q.B. 349 answered the first issue "Yes" and the second issue "No," and gave judgment for the plaintiff accordingly. The first and third defendants appealed.

The grounds of appeal of the first defendant were (1) that, in relation to the first preliminary issue, the judge wrongly construed the phrase "shall be forfeited" in section 12 of the Historic Articles Act 1962 as meaning "shall be automatically forfeited" whereas on its true construction the phrase meant "shall be liable to be forfeited" and in consequence the first preliminary issue should have been answered in the negative; and (2), in relation to the second preliminary issue, that the judge wrongly held that section 12 was neither a foreign penal law nor a foreign revenue law nor a foreign public law whereas in truth the section was one, two or all three of such laws and hence unenforceable in England, and in consequence the second preliminary issue should have been answered in the affirmative.

The grounds of appeal of the third defendant were that (1), in relation to the first preliminary issue, (a) the judge wrongly construed the phrase "shall be forfeited" in section 2 of the Act of 1962 as meaning "shall be automatically forfeited," whereas on its true construction the phrase meant "shall be liable to be forfeited"; (b) the judge, having found that the phrase "shall be forfeited" where it occurred in the Customs Act 1913 and its successor the Customs Act 1966 did not provide for automatic forfeiture but provided only that goods should be liable to forfeiture in certain circumstances with the effect that title passed to the Crown only on seizure or later on condemnation, should not have found that the same phrase had a different meaning in section 12 of the Act of 1962 which expressly provided that the provisions of the Act of 1913 and/or 1966 should apply to historic articles; (c) the judge erred in placing any or excessive weight on the words "subject to the provisions of this Act" in section 12 (2) of the Act of 1962, in giving the phrase "shall be forfeited" a different meaning in that Act from its meaning in the Customs Acts, for there were no relevant provisions in the Act of 1962 to which the phrase was properly subject; and (d) the judge erred in applying the doctrine of purposive construction adumbrated in Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251 by reason that (i) there was no room for the application of the doctrine since the meaning of the phrase to be construed was clear, (ii) where, as in the instant case, the words being construed would have been effective whichever of the constructions contended for was adopted, the doctrine did not require the choice of the most severe construction, a***6** fortiori when such severe construction was out of accord with the relevant statutory framework, and (iii) the judge failed to attach any or sufficient weight to the evidence that it would not have been part of the purpose of the Act of 1962 to create uncertainty of title, which on the construction contended for by the plaintiff and found by the judge was bound to occur; and (2), in relation to the second preliminary

issue, (a) the judge wrongly held that section 12 was not a foreign penal, revenue or public law, whereas in truth it was one or other or all three and hence unenforceable in England; (b) the judge erred in holding that section 12 was not a penal law by (i) failing to give any or sufficient weight to the fact that the section made no provision whatsoever for the payment of compensation by the Crown to the owner of the chattel forfeited, (ii) holding by implication that it would follow from the fact that the purpose of the section was to preserve an historic article as the property of the people of New Zealand, that such a section was not a penal one, and (iii) failing to give any weight to the fact that whereas the said purpose would have been attained by the forfeiture of the chattel together with the payment of compensation, the effect of the section on the construction adopted by the judge would be to preserve the chattel for the people of New Zealand and to mulct its owner of its value (said by the plaintiff to amount to not less than£300,000 in the instant case); (c) the judge erred in applying the test of the characterisation of the English suit rather than the test of whether the enactment of the foreign state which the plaintiff sought to enforce was a penal, revenue or other public law; and (d) the judge erred in failing to hold that it was a principle of English law that the courts of England would not enforce the public laws of a foreign state, and that section 12 was such a public law.

By a respondent's notice the plaintiff sought to contend on the appeal that the judge's order should be affirmed on the additional grounds that (1), in relation to the first preliminary issue, (a) the judge failed to attach any or any sufficient weight to section 5 (j) of the Acts Interpretation Act 1924 of New Zealand, when construing the Historic Articles Act 1962; and (b) if and in so far as it was necessary or legitimate to have regard to the provisions of the Customs Act 1966 for the purposes of construing the Act of 1962, the judge ought to have accepted the plaintiff's submission that the words "shall be forfeited" in the Act of 1966 did not require an act of seizure before forfeiture took effect; and (2), in relation to the second preliminary issue, the judge ought to have accepted the plaintiff's submission that his claim did not involve the extraterritorial enforcement of New Zealand law.

The facts are stated in the judgment of Lord Denning M.R.

Counsel's argument on the second preliminary issue only is reported. For argument in the House of Lords on the first preliminary issue, see post, p. 35G et seq.

Colin Ross-Munro Q.C. and *Gerald Levy* for the third defendant. Section 12 of the Historic Articles Act 1962 is a foreign penal law. It is not sought to argue that it is a revenue law. Staughton J. [1982] Q.B. 349 was wrong to hold that there is no residual third category of "other public laws," and***7** rule 3 in *Dicey & Morris, The Conflict of Laws*, 10th ed. (1980), vol. 1, pp, 89-90, stating that there is, is correct.

Two preliminary points are probably not in dispute. (1) For the purpose of the rule that foreign penal, revenue or other public laws are unenforceable in England, New Zealand is a foreign sovereign state, within Government of India v. Taylor [1955] A.C. 491. (2) It is for the English court to determine the characterisation of foreign penal etc. laws.

The cases establish five broad propositions. (1) English courts will not enforce penal, revenue and other public laws of a foreign country. (2) English courts will recognise penal, revenue and other public laws of foreign states, in order for example to enforce a contract: Foster v. Driscoll [1929] 1 K.B. 470. (3) English courts recognise transfers of title pursuant to foreign nationalisation, expropriatory or confiscatory legislation if the asset was within the jurisdiction of the foreign state at the time of the transfer: Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532. (4) Transfers of title, as in (3), will not be recognised if the asset was in England at the time of the transfer: Frankfurther v. W.L. Exner Ltd. [1947] Ch. 629.

(5) English courts will not recognise a foreign law which is unacceptably unfair, racial or barbaric: Oppenheimer v. Cattermole [1976] A.C. 249. It is important to keep in mind the difference between recognition and enforcement, which appears in Government of India v. Taylor [1955] A.C. 491.

There are two main elements for ascertaining what is a public law, in private international law. (1) It must be a law which grants power to the state in its capacity as sovereign over an individual. One must see whether the state or some organ of state is trying to enforce the law. Huntington v. Attrill [1893] A.C. 150 illustrates the distinction between an action or proceeding on behalf of a government and one on behalf of an individual. (2) The question must be asked whether what is being claimed is compensation, or something different.

Forfeiture provisions may be penal: Folliott v. Ogden (1789) 1 Hy. B1. 123 and Rex v. NAT Bell Liquors Ltd. [1922] 2 A.C. 128. The court must look to the substance of the matter to see if the law is penal: Banco de Vizcaya v. Don Alfonso de Borbon Y Austria [1935] 1 K.B. 140, 143-144. The most important "penal" case is Huntington v. Attrill [1893] A.C. 150. The relevant question is not "is the statute penal?" but "is the statutory provision relied on by the plaintiff a penal provision?" On that basis, section 12 of the Act of 1962 is a penal provision for the following reasons. (1) The purpose and effect of section 12 (2) is to expropriate goods without any compensation, as a sanction for the breach of the Act. Where the owner loses his goods and is mulcted of their value by the state, that is a classic penalty. The value in the present case could be some £300,000. If the desire of the state was merely to preserve the New Zealand heritage, the Crown could have been given the right to retain the goods on payment of their market value. As it is, the section provides for a punishment for breach of the Act. If compensation were provided for, the section would not be penal, though it might still be an "other public law." Further, the Government of New Zealand might have been entitled to relief if it had reduced the carving into its possession and displayed it in a museum, and it was then removed, because it would***8** then have already executed its own penal provision. The Government would have acquired a good title by seizing and reducing into possession, including title against the previous owner, whose title would be extinguished by section 12. The English court would recognise that title, as in Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532: see Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1, pp. 93-94. The court will not however reduce the article into the New Zealand Government's possession in England. (2) The plaintiff is not a private individual suing in a private right but is the state itself. (3) In most cases the penalty of forfeiture without compensation would be far more serious than the £200 fine in section 5 of the Act of 1962.

Loucks v. Standard Oil Co. of New York (1918) 120 N.E. 198, which Staughton J. strongly relied on, is not in point because compensation there was payable to the widow and/or children (i.e., private individuals), and not to the state. The provision in question in the case could not possibly be penal within Huntington v. Attrill [1893] A.C. 150. Staughton J. [1982] Q.B. 349, 366, took the passage of Cardozo J. in the Loucks case, 120 N.E. 198, 198 out of context. The purpose of the provision is wholly irrelevant for deciding whether it is penal etc., unless perhaps it is so barbaric that it cannot be accepted, as in Oppenheimer v. Cattermole [1976] A.C. 249.

The principal case on "revenue" is Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301. "Revenue" means more than income tax; it also covers the broad field of customs and duties. It is not contended that section 12 is a revenue law.

The existence of the residual category of "public" laws appears from a number of cases, the first in time being King of Italy v. Marquis Cosimo de Medici Tornaquinci (1918) 34 T.L.R. 623, which however is not very helpful as it is briefly reported.

King of the Hellenes v. Brostrom (1923) 16 L1.L.Rep. 167concerned decrees providing that if currency was unlawfully exported, it was liable to be forfeited. To that extent the facts were similar to the present case. The decrees were not really penal or revenue, as they were made to protect the Greek currency. They came within a third category. The assets were in England and had not been reduced into possession. In Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476, the case was put on "revenue," but the interesting point is that, again, the goods had not been reduced into possession. The propositions stated at p. 479 are adopted. In Schemmer v. Property Resources Ltd. [1975] Ch. 273, the judge treated the Act as a penal law, but whether the particular provision was penal is open to question. Schemmer was obviously acting on behalf of the United States Government or the Securities Commission. The decision was right, but questionably on the ground that the provision was a penal one. It could be seen as in a third category. The issue in In Re Lord Cable, Decd. [1977] 1 W.L.R. 7 was whether Indian exchange control regulations should be enforced in England. Exchange control is neither revenue nor penal (see Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301, 324, *per* Lord Reid), and the judge in the Cable case did not base his decision on either. In F. & K. Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139, which the plaintiff relied on below, the question was essentially whether the Israeli***9** legislation should be recognised, not whether it should be enforced, and the points arising in the present case were not discussed. Staughton J. was correct [1982] Q.B. 349, 369G-H, not to put any weight on the case. See also generally, on the subject, Dr. F. A. Mann's paper on Prerogative Rights of Foreign States and the Conflict of Laws (1954) 40 Tr.Gro.Soc. 25, 27-33.

Paul Baker Q.C. and *Nicholas Patten* for the first defendant. The third defendant's submissions are adopted. The reasons for the non-enforcement of foreign penal, revenue and other public laws have changed since Folliott v. Ogden, 1 Hy. B1. 123, probably as a result of changes in taxation. The approach in the 18th century was that it was undesirable for one country to carry out another's punishment. Government revenues were then obtained from customs and from the forfeiture of goods of convicted felons, heirless persons and others. There was no direct taxation; it was all indirect and local in operation. The concept of tax is now quite different; it is a matter of civic obligation. The turning point in the judicial attitude was Huntington v. Attrill [1893] A.C. 150. The principle is now based on the sovereignty of states, and the vice aimed at is infringing the sovereignty of another country. Relationships between sovereigns are carried on by governments and diplomacy. At the end of his judgment Staughton J.[1982] Q.B. 349, 371-372, referred to the interests of comity requiring the national heritage of other countries to be protected, and the "hope of reciprocity" as a reason of public policy which reinforced his decision. Courts are not in a position to demand reciprocity. That is solely a matter for governments through diplomatic channels and treaties. Therefore, however meritorious the individual law might seem, there is more at stake.

If the submissions are right, all public-type laws which are not translatable into individual terms and which a foreign government is trying to enforce, will come within the prohibition. That will even be true of bona vacantia, which troubled the judge [1982] Q.B. 349, 371: see Dicey & Morris, The Conflict of Laws, 10th ed., vol. 2, p. 611.

Charles Gray and *Nicholas Paines* for the plaintiff. Courts in the United Kingdom recognise the lex situs in regard to moveable property, with two exceptions: where the lex situs purports to have extra-territorial effect, and where the foreign law is repugnant to public policy here. Where the lex situs is recognised, it is normally enforced, but there are three exceptions, namely when the law is penal, revenue, or repugnant. The Historic Articles Act 1962 comes within none of those exceptions.

Rather than attempt a definition of a "revenue" law,

it is easier to list laws which have been held to be revenue: see Halsbury's Laws of England, 4th ed., vol. 8 (1974), p. 317, para. 420, note 1. They perhaps all have the characteristic that they form part of the legislative machinery by which states raise money for the executive functions of government. "Fiscal" might be a better description than "revenue," which is ambiguous. If anything, the legislation in the present case would lead to a charge on the state, since the carving would be placed in a museum. The English court is not being asked to raise money for a foreign government, and the law is therefore not revenue, for the same reason as was given in Regazzoni v. K.C. Sethia (1944) Ltd. [1956] 2 Q.B. 490.***10**

When considering penal laws, it is vital to appreciate that it is the purpose of the Act that must be looked at, not its consequences. It is accepted that the consequence might throw some light on the purpose, and also that "penal" in a broad sense means "harsh." But it has a more limited meaning in the present context. A suggested definition is that the law must be part of the criminal code of the country, which is designed to punish the wrongdoer and has as its purpose the vindication of the public justice. Staughton J. raised the question whether it is the suit or the provision that must be penal. The plaintiff does not argue that the suit must be penal.

In Huntington v. Attrill [1893] A.C. 150, 156, Lord Watson said that the object of the law must be the imposition of punishment. A submission that it was sufficient if that was an incidental consequence was rejected: see p. 159. Lord Watson drew a distinction between remedial and penal provisions. The purpose requirement is strongly emphasised in Loucks v. Standard Oil Co. of New York, 120 N.E. 198. The case contains the nearest to an attempted definition of "penal," and purpose is at the heart of it. The dissenting judgment in the case was on another point. The reason for the provision being penal in Rex v. NAT Bell Liquors Ltd. [1922] 2 A.C. 128 was that a punishment was imposed. See also Regazzoni v. K.C. Sethia (1944) Ltd. [1956] 2 Q.B. 490, 499, *per* Sellers J.

The object of the Act of 1962 is to keep works of art in New Zealand. The punishment provisions are merely a byproduct. The Act therefore cannot be "penal," however harsh the consequences might be in any particular case. The third defendant's submissions err in that they concentrate too much on the consequences. That approach cannot be right for two reasons. First, whether a statute was held to be penal or not would depend on the particular financial resources of the person affected. It would thus be possible for the same law to be held penal as against X but not as against Y. Secondly, it would depend on the value of the object, with the same anomalous result.

The cases do not support the existence of an additional category of unenforceable "public" laws embracing all instances of public laws. There may be a limited third category, but if so it should be based on public interest. With one exception, none of the textbooks recognises a separate "public law" category as such: see Halsbury's Laws of England, 4th ed., vol. 8, pp. 315-316, paras. 418 and 419; Cheshire and North's Private International Law, 10th ed. (1979), pp. 131-145 and Morris, The Conflict of Laws, 2nd ed. (1980), pp. 41, 47-48, 322. The Foreign Judgments (Reciprocal Enforcement) Act 1933, which is declaratory of the common law, mentions no such category, nor does the American Law Institute's Restatement, Second, Conflict of Laws, sections 89-90. The only exception among the textbooks is *Dicey & Morris, The Conflict of Laws*, 10th ed., pp. 89-90, rule 3. The explanation is perhaps that it was desired to keep some third category after the "political" category, which had figured in previous editions of the work, disappeared as a result of Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301.

The proposition in rule 3 has no foundation in the cases, and some are inconsistent with it. InEmperor of Austria v. Day and Kossuth (1861) 3 De G.F. & J. 217, a foreign sovereign was asserting a prerogative right. If ever there was a "public law" category,

that would be in it but the case seems to have been decided on a sort of proprietary basis. If the category existed, no injunction could have been granted, and similarly in Lepage v. San Paulo Coffee Estates Co. [1917] W.N. 216.Huntington v. Attrill [1893] A.C. 150 is a classic penal law case. The reasoning that because penal laws, which are public laws, are unenforceable, therefore public laws in general are unenforceable, is false. In King of Italy v. Marquis Cosimo de Medici Tornaquinci, 34 T.L.R. 623, the state papers must necessarily have been vested in the Italian state by virtue of a public law, but the judge granted an injunction to restrain their sale in England, King of the Hellenes v. Brostrom, 16 L1.L.Rep. 167, was argued and decided on the basis that it was a revenue case: see pp. 168, 193. Since the Greek Government took a "cut," the provision was a revenue one. Government of India v. Taylor [1955] A.C. 491 similarly was argued and decided as "revenue." The difficulties referred to in Regazzoni v. K.C. Sethia (1944) Ltd. [1956] 2 Q.B. 490, 520, 524, about defining what a "political" law was, apply equally to "public" laws. The law in F. & K. Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139 must have been "public" if any meaning is to be given to the expression, but a declaration was made and the law was given effect to. In Kahler v. Midland Bank Ltd. [1950] A.C. 24 a law which on any footing must have been a public law was indirectly enforced. Dr. Mann in his paper, 40 Tr.Gro.Soc. 25, concludes that all laws which assert the jus imperii are unenforceable. The fallacy lies in the proposition that penal and revenue laws are not enforced simply because they assert the jus imperii. In fact, there are many reasons why such laws are not enforced, including convenience, history and public policy. It is nothing to do with jus imperii. At p. 37 Dr. Mann concedes the difficulty with his thesis. At p. 45 he also is hesitant about the existence of a category of public laws. In Schemmer v. Property Resources Ltd. [1975] Ch. 273 the law was regarded as penal: see p. 288C.

It would be consistent with the majority of the textbooks and the American Restatement to treat any third category as limited to cases where enforcement would be contrary to the public interest of the lex fori. It would probably be confined to discriminatory and confiscatory legislation which was repugnant. It might extend to foreign exchange provisions: see In Re Lord Cable, Decd. [1977] 1 W.L.R. 7. However, that is really yet another revenue case. It is difficult to reconcile the case with Kahler v. Midland Bank Ltd. [1950] A.C. 24. In any event it is a slender basis on which to erect a whole category embracing all public laws.

The Act of 1962 could not possibly come within such a third category. It would be strange for an English court to say that it would be contrary to our public policy to enforce the New Zealand law when the United Kingdom has a very similar law: see the Import, Export and Customs Powers (Defence) Act 1939 and regulations made under it, which are currently the Export of Goods (Control) Order 1981 (S.I. 1981 No. 1641), Schedule 1, Part 1, Group B. The plaintiff cannot improve on the way the matter was put by Staughton J. [1982] Q.B. 349, 371-372.
***12**

An alternative, tentative, submission, on the basis that there is automatic forfeiture but the above submissions on enforceability are wrong, is that the New Zealand Government is only asserting a proprietary right, since it acquired title to the carving in New Zealand. It is accepted that Brokaw v. Seatrain U.K Ltd. [1971] 2 Q.B. 476 constitutes a hurdle, since the carving has not been reduced into actual possession. The distinction between reduction to actual possession and having a proprietary right without possession is a narrow one, but the difficulty is recognised.

Ross-Munro Q.C. in reply. The question whether there is a third category of public laws may be the most interesting one intellectually, but if section 12 is penal, the defendants must succeed. The definition of "penal" in Halsbury's Laws of England, 4th ed., vol. 8, para. 419 is adopted. See also Huntington v. Attrill [1893] A.C. 150, 159, and Dicey &

Morris, The Conflict of Laws , 10th ed., vol. 1, p. 92. The plaintiff's proposed definition cannot be right. Whatever be the position on the specific provisions which were the subject of decision in Schemmer v. Property Resources Ltd. [1975] Ch. 273, it could not be said that the whole of the Securities Exchange Act of 1934 was part of the United States Criminal Code. The purpose of a law is of little importance, for deciding whether it is penal. Many statutes have several purposes. The primary object of the Companies Act 1948 is to regulate the formation and subsequent activities of companies. Section 329, however, is undoubtedly a penal provision, and it is quite certain that a New Zealand court would refuse to enforce that section. There are two elements which must be had regard to: (1) whether the state or an organ of state is bringing the action; and (2) whether the cause of action concerns a private right giving rise to a demand for compensation (in which case it is not penal), or the breach of a public law. Although the word "purpose" appears everywhere in Cardozo J.'s judgment in Loucks v. Standard Oil Co. of New York, 120 N.E. 198, the two elements were there (the action was brought by the executors, not the state, and the action was in respect of a private wrong), and the case was rightly decided for that reason.

As to public laws, the House of Lords said in Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301 that exchange control is not revenue or penal, and in Kahler v. Midland Bank Ltd. [1950] A.C. 24 that it was not confiscatory. If therefore it is not to be enforced, as In Re Lord Cable, Decd. [1977] 1 W.L.R. 7 decides, one must look to principle to see why that is so. The plaintiff's suggestion, that it must not be contrary to English public policy, is a shifty formulation on which to build a principle. Public policy is an unruly horse. The true principle is based on the rule of public international law that a sovereign state's sovereignty ends at its own frontiers. That has the advantage of simplicity and continuity. It is the explanation of Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532; Frankfurther v. W.L. Exner Ltd. [1947] Ch. 629 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718, which was discussed in the Frankfurther case. The relevance in the present context is that if property is claimed it must have been reduced into possession. If the Greek Government passed a law today and sued for the return of the Elgin marbles, the English court would recognise***13** the law but not enforce it because the marbles have not been reduced into the possession of the Greek Government.

Emperor of Austria v. Day and Kossuth, 3 De G.F. & J. 217 , must be a decision on its own facts, even if it is rightly decided. It has been much criticised by academic writers. The action in Lepage v. San Paulo Coffee Estates Co. [1917] W.N. 216 was about whether there was power to give a good receipt for money received: see the end of the headnote. No one took the point whether it was a private or public right of action. It does not help one way or the other.

On the reciprocity point, it is not for courts to take the initiative and say that the New Zealand law will be enforced in the hope that the New Zealand authorities will do the same for us. This is exclusively the province of governments, who do not proceed by expressions of hope but by treaties. Countries with frequently changing governments might not reciprocate, in the absence of a treaty.

Baker Q.C. also in reply. Even if the plaintiff's test is adopted, and the purpose of the law is considered rather than its consequences, section 12 (2) of the Act of 1962 is still penal. If the object of the Act were solely to retain historic articles within New Zealand, it would have been logical to enact that all goods would be forfeited if they were exported, whether innocently or not. The presence of the qualification "knowingly" in section 12 (2) is inconsistent with that construction. That word makes it look penal, as does the phrase "in breach of this Act."

Cur. adv. vult.

May 21. The following judgments were read.

LORD DENNING M.R.

The door of the treasure house

Years ago in New Zealand a great chief of the Maoris had a treasure house. In it there were stored such things as dried fish, special foods and valuables. At the entrance there was a great door. It was made of totaro wood which is light, durable, tough, and of a dark red colour. This great door was four feet high and nearly five feet wide. It had five panels carved with exquisite skill. These depicted human figures with serpentine bodies and wide pointed heads.

This great door was lost for centuries in a swamp near Waitara in the province of Taranaki in North Island. Then in 1972 a Maori tribesman called Manukonga, whilst cutting a track through the swamp, came upon it and carried it to his home.

In the next year, 1973, there came to New Zealand Lance Entwistle, the third defendant. He was from London and was a dealer in primitive works of art. He got to know of this carving and went to see it. He realised at once that it was of much value. It was of the highest importance to the study of Maori art and civilisation and Polynesian sculpture. He persuaded Manukonga to sell it to him for the sum of $6,000. He took it up to Auckland and then across to **New** York. From there he telephoned***14** to George **Ortiz**, the first defendant, who lived in Geneva. Now George **Ortiz** was a collector of African and Oceanic works of art. His collection was one of the finest in the world. Lance Entwistle asked George **Ortiz** to inspect this carving. George **Ortiz** went to **New** York to see it. Lance Entwistle told him that it had been exported from **New Zealand** without a permit but nevertheless he was the owner of it and could pass a good title to it.

Thereupon, on April 23, 1973, George **Ortiz** bought this carving from Lance Entwistle for U.S. $65,000. It was sent to Geneva by air and was kept by George **Ortiz** in his collection there. In October 1977 the daughter of George **Ortiz** was kidnapped. In order to raise money for her release, he sent his art collection to Sotheby's, the second defendants, in London for sale by auction. Sotheby's prepared an attractive catalogue. It contained a fine coloured picture of this carving. It was the principal item in the sale. Sotheby's announced that the auction was to be held on Thursday, June 29, 1978.

This came to the notice of the New Zealand Government. Their Attorney-General at once on June 26, 1978 - three days before the sale - issued a writ claiming a declaration that this carving belonged to the New Zealand Government and an injunction to prevent the sale or disposal of it. In the face of this writ it was agreed that Sotheby's would not include this carving in the sale but would hold it pending trial or further order. The sale was held without this carving. Enough was realised from the other items to pay the ransom. So George Ortiz does not propose to sell it now. It is said to be worth £300,000.

The case may eventually require a hearing on disputed points of fact. But meanwhile this court has ordered that these two points be tried as preliminary issues:

"(1) Whether... Her Majesty the Queen has become the owner and is entitled to possession of the carving... pursuant to the provisions of the [New Zealand] Historic Articles Act 1962 and the Customs Acts 1913 and 1966; and (2) whether in any event the provisions of the said Acts are unenforceable in England as being foreign penal, revenue and/or public laws." The defendants have also made the following concessions:

"The great majority of countries have legislation to forbid or control the export of antiquities and in many cases the sanction for any attempt to export an antiquity illegally is that the object may be confiscated ..."

Although this case concerns New Zealand law, I propose to consider first the English law. This is

because New Zealand has inherited the common law of England; and also because its statutes and methods of interpretation are on much the same lines as our own. We use the same language - the English language - to express the same principles, to define the same concepts, and to give the same meaning.***15**

The law of England

So far as England is concerned, whenever there is legislation providing that goods are to be forfeited for one cause or another, the law has always said that the forfeiture does not take effect until the goods are seized and that the title then relates back to the cause of forfeiture. If the owner or anyone else disputes the forfeiture, there are proceedings for condemnation. After condemnation, the title is perfected and can no longer be disputed by anyone.

That was settled in the great case of Lockyer v. Offley (1786) 1 T.R. 252. The master of the sailing vessel Hope smuggled 60 gallons of brandy into London. The customs officers, a month later, seized the ship and claimed her as forfeited. Willes J. said, at p. 260:

"it has been said that under the 24 Geo. 3 c. 47 and the excise laws, the forfeiture attaches the moment the act is done... but I think the actual property is not altered till after the seizure, though it may be before condemnation.... Till the seizure of the ship, it was not certain that the officers of the Crown knew of the illicit trade carried on by the master, or whether they would take advantage of the forfeiture."

In *Manning Exchequer Practice*, 2nd ed. (1827), it is said, at p. 142:

"Seizures for non-payment of customs, and the like, are grounded upon a principle of the common law, applied to Acts of Parliament creating a forfeiture" (emphasis added), and, at p. 181:

"The property in goods, forfeited under the excise laws, is not altered until after seizure... For some purposes, as to avoid intermediate alienations and incumbrances, etc., the forfeiture seems to relate to the act done." From that time onwards there were many Customs Acts. In most of them, the statute simply said that on breach the goods "shall be forfeited": see the Customs Laws Consolidation Act 1876, sections 106, 130 and 138; and that on seizure notice was to be given to the owner of the goods: see section 207. In accordance with the law as laid down in Lockyer v. Offley, 1 T.R. 252, the forfeiture was not automatic. It did not take effect until the goods were seized. Indeed, when a fresh consolidation Act was passed in 1952, Parliament did not use the words "shall be forfeited." It used instead the words "shall be liable to forfeiture": see sections 47 to 56 and 275 to 280 of the Customs and Excise Act 1952. Paragraph 1 of Schedule 7 said:

"The commissioners shall give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof:..."

Likewise in section 103 (1) of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) it was enacted that on certain wrongs being done "such ship shall be forfeited to Her Majesty." Here too it was held that the forfeiture***16** took effect on seizure, but that the title then related back to the time of the wrongful act done which was the cause of the forfeiture (see The Annandale (1877) 2 P.D. 179, 185, *per* Sir Robert Phillimore) so that any disposal of the ship in the interim was invalid and of no effect: see the same case in the Court of Appeal, 2 P.D. 218.

So also in section 1 (1) of the Mortmain and Charitable Uses Act 1888 (51 & 52 Vict. c. 42) the words "shall be forfeited" were held to mean "shall be liable to be forfeited": see Attorney-General v. Parsons [1956] A.C. 421.

Works of art

So far as works of art are concerned, the law of England rests on a statute passed on the outbreak of the second world war. It is the Import, Export and Customs Powers (Defence) Act 1939. It gives the Board of Trade power by order to prohibit the import or export of goods of any specified description. The present order is the Export of Goods (Control) Order 1981 (S.I. 1981 No. 1641). It prohibits the export, unless permitted by licence, of, amongst other things: "Any goods manufactured or produced more than 50 years before the date of exportation," (Schedule 1, Part I, Group B) except personal property, letters, and so forth.

Section 3 (1) of the Act of 1939 provides that if any goods are imported or exported in contravention of an order under the Act "those goods shall be deemed to be prohibited goods and shall be forfeited ..." Section 9 (2) says that the Act is to be construed as one with the Customs Consolidation Act 1876 (39 & 40 Vict. c. 36). So the words "shall be forfeited" bear the same meaning as in the Act of 1876. So the forfeiture is not automatic. It does not take effect until the goods are seized.

It is clear therefore that if works of art more than 50 years old are exported from England without permission they are not automatically forfeited. They are only "liable to be forfeited." The title does not pass to the Crown until they are seized.

The New Zealand Customs Act 1913

The Customs Act 1913 of New Zealand is much more detailed and precise than the United Kingdom Act of 1876. For present purposes it is important to notice that it enacted in express terms the principle of Lockyer v. Offley, 1 T.R. 252. It said in section 251:

"*Forfeiture to take effect on seizure* - When it is provided by this Act or any other Customs Act that any goods are forfeited, the forfeiture shall take effect without suit or judgment of condemnation so soon as the goods have been seized in accordance with this Act or with the Act under which the forfeiture has accrued, and any such forfeiture so completed by seizure shall for all purposes relate back to the date of the act or event from which the forfeiture accrued." It also gave a time-bar of one year, in section 252: "Seizure of forfeited goods - ... (4) No goods shall be so seized at any time except within one year after the cause of forfeiture has arisen," and also a territorial limitation, in section 253: "*Where goods may be seized* - Goods may be ***17** seized as forfeited wherever found, whether on land in New Zealand or in the territorial waters of New Zealand ..."

The New Zealand Historic Articles Act 1962

The Historic Articles Act 1962 is far more detailed and comprehensive than the United Kingdom Act of 1939 and the orders thereunder. Section 5 makes it unlawful to remove any historical article without a permit:

"*Restrictions on export of historic articles* - (1) It shall not be lawful after the commencement of this Act for any person to remove or attempt to remove any historic article from New Zealand, knowing it to be an historic article, otherwise than pursuant to the authority and in conformity with the terms and conditions of a written certificate of permission given by the Minister under this Act. (2) Every person who contrary to the provisions of this section removes or attempts to remove any article from New Zealand, knowing it to be an historic article, commits an offence, and shall be liable on summary conviction to a fine not exceeding £200. (3) Nothing in this section shall apply to any historic article lawfully taken and normally kept outside New Zealand but temporarily within New Zealand." Section 12 is the section which most concerns us. So I set it out in full:

"*Application of Customs* Act 1913 - (1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited

pursuant to an Order in Council under section 47 of the Customs Act 1913. (2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913. (3) Where any historic article is forfeited to Her Majesty pursuant to this section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions: Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose."

The interpretation of section 12(2)

The crucial words are those in section 12 (2), "shall be forfeited to Her Majesty." Seeing that those words come within a section which is headed "Application of Customs Act 1913," it seems to me that those words are to be construed as one with the Customs Act 1913. The words "shall be forfeited" are to be construed in the light of section 251 of the Act of 1913 which is, in turn, only an express statement of the principle in Lockyer v. Offley, 1 T.R. 252. They do not mean there is to be an automatic forfeiture. Forfeiture only takes place when the goods are***18** seized; but the title then relates back to the time when the cause of forfeiture arose.

The Customs Act 1966 of New Zealand

Much of the Act of 1966 is a re-enactment of the Act of 1913. But there is one section which changes the wording. Section 251 of the Act of 1913 (on which I have placed so much stress) is replaced by section 274 which says:

"*Forfeiture to relate back* - When it is provided by this Act or any other of the Customs Acts that any goods are forfeited, and the goods are seized in accordance with this Act or with the Act under which the forfeiture has accrued, the forfeiture shall for all purposes relate back to the date of the act or event from which the forfeiture accrued." Then section 275 (4) extends the time from one year to two years: "*Seizure of forfeited goods* - ... (4) No goods shall be so seized at any time except within two years after the cause of forfeiture has arisen." And section 276 keeps the territorial jurisdiction: "Where goods may be seized - Goods may be seized as forfeited wherever found within the territorial limits of New Zealand."

I do not think the change of wording in section 274 imputes any change in sense from section 251 of the Act of 1913. Section 274 shows that the important thing is seizure. When it says that "the forfeiture shall for all purposes relate back." that means that the forfeiture does not operate automatically. The phrase "relate back" shows that the title does not accrue until the seizure, and that it then relates back to the cause of forfeiture. In short, it is another affirmation of the principle in Lockyer v. Offley, 1 T.R. 252.

The judge's view

Staughton J. analysed the Customs Acts 1913 and 1966 of New Zealand and came to the conclusion [1982] Q.B. 349, 360 that

"it does not provide for automatic forfeiture but does provide that goods shall be liable to forfeiture in certain circumstances, with the effect that title passes to the Crown only on seizure or later on condemnation." I come to the same conclusion on the Customs Acts.

The judge then considered the Historic Articles Act 1962 of New Zealand. He took the view that it had no clear meaning and that he should adopt the "purposive" approach to statutes as indicated perhaps by section 5 (j) of the New Zealand Acts Interpretation Act 1924 and the speeches in the House of Lords in Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251. The judge held [1982] Q.B. 349, 362D that the purpose of the Act of 1962 "points firmly in favour

of automatic forfeiture." He said, at p. 362:

"... the purpose of the Act is to secure the enjoyment of historic articles for the people of New Zealand in the territory of New***19** Zealand; that purpose is plainly advanced if articles exported or attempted to be exported become automatically the property of the Crown and can if necessary be recovered by the Crown."

I can well follow the judge's reasoning, but I think it is open to this fatal objection: if accepted, it means that the Historic Articles Act 1962 would have effect beyond the territory of New Zealand. It would have extra-territorial effect. That would be contrary to international law. To this I now turn.

The territorial theory of jurisdiction

It was said long ago by Story J. in the Supreme Court of the United States in The Apollon (1824) 9 Wheat. 362, 370: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." And in his book, Story's Conflict of Laws, 2nd ed. (1841), p. 26, he said: "no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein," except that, see p. 28, "every nation has a right to bind its own subjects by its own laws in every other place."

In our present case the New Zealand Government invite us to interpret section 12 (2) of the Historic Articles Act 1962 as if it said: "An historic article which has been knowingly exported from New Zealand in breach of this Act shall be automatically forfeited to Her Majesty, and Her Majesty can recover it in any other country into which it may be imported." So interpreted, the Act seems to me to infringe the rule of international law which says that no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory. It is a direct infringement of the territorial theory of sovereignty which is most ably discussed by Dr. F. A. Mann in his Studies in International Law (1973), pp. 1 to 139.

If this Historic Articles Act 1962 provided for automatic forfeiture, that forfeiture would take place and would come into effect as soon as the historic article was exported, i.e. as soon as it left the territorial jurisdiction of New Zealand. That would be a piece of extra-territorial legislation which is invalid by international law.

Rather than suppose that the New Zealand Parliament would infringe international law, or would go beyond the limits of its own jurisdiction, I am quite clear that we should read section 12 (2), not as providing for automatic forfeiture, but as meaning "shall be liable to forfeiture."

A point of vast importance

The next preliminary point proceeds on the assumption that the Historic Articles Act 1962 provides for automatic forfeiture and then asks: should this law be enforced by the courts of England?

This point may become real when it is remembered that the Act of 1962 applies not only to *actual export* of an historic article, but also to attempted export. An *attempt* might be made to export an historic article. It might be taken to the airport and then prevented at the last moment from being loaded on to the aircraft. A New Zealand statute could well provide***20** (within its territorial jurisdiction) for automatic forfeiture to the Crown on such an attempt being made. The owner makes a second attempt. Then, before it is seized by the authorities, he manages to export it. He gets it to England. The New Zealand Government seeks to recover it. Will the English courts enforce its claim?

This second point is of vast importance. Most countries have legislation to prevent the export of their historic articles unless permitted by licence. This legislation may provide for automatic forfeiture on export or attempted export. It might be very desirable that every country should enforce every other country's legislation on the point - by enabling such

articles to be recovered and taken back to their original home. But does the law permit of this?

Recognition and enforcement

At the outset I must point out that we are here concerned with a suit by a foreign state to enforce its laws. I hope our New Zealand friends will forgive me calling them a "foreign state." I only use the term so as to bring home the fact that we are concerned with an independent sovereign government which exercises sovereign authority over its own territory, and which, by international law, has no right to exercise sovereign authority beyond its own territorial limits.

This suit by a foreign state to enforce its laws is to be distinguished altogether from a suit between private firms or individuals which raises a question as to whether a contract has been broken by one or the other or whether a wrong has been done by one to the other. In such a suit our courts will often recognise the existence of the laws of a foreign state. We will recognise the foreign law so much that we will refuse to enforce a contract which is in breach of the laws of the foreign state: see the Prohibition case of Foster v. Driscoll [1929] 1 K.B. 470, and the jute case of Regazzoni v. K.C. Sethia (1944) Ltd. [1956] 2 Q.B. 490 and [1958] A.C. 301.

This present case is different. It is a suit by a foreign state brought in the English courts here to enforce its laws. No one has ever doubted that our courts will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of that foreign state. We do not sit to collect taxes for another country or to inflict punishments for it. Now the question arises whether this rule extends to "other public laws." *Dicey & Morris, The Conflict of Laws*, 10th ed. (1980), vol. 1, p. 90, rule 3 say it does. I agree with them. The term "other public laws" is very uncertain. But so are the terms "penal" and "revenue." The meaning of "penal" was discussed in Huntington v. Attrill [1893] A.C. 150 and Loucks v. Standard Oil Co. of New York (1918) 120 N.E. 198. The meaning of "revenue" was discussed in Government of India v. Taylor [1955] A.C. 491. But what are "other public laws"? I think they are laws which are eiusdem generis with "penal" or "revenue" laws.

Then what is the genus? Or, in English, what is the general concept which embraces "penal" and "revenue" laws and others like them? It is to be found, I think, by going back to the classification of acts taken in international law. One class comprises those acts which are done by a***21** sovereign "jure imperii," that is, by virtue of his sovereign authority. The others are those which are done by him "jure gestionis," that is, which obtain their validity by virtue of his performance of them. The application of this distinction to our present problem was well drawn by Dr. F. A. Mann 28 years ago in an article "Prerogative Rights of Foreign States and the Conflict of Laws" in *Transactions of the Grotius Society* (1954) 40 Tr.Gro.Soc. 25, reprinted in his *Studies in International Law* (1973), pp. 492 to 514.

Applied to our present problem the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.

If this be right, we come to the question: what is meant by the "exercise of sovereign authority"? It is a term which we will have to grapple with, sooner or later. It comes much into the cases on sovereign immunity and into the State Immunity Act 1978: see sections 3 (3) (c) and 14 (2) (a). It was much discussed recently in I Congreso del Partido [1983] 1 A.C. 244 and by Hazel Fox "State Immunity: The House of Lords' Decision in I Congreso del Partido" in the *Law Quarterly Review*(1982) 98 L.Q.R. 94. It can provoke much difference of opin-

ion as is shown by the differences amongst the Law Lords on the facts of that very case. But, difficult as it is, it must be tackled.

I suggest that the first thing in such a case as the present is to determine which is the relevant act. Then to decide whether it is of a sovereign character or a non-sovereign character. Finally, to ask whether it was exercised within the territory of the sovereign state - which is legitimate, or beyond it - which is illegitimate.

In solving the question, we can get guidance from the decided cases. I will take therefore the cases decided in the English courts about tangible things which have been confiscated - or attempted to be confiscated - by a sovereign government.

Don Alonso v. Cornero (1611) Hob. 212; 2 Brownl. 29.

This case was decided in 1611. According to Dicey & Morris, The Conflict of Laws, 10th ed. (1980), vol. 1. p. 94, n. 22, it is the only reported English case which approaches the problem. Sir Walter Raleigh had recently introduced tobacco into Europe. It was a growth industry. Senor Cornero, a Spanish subject, committed crimes in Spain and fled in a ship to England, carrying with him 3,000 1bs. of tobacco. His very flight was in Spanish law a cause of forfeiture cf his goods, as it was in English law at that time: see *Blackstone's Commentaries*, vol. 4, 17th ed. (1830) p. 387. So these goods were "forfeited upon the high sea" to the King of Spain: see 2 Brownl. 29. On arrival in England, Cornero unloaded the tobacco and sold it to Sir John Watts for £800.

The Spanish ambassador then on behalf of the King took proceedings***22** in rem in the Court of Admiralty on the ground that the cargo was the property of the King of Spain. (This procedure in Admiralty for forfeiture is well recognised to this day: see section 1 (1) (s) of the Administration of Justice Act 1956 and The Skylark [1965] P. 474.) The Admiralty marshal served the warrant of arrest on the cargo in the hands of Sir John Watts. Sir John Watts then moved the Court of Common Pleas for a writ of prohibition to prevent the Spanish ambassador from proceeding any further with the arrest. The court granted his application. Prohibition was granted. The goods were released. Sir John Watts kept the tobacco and sold it - or smoked it. The King of Spain took nothing.

The report of the case in Hob. 212 tells us that the judges were quite willing to allow the Spanish ambassador to bring proceedings on behalf of the King of Spain - "they would not let [i.e. prevent] the ambassador from prosecuting his master's subject." As to the goods, the judges said, Hob. 212:

"if any subject of a foreign prince bring goods into the kingdom, though they were confiscate before, the property of them shall not here be questioned but at the common law." As I understand it, that means that the courts of this country would not enforce the forfeiture. Our courts would not enforce the title claimed by the Spanish King. Our courts of "common law" would enforce a possessory title by trespass or trover, but this would not avail the King of Spain because he never had possession: see Isaack v. Clark (1615) 2 Bulst. 306.

The confiscation was an act done in the exercise of sovereign authority outside the territory of Spain - it was done on the high seas. So our court would not enforce it. So also when many centuries later the Spanish Constituent Cortes passed a decree confiscating all the private property of the ex-King, it was held that it would not be enforced against his property in England: see Banco de Vizcaya v. Don Alfonso de Borbon Y Austria [1935] 1 K.B. 140.

King of Italy v. Marquis Cosimo de Medici Tornaquinci (1918) 34 T.L.R. 623

In Italy the Marquis of Medici had a most valuable collection of historical manuscripts covering a period of 700 years. They were known as the Medici archives. Some of them were official communications and belonged to the Italian state. The govern-

ment had allowed the Marquis to hold them on behalf of the state. Others were family papers coming down in the Medici family. They belonged to the marquis himself In 1909 the Italian Government passed a law by which the state papers were to be kept in Italy. They belonged to the state. By the same law the Italian Government prohibited the export of the family papers without a permit and there was a heavy export duty when a permit was granted. The state also had the right to purchase the family papers. The marquis brought these Medici archives to England and put them into the hands of Christie's for sale. Peterson J. held that the state papers belonged to the State of Italy and granted an injunction to prevent their being disposed of. But he refused***23** to grant any injunction, at the suit of the Italian Government, in respect of the family papers. It was only at the interlocutory stage. Peterson J. is reported as having said, at p. 624:

"Article 9 prohibited their exportation, but it was manifest that this only applied so long as they remained in Italy. The question arose whether there was any probability, at the trial of the action, that these documents, apart from the state papers, would be ordered to be returned to Italy. He did not think that the court would undertake such a burden." The prohibition of export of the family papers was an exercise of sovereign authority by the King of Italy. It would not be enforced in our courts.

Princess Paley Olga v. Weisz [1929] 1 K.B. 718

Princess Paley Olga was the widow of Grand Duke Paul of Russia. She occupied the Paley Palace near St. Petersburg, full of valuable furniture, pictures and objets d'art. In 1918 the revolutionaries took possession of it. The Princess fled to England. The Soviet Government passed decrees declaring all of its contents to be the property of the Soviet Republic. They turned it into a state museum. In 1928 the Soviet Government sold some of the articles to Mr. Weisz for £40,000. He brought them to England. The Princess claimed that they belonged to her. She sued Mr. Weisz to recover them. She failed. Scrutton L.J. said, at p. 725:

"Our Government has recognised the present Russian Government as the de jure Government of Russia, and our courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts." (Emphasis added.) The confiscation by the Soviet Government was an exercise of sovereign authority within its own territory. It would therefore be enforced in England. If the Princess had removed the articles from the museum in St. Petersburg and brought them to England, the English courts would have made her give them up to the Soviet Government.

Brokaw v. Seatrain U.K. Ltd.[1971] 2 Q.B. 476

Mr. and Mrs. Shaheen were United States citizens living in the United States. Their daughter married Mr. Brokaw, an Englishman. The parents determined to send to their daughter their furniture and household effects so as to set up house in England. They were shipped on an American ship for delivery in England. While the vessel was on the high seas, the United States Government served a notice of levy on the shipowners. They claimed possession of the goods on the ground that Mr. and Mrs. Shaheen owed them money for taxes and that they were entitled by United States law to levy upon all the property of Mr. and Mrs. Shaheen. This court held that the United States Government had no right to the goods. I said, at p. 482:

"If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have***24** been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law. I would apply to this situation some words of the United States Supreme Court in Compania Espanola de Navegacion Maritima, S.A. v. the Navemar (1938) 303 U.S. 68, 75 in an analogous case: '... since the decree was in invitum, actual possession by some act of physical dominion or control on behalf of the Spanish Government was needful.'" The notice of levy was an

act done in the exercise of sovereign authority. It was not done in the territory of the United States but outside it. It would not be enforced by our courts. But if the United States Government had actually reduced the goods into their possession in the United States, that act would have been done within its own territory. It would therefore have been enforced in our courts.

I have not gone into any of the cases on intangible things or on foreign exchange regulations, such as Kahler v. Midland Bank Ltd. [1950] A.C. 24 and In Re Lord Cable, Decd. [1977] 1 W.L.R. 7; but I would suggest that they might be solved by adopting the distinction between acts done in the exercise of a sovereign authority within its own territory, and those outside it.

Conclusion

Returning to our present case, I am of opinion that if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of "public laws" which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory.

On this point, therefore, I differ from the judge; but I would express my gratitude to him for his most valuable contribution to this important topic. He held that our courts should enforce the foreign laws about works of art by ordering them to be delivered up to the foreign government. He hoped that, if we did this, the courts of other countries would reciprocate and enforce our laws which prohibit the export of works of art. I regard this as too sanguine. If our works of art are sold to a dealer and exported to the United States without permission, as many have been, I doubt very much whether the courts of the United States would order them to be returned to England at the suit of our government, on the ground of forfeiture.

The retrieval of such works of art must be achieved by diplomatic means. Best of all, there should be an international convention on the matter where individual countries can agree and pass the necessary legislation. It is a matter of such importance that I hope steps can be taken to this end.

I would answer the first preliminary issue "No," and the second preliminary issue "Yes." I would allow the appeal accordingly.***25**

ACKNER L.J.

The most helpful and detailed submissions by counsel have ultimately satisfied me that this apparently complex case is not as difficult as it initially appeared. The appeal raises two main questions, although if the first is decided adversely to the plaintiff, the Attorney-General of New Zealand, he fails in his claim and the resolution of the second question becomes unnecessary.

1. Is an historic article knowingly exported or attempted to be exported in breach of the New Zealand Historic Articles Act 1962, automatically forfeited so that title there and then passes to Her Majesty in right of the Government of New Zealand, or must seizure first take place before the property vests in the Crown?

An Act may provide for automatic forfeiture, or it may provide merely that the goods shall be liable to forfeiture if some further step is taken to that end. For example, the English Customs and Excise Act 1952, which was in force at the material time (now the Customs and Excise Management Act 1979) provided in the material sections, not for automatic forfeiture where various offences were committed, but that the goods "shall be liable to forfeiture." By contrast the Maori Antiquities Act 1908, which remained in force until 1962 when it was repealed by the Historic Articles Act 1962, made special provision for a limited category of antiquities, namely those entered for export. Section 6 (3) of the Act of 1908 provided:

"Any Maori antiquities entered for export contrary to this Act shall be forfeited, and shall vest in His Majesty for the use of the people of New Zealand; Provided that the Minister may, after inquiry, cancel the forfeiture if he thinks fit."

Antiquities which had been entered for export would not only have come to the attention of customs, but would have been reduced into the possession of the Crown. Thus, the provision for such goods to vest in the Crown without the necessity for some further action, such as seizure, was a practicable course clearly open to the legislature. However, in respect of Maori antiquities which were not entered for export, there was no provision for automatic forfeiture. Forfeiture could only be achieved under the Customs Act 1913, and, as appears hereafter, it is indisputable that such forfeiture was not automatic.

When the Maori Antiquities Act was repealed, the New Zealand legislature did not choose to repeat the wording of section 6 (3) referred to above. It adopted the drafting technique of incorporating the provisions of the Customs Act 1913, which had by then been in force for nearly 50 years. [His Lordship read section 12 of the Historic Articles Act 1962, ante, pp. 578H - 579B, and continued:] Section 47 of the Customs Act 1913 referred to in section 12 (1) set out above, provided inter alia for a liability to a penalty of £200 and, by subsection (5), made this provision:

"All goods shipped on board any ship for the purpose of being exported contrary to the terms of any such prohibition in force with***26** respect thereto, and all goods waterborne for the purpose of being so shipped and exported, shall be forfeited." However, any possible ambiguity as to the meaning of the phrase "shall be forfeited" was resolved beyond all doubt by section 251 of the Act of 1913, which provided:

"*Forfeiture to take effect on seizure* - When it is provided by this Act or any other Customs that any goods are forfeited, the forfeiture shall take effect without suit or judgment of condemnation so soon as the goods have been seized in accordance with this Act or with the Act under which the forfeiture has accrued, and any such forfeiture so completed by seizure shall for all purposes relate back to the date of the act or event from which the forfeiture accrued."

It will of course be appreciated that the section not only provided for forfeiture to take effect on seizure, but that the title thus acquired should, for all purposes, relate back to the date of the act or event from which forfeiture accrued.

Mr. Charles Gray, for the Attorney-General, to whose able argument I should like to express a particular tribute, contended in his initial submission that it is clear from the language of section 12 that forfeiture takes place under the Act of 1962 and not under the customs legislation. This submission is not referred to by the judge in his judgment, is barely taken in the respondent's notice and, in my judgment, is quite unsustainable. The very purpose of section 12, as its heading indicates, is to apply the Customs Act 1913 to any historical article the removal of which from New Zealand is prohibited by the Historic Articles Act 1962. Such application is, as specifically enacted, "subject to the provisions of this Act." Thus, where there is within the Act of 1962 a special provision which conflicts with the Customs Act, the Act of 1962 takes precedence. Thus, specific provision is made in section 12 (3) for delivery to the Minister and for his discretion as to the return of the goods, whereas section 252 (3) of the Customs Act 1913 provided for the goods to be taken "to a King's warehouse or such other place of security as the collector or other proper officer directs."

If the forfeiture provisions of the Customs Act 1913 applied, as the judge in my judgment rightly held, it is then common ground that so long as the Act of 1913 was in force the forfeiture was not automatic. Before title could pass to the Crown, the goods had to be seized. Since section 251 (4) provided that no goods should be seized at any time except within

one year after the cause of forfeiture had arisen, and no such seizure ever took place, then if the Customs Act 1913 alone regulated the forfeiture, the Attorney-General would fail in his claim.

On January 1, 1967, the Customs Act 1913 was replaced by a new Customs Act, the Customs Act 1966, and it is common ground that references in the Historic Articles Act 1962 to the Customs Act 1913 must now be treated as references to the Customs Act 1966. Thus, the next question is whether the Customs Act 1966 still requires seizure to take place before forfeiture can take effect, or whether it fundamentally changes***27** the position by providing for the automatic vesting in the Crown of the title to the goods, immediately the prohibitive act takes place.

Before contrasting section 251 of the Act of 1913 with its successor - section 274 of the Act of 1966 - it is important to note the marked similarities in the material sections. In both Acts "forfeited goods" are defined as meaning any goods in respect of which a cause of forfeiture has arisen under the Customs Acts. In both Acts there is a time bar in relation to seizure, expressed in the same terms as I have quoted above, except that the period of one year is increased in the Act of 1966 to two years. I agree with the judge that it does appear odd that goods can no longer be seized after two years and yet, if the Attorney-General is right, it is still open to the Crown to enforce a proprietary right by any other means. Moreover, if a significant change is intended it seems strange that the same words, "cause of forfeiture," should be adopted: see section 275 (1) and (4) of the Act of 1966. The provisions governing notice of seizure are the same (sections 255 and 278 of the Acts of 1913 and 1966 respectively) as are the provisions for condemnation (sections 259 and 282). In section 262 of the Customs Act 1913 it is provided that "All forfeited goods shall, on forfeiture, become the property of His Majesty ..." It is common ground that under that Act "on forfeiture" means on seizure. The only change made on its counterpart, section 286, is that "the Crown" takes the place of "His Majesty the King." The provisions as to waiving the forfeiture are identical (sections 264 and 287). Under section 264 of the Act of 1913 the phrase "When any forfeiture has accrued" must mean cause of forfeiture. Presumably it would have the same meaning in the Act of 1966. The application of the forfeiture provisions are the same in each Act (sections 265 and 288).

I now set out section 274 of the Customs Act 1966. This provides:

"*Forfeiture to relate back* - When it is provided by this Act or any other of the Customs Acts that any goods are forfeited, and the goods are seized in accordance with this Act or with the Act under which the forfeiture has accrued, the forfeiture shall for all purposes relate back to the date of the act or event from which the forfeiture accrued." Thus the heading to section 251 of the Act of 1913, "Forfeiture to take effect on seizure," has been removed from the section as has the provision that the forfeiture shall take effect without suit or judgment of condemnation so soon as the goods have been seized and any such forfeiture so completed by seizure. It accordingly appears that the intention was that forfeiture should no longer take effect and be completed on seizure. This, however, still leaves unanswered the question: when is it to take effect? The legislature clearly thought it important to continue to provide that forfeiture should relate back - hence the very heading to the section - using the terms of the old section 251. If forfeiture was to be automatic in its effect, so that title passed there and then to the Crown, this specific provision for relating back is clearly superfluous. Moreover, the further question arises: why should there be any reference in the new section to "and the goods are seized in accordance with this Act," if seizure were no longer of any relevance?***28**

Mr. Gray can provide no real explanation for the existence of section 274. Mr. Baker, on behalf of the first defendant, Mr. Ortiz, does offer this explanation. Section 283 of the Act of 1966 provides for a new cause of condemnation of forfeited

goods, namely the conviction of an offence which involved forfeiture. The conviction itself shall have effect as condemnation without suit or judgment of any goods that have been seized or in respect of which forfeiture has accrued. He submits that if section 251 had been left in its original form, then there would have been a conflict, since that section provides for forfeiture to take place on seizure. Thus he submits that under the new Act seizure set in train the process of the alteration of title, but this did not in fact take place until condemnation, and thus it was necessary to retain the provisions in section 251 relating back the title. This, he submitted, explained the slight alteration in section 277 of the Act of 1966 dealing with the rescue of seized goods as compared to its predecessor, section 254. The words "as if they were" the property of the Crown were used instead of "being the" property because the property passed on condemnation and not on seizure.

I do not find Mr. Baker's explanation a wholly satisfying one, but it is better than nothing at all. It is clear that the draftsman was borrowing language from the Act of 1913, as well as from Australian and English legislation. This may well explain the oddity of the provision in section 272 of the Act of 1966 that every boat, vehicle or animal used in smuggling goods "shall be forfeited," whereas in section 273 it is provided,

"When any boat, vehicle, or animal *has become liable* to forfeiture under the Customs Acts, whether by virtue of section 272 of this Act or otherwise, all equipment thereof shall *also be liable to forfeiture*." (Emphasis added).

The judge was impressed by the apparent inconsistency of forfeiture being automatic and yet there being the time bar on seizure. He was also, in my judgment rightly, concerned about the difficulty and uncertainty which would ensue, as Mr. Thomas Q.C., who gave expert evidence for the defendants, pointed out, if title to goods passed automatically to the Crown upon any of the various events which gave rise to forfeiture. In this respect he referred, [1982] Q.B. 349, 359, to a manuscript treatise of Hale C.J., which was found amongst his papers and published in Hargrave's Law Tracts in 1787, and which was brought to the judge's attention by Mr. Baker. It included this passage, at p. 226:

"Though a title of forfeiture be given by the lading or unlading the custome not paid, yet the King's title is not compleat, till he hath a judgment of record to ascertain his title; for otherwise there would be endless suits and vexations; for it may be, 10 or 20 years hence there might be a pretence of forfeiture now incurred."

To have provided that all sorts and kinds of goods to which the Customs Act 1966 applied should automatically be forfeited to the Crown in certain circumstances could have cast upon the Crown a very onerous and burdensome obligation. Thus, considering both the provisions of the Customs Act 1966 and its predecessor, the Act of 1913, and its purpose, the judge preferred the evidence of Mr. Thomas that it did not provide for***29** automatic forfeiture, but that it provided that goods should be liable to forfeiture in certain circumstances, with the effect that title passed to the Crown only on seizure or later on condemnation. I respectfully agree. If the legislature had intended to make the very significant change in the Act of 1966 for which Mr. Gray contends, then not only would one have reasonably expected clear language to that effect, but also the absence of the apparently inconsistent provision for relation back in section 274, with its reference to the seizure of the goods.

The judge thus reached this provisional view: having regard to the fact that the words in section 12 (2) of the Historic Articles Act 1962 "shall be forfeited" were immediately followed by a reference to the Customs Act 1913 and the same words occurred in that Act and in the Act of 1966, where they had the meaning "shall be liable to forfeiture," linguistic considerations pointed to the view that in the Act of 1962 they had the same meaning. Accordingly, they did not mean "shall be forfeited automatically." I have used the word "provisional" because he - that

is, the judge - then considered the words in section 12 (2) "subject to the provisions of this Act." Having observed that the nature of the articles dealt with by the Historic Articles Act 1962 were unlikely to impose any onerous burdens on the Crown, he then turned to the provisions of the New Zealand Acts Interpretation Act 1924, which the Attorney-General's expert, Dr. Inglis, considered to be of considerable importance. This provided in section 5 (j):

"Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit:..."

Mr. Thomas's view that section 5 (j) was not an early recognition in 1924 of the power of the courts to disregard the literal meaning of an Act and to give it a purposive construction was preferred by the judge. Mr. Thomas considered that the section did no more than abolish the old distinction between remedial and penal acts and said that it was very rarely cited in New Zealand. Mr. Gray has failed to persuade me that the judge was wrong to have preferred Mr. Thomas's evidence. The very terms of the section, deeming every act to be remedial irrespective of whether it is a penal act, is clearly designed to abolish the distinction.

The judge, who had appeared in Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251, which had only just been reported, drew the attention of the experts on New Zealand law to two passages in the speeches in that case. The first was in the speech of Lord Wilberforce, at p. 272:

"I start by considering the purpose of article 26, and I do not think that in doing so I am infringing any 'golden rule.' Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation, and if it is usual - and indeed correct - to look first***30** for a clear meaning of the words used, it is certain, in the present case, both on a first look at the relevant text, and from the judgments in the courts below, that no 'golden rule' meaning can be ascribed."

The second passage was in the speech of Lord Diplock, at p. 280, where after referring to

"the traditional, and widely criticised, style of legislative draftsmanship which has become familiar to English judges during the present century and for which their own narrowly semantic approach to statutory construction, until the last decade or so, may have been largely to blame," he continued:

"That approach for which parliamentary draftsmen had to cater can hardly be better illustrated than by the words of Lord Simonds in Inland Revenue Commissioners v. Ayrshire Employers Mutual Insurance Association Ltd. [1946] 1 All E.R. 637, 641: 'The section... section 31 of the Finance Act 1933, is clearly a remedial section.... It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsmen failed.' The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current English style of legislative draftsmanship."

Fothergill's case concerned an international convention where the essential words were ambiguous and had to be resolved by reference to their French meaning. Both the New Zealand experts said that the courts in New Zealand would follow and apply the passages referred to above. Such an agreement cannot be dissociated from the nature of that case, where there was no clear meaning which emerged

from the words in the statute. The judge having, in my judgment, correctly concluded that the clear provisions of section 251 of the Customs Act 1913, which provided against automatic forfeiture, had been in substance re-enacted in the Act of 1966 by making seizure or perhaps even condemnation the sine qua non to the vesting of the property of the goods in the Crown, was not entitled to conclude that the words "shall be forfeited" were capable of either of the two meanings contended for. Having, in my respectful judgment, wrongly concluded that there was this ambiguity, he then [1982] Q.B. 349, 362 expressed the view that

"the purpose of the Act is to secure the enjoyment of historic articles for the people of New Zealand in the territory of New Zealand; that purpose is plainly advanced if articles exported or attempted to be exported become automatically the property of the Crown and can if necessary be recovered by the Crown." The purpose of the Act is set out in its title: "An Act to provide for the protection of historic articles and to control their removal from New ***31** Zealand." However, I accept Mr. Ross-Munro's well argued submission that what the judge was seeking to do was to interpret the words "subject to the *provisions* of this Act," in section 12 (2) of this Historic Articles Act 1962, as "subject to the purpose of this Act." Having correctly concluded, after a proper consideration of the Customs Acts, that there was no ambiguity in the words "shall be forfeited" there was no warrant for embarking on a search for the "purpose" of the Act.

I therefore reach the clear conclusion that an historic article knowingly exported or attempted to be exported in breach of the New Zealand Historic Articles Act 1962 is *not* automatically forfeited, so that the title there and then passes to Her Majesty in right of the Government of New Zealand. Seizure must first take place and, in view of the time bar contained in section 274 of the Customs Act 1966, the Attorney-General falls at the first fence.

2. Are the provisions of the Historic Articles Act 1962 and the Customs Acts 1913 and 1966 unenforceable in England as being foreign revenue, penal and/or public laws?

The judge answered this question in the negative. I have no difficulty in agreeing with him that the forfeiture provisions in section 12 of the Historic Articles Act 1962 are not a foreign revenue law. He correctly stated that the rule as to not enforcing a foreign law applies only to what may more or less accurately be described as taxes. He followed the observations of Denning L.J. in Regazzoni v. K. C. Sethia (1944) Ltd. [1956] 2 Q.B. 490, 515, approved by Viscount Simonds [1958] A.C. 301, 318: "These courts do not sit to collect taxes for another country or to inflict punishment for it:..."

A list of cases in which foreign law has not been enforced on the ground that it was revenue law is set out in Halsbury's Laws of England, 4th ed., vol. 8 (1974), p. 317, para. 420, n. 1, and are cases concerning capital gains tax, customs duty, stamp duty, rates, succession duty, income tax, profit tax and national insurance contributions. I do not think it would be overstating the position if I said that, certainly by the end of the defendants' submissions, all criticism of the judge's decision on this aspect of the case was virtually abandoned, although technically the point has been kept open.

Are the English courts being asked to enforce a foreign penal law?

It is common ground that if the question in this case was one of recognising the Historic Articles Act 1962, then it is a law which the English courts would recognise. Thus, if the carving had been seized and condemned in New Zealand, thereby being reduced into the possession of the New Zealand Government, then that Government would have been entitled to enforce its proprietary title in this country by reference to the Historic Articles Act 1962.

In Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 goods said to be household effects were shipped in a United States ship from Baltimore in the United

States to London, via Southampton. While the ship was***32** on the high seas the United States Treasury served a notice of levy in respect of unpaid tax on the shipowners in the United States, demanding the surrender of all property in their possession belonging to two United States taxpayers. When the ship docked at Southampton, both the former owner of the goods and the United States government claimed possession from the shipowners. Lord Denning M.R. said, at p. 482:

"If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law... If the United States Government had taken these goods into their actual possession, say in a warehouse in Baltimore, or may be by attornment of the master to an officer of the United States Government, that might have been sufficient to enable them to claim the goods. But there is nothing of that kind here. The United States Government simply rely on this notice of levy given to the shipowners, and that is not, in my view, sufficient to reduce the goods into their possession." Thus, Mr. Gray cannot validly contend that he is suing to enforce a proprietory title and not to enforce a statute. In order to make good his title in these proceedings, he has to rely on the Historic Articles Act 1962, since he cannot rely on any previous possession or other root of title.

The question whether a foreign law is penal must be decided by the English court. It must determine for itself, in the first place, the substance of the right sought to be enforced; and in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. The rule has its foundation in the wellrecognised principle that crimes, including in that term all breaches of public law, punishable by pecuniary mulct, or otherwise, at the instance of the state government, or someone representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed. Accordingly, no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country: *per* Lord Watson in Huntington v. Attrill [1893] A.C. 150, 155-156. Lord Watson continued, at p. 157:

"A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the state whose law has been infringed... But foreign tribunals do not regard these violations of statute law as offences against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorised to prosecute on its behalf, or of a member of the public in the character of a common informer."***33**

It was thus held that the action by the appellant in an Ontario court upon a judgment of a New York court against the respondent under New York State laws, being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial and not penal. It was a suit for a penalty by a private individual in his own interest, and not a suit brought by the government or people of a state for the vindication of public law.

Huntington's case makes it clear that the first part of Mr. Gray's definition of foreign penal law, namely that it must be part of the criminal code of a foreign country, is not sustainable. The right which it is sought to enforce may be a right which arises under legislation which is essentially designed to regulate commercial activities such as company legislation which may well contain a penal provision. I agree with the judge that it cannot be right simply to categorise the statute sought to be enforced as a

whole. The court must pay regard to the particular provision of the foreign law which it is sought to enforce.

It was readily accepted that forfeiture may, in certain circumstances, be a penalty. In Rex v. NAT Bell Liquors Ltd. [1922] 2 A.C. 128 forfeiture of whisky to the Crown in the Province of Alberta was held to be a penalty; so also in Banco de Vizcaya v. Don Alfonso de Borbon Y Austria [1935] 1 K.B. 140 a decree expropriating all property of the defendant on the ground that he was guilty of high treason was held to be a penal law and unenforceable in this country. But, urges Mr. Gray, the whole scheme of the Historic Articles Act 1962 is to preserve in New Zealand articles to which the Act applies. The provisions for forfeiture are but a deterrent by-product. The fact that it carries with it unpleasant consequences no more makes it penal than did the Massachusetts statute which was the foundation of the dispute in the case in the Court of Appeals of the State of New York, Loucks v. Standard Oil Co. of New York (1918) 120 N.E. 198.

That statute provided for the recovery on behalf of the widow or children or next of kin of any person killed by negligence of damages "in the sum of not less than $500, nor more than $10,000, to be assessed with reference to the degree of... culpability" of the wrongdoer. It thus provided for penal damages. To my mind, this decision, so far from assisting the Attorney-General, does the contrary. Cardozo J., giving the judgment of the court, followed Huntington v. Attrill [1893] A.C. 150 by repeating that a penal statute is one which awards a penalty to the state, or to a public officer on its behalf, or to a member suing in the interest of the whole community, to redress a public wrong. The purpose must be, not reparation to one aggrieved, but vindication of the public justice. Mrs. Loucks was not a member of the public suing in the interests of the whole community. She was suing in her own interest. Nor was she suing to redress a public wrong - to vindicate the public justice. She was suing to vindicate a private right - reparation owed to one who was aggrieved.

In the instant submission, the claim is made by the Attorney-General on behalf of the state. It is not a claim by a private individual. Further, the cause of action does not concern a private right which demands***34** reparation or compensation. It concerns a public right - the preservation of historic articles within New Zealand - which right the state seeks to vindicate. The vindication is not sought by the acquisition of the article in exchange for proper compensation. The vindication is sought through confiscation. It is of course accepted that the provision of section 5 (2) of the Historic Articles Act 1962, which provides for a fine not exceeding£200 for the same offence as gives rise to forfeiture, is a penal provision. However, in the majority of cases, forfeiture is a far more serious consequence. This case is a dramatic example. The current value of the carving is asserted by one of the parties to these proceedings to be in the region of £300,000.

It seems to me to be wholly unreal to suggest that when a foreign state seeks to enforce these forfeiture provisions in another country, it is not seeking to enforce a foreign penal statute. No doubt the general purpose of the Act of 1962 is to preserve in New Zealand its historic articles. However, this does not mean that a suit to enforce the forfeiture provisions contained in section 12 is not a suit by the state to vindicate the public justice. I therefore cannot agree with the judge that section 12 is not a penal provision. Accordingly, if I am wrong in the answer I have given to the first question raised in this action, I would still dismiss the Attorney-General's claim on this point of public international law.

In these circumstances it is unnecessary for me to consider the question of whether there is a third category of foreign laws which our courts do not enforce, namely public law, and if so, what it comprises. Without reaching any firm conclusion, I am impressed by the reasoning of the judge that there is no such vague general residual category and, that if the test is one of public policy, there is no reason

why English courts should not enforce section 12 of the Historic Articles Act 1962 of **New Zealand**.

I accordingly would also allow this appeal.

O'CONNOR L.J.

(read by Ackner L.J.). In June 1978 the first defendant, George **Ortiz**, sent part of his collection of Polynesian and Maori artefacts to London for sale by auction at Sotheby's. Among the treasures was a carved wooden panel, a Maori rarity from **New Zealand** estimated by some to be worth £300,000. The auction was to take place on June 29, 1978. On June 26 the writ in this action was issued and the plaintiff applied for and obtained an injunction to prevent the sale of the Maori carving on the ground that it was owned not by Mr. **Ortiz** but by Her Majesty in the right of the Government of **New Zealand**. The basis of the claim was that the carving had been illegally exported from **New Zealand** in 1973 and thus been forfeited to the Crown.

There is no dispute that the third defendant, Mr. Entwistle, had exported the carving from **New Zealand** in 1973 without permission knowing that it was an historical article the export of which was prohibited by the **New Zealand** Historic Articles Act 1962 unless permission under that Act had been obtained. In due course an order was made for the trial of two preliminary issues of law. [His Lordship read the questions***35** of law, ante, p. 14E-G, and continued:] Staughton J. held that the plaintiff succeeded on both issues. The defendants appeal to this court.

The first issue depends upon the true construction of section 12 (2) of the New Zealand Historic Articles Act 1962. The question is whether subsection (2) makes forfeiture automatic on export or attempted export, or whether as a result of the Customs Act 1913 forfeiture depends upon seizure.

The Customs Act 1913 had been repealed and reenacted in the Customs Act 1966 so that for this case the Act of 1962 must be read with the Act of 1966. Section 251 of the Act of 1913 expressly provided that forfeiture was to take place on seizure. That section has been replaced by section 274 in the Act of 1966. Mr. Gray on behalf of the plaintiff submitted that a radical change in the law had been made by the difference in wording between the two sections and that from 1967, when the Act of 1966 came into force, forfeiture was automatic. Like Lord Denning M.R. and Ackner L.J. and Staughton J., I cannot agree with this submission for the reasons given by them.

I can find no ambiguity in section 12 (2) of the Act of 1962. The incorporation of the Customs Act "subject to the provisions of this Act" requires that the same meaning be given to the phrase "shall be forfeited" in both Acts unless by express provision or necessary implication a different meaning is required under the Act of 1962. There is no express provision and I can find nothing in that Act which requires that a different meaning be given to the phrase. Forfeiture under the Act of 1962 is not automatic and the first issue must be decided in favour of the defendants.

Once that decision is reached it is not necessary to decide the second issue. Lord Denning M.R. and Ackner L.J. have however dealt with the issue. I agree the claim fails on this issue as well as the first because this is a penal law which our courts will not enforce.

Appeal allowed with costs. Leave to appeal. (M. I. H.)

RepresentationSolicitors: Manches & Co.; Joelson Wilson; Allen & Overy.

The plaintiff appealed.

Andrew Morritt Q.C., Charles Gray and *Mark Warby* for the plaintiff. The first preliminary issue depends on the proper construction of the Historic Articles Act 1962. Technically that is a matter of fact since it is a question of foreign law, but it would be artificial so to regard it since if the House

were sitting as the Privy Council the question would be one of law. The two experts who gave evidence adopted different approaches. The issue will be argued as though it were a point of law arising on an English statute. The contention in the courts below that the Customs Acts 1913 and 1966 provide for automatic forfeiture is now***36** abandoned. However, there is automatic forfeiture under section 12 (2) of the Act of 1962.

The equivalent Act before 1962 was the Maori Antiquities Act 1908. The definition of "Maori antiquities" in section 2 is narrower than that of "historic article" in section 2 of the Act of 1962. Section 6 (3) provides that any Maori antiquities entered for export contrary to the Act "shall be forfeited, and shall vest in His Majesty." It is clear from that wording, and from the absence of any reference to the necessity of seizure and condemnation, that automatic forfeiture was intended. The word "and" imports that the arising of the cause of forfeiture and the vesting in the Crown occurred simultaneously. It was accepted before Staughton J. that that was the position: see [1982] Q.B. 349, 356A-B. There was also a Customs Act in 1908, but there was no provision linking the two Acts or applying the Customs Act to antiquities. Until 1962, therefore, section 6 (3) provided the only protection for antiquities.

In the Customs Act 1913, "forfeited goods" and "restricted goods" were defined in section 2. Section 47 (5) provided that all goods "shipped on board any ship for the purpose of being exported" contrary to the terms of the prohibitions set out earlier in the section and all goods "waterborne for the purpose of being so shipped and exported, shall be forfeited." The words "shall be forfeited" have constantly been construed in England as forfeited only when seized. Moreover, there is good reason why there should not be automatic forfeiture for the general run of customs goods (e.g., guns), since there could be complications with an extensive range of liabilities. References later in the Act to seizure confirm that forfeiture under section 47 (5) was conditional. Section 47 did not apply to historic articles until that section and the Act of 1913 were brought into the Act of 1962 by section 12 (1) of that Act (but "subject to the provisions" of the Act of 1962). Thereafter historic articles were included in "restricted goods." The effect therefore was that section 12 (1) provided for the conditional forfeiture of historic articles shipped on board or waterborne to avoid a prohibition on export.

If the forfeiture referred to in section 12 (2) were also conditional, that subsection would be wholly superfluous. The subsection must be intended to have some further effect, and the only possibility is automatic forfeiture. That subsection in effect reproduces, with certain changes, section 6 (3) of the Act of 1908. There is no indication that the Act of 1962 has any different purpose, as regards the protection of antiquities, from the Act of 1908, and indeed the preamble to the Act of 1962 is "an Act to provide for the protection of historic articles and to control their removal from New Zealand." It is permissible to have regard to the preamble in order to ascertain the purpose of the Act: secion 5 (e) of the Acts Interpretation Act 1924. Forfeiture under section 12 (1) occurs where there is no particular state of mind in the exporter, for example, in the case of an innocent exporter. Section 12 (2) applies where the goods are "knowingly" exported in breach of the Act, and it also includes attempted exports. The subsection both limits section 6 (3) of the Act of 1908, in that the scope of automatic forfeiture is confined, and***37** extends it, in that it applies whether the goods have been entered for export or not.

Section 12 (2) is in effect a longstop provision to cater for smugglers. Section 12 (3), imposing an obligation to deliver the article to the minister, and the proviso to that subsection, reinforce the submission. It follows that "forfeited goods" in the latter part of section 12 (2) must mean goods which have been forfeited, and therefore the meaning there is not that in the Customs Act, where the definition is in terms of goods liable to be forfeited. The provi-

sions of the Act of 1962 are expressed to be paramount. and therefore the definition in the Customs Act cannot prevail if it would not fit into the Act of 1962 in any particular context. Sections 253 to 259 of the Act of 1913 set out a code of seizure and condemnation. That procedure is followed if there is a requirement of conditional forfeiture. Where section 12 (2) applies, other remedies have to be pursued, for example, an action in a foreign country, as in the present case.

The Act of 1913 was replaced by the Customs Act 1966. It is now accepted that references in the Act of 1962 to the Act of 1913 must be read as references to the later Act, in accordance with section 21 of the Acts Interpretation Act 1924. There is no material difference between the two Customs Acts. The counterpart in the Act of 1966 of section 47 of the Act of 1913 is . A new section 287 of the Act of 1966, inserted by section 10 of the Customs Acts Amendment Act 1970, makes it clear that forfeiture under the Customs Acts is conditional.

If "shall be forfeited" in section 12 (2) is ambiguous. the ambiguity should be resolved in favour of the plaintiff, since automatic forfeiture would plainly "best ensure the attainment of the object of the Act," and the Act of 1962 should be construed accordingly: section 5 (j) of the Act of 1924. Although the first part of that subsection abolishes the distinction between remedial and penal provisions, it goes on to provide that every Act "shall... receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act." Its predecessor was considered in Smith v. McArthur [1904] A.C. 389. The English common law is, in appropriate cases, to the same effect: see Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251.

Automatic forfeiture does not involve a less liberal construction than conditional forfeiture (where there is a right of challenge before forfeiture becomes complete) since if the goods have gone from the country the procedure for seizure and condemnation is irrelevant anyway. The only action that can be taken is a suit in the foreign country. If it is successful, there is nothing to prevent the minister from then exercising his discretion under the proviso to section 12 (3) of the Act of 1962. He could for example invite the exporter to apply for a permit. Moreover, it would be open to the "owner" to prove that he did not have the relevant knowledge at the relevant time, and there would be judicial protection to that extent.

The judgment of Staughton J. [1982] Q.B. 349 was right for the reasons he gave, although he did not deal with the "superfluity" point. In the judgments of the Court of Appeal, Lord Denning M.R., ante, p. 17G, and Ackner L.J., ante. p. 26D, wrongly took into account the marginal note to section 12, "Application of Customs Act 1913."***38** Section 5 (g) of the Acts Interpretation Act 1924 provides that marginal notes are not to be deemed part of the Act. After 1956 the headings of sections came after the section numbers, but in Daganayasi v. Minister of Information [1980] 2 N.Z.L.R. 130 it was held that they were still marginal notes. Lord Denning M.R., ante, p. 19A. was quite wrong to suggest that the Act of 1962 would have effect beyond the territory of New Zealand, cf. Staughton J. [1982] Q.B. 349, 355C. The Customs Acts define the time of exportation in such a way as to keep the ambit of the Acts well within the New Zealand territorial limits: see section 69 of the Act of 1966. Lord Denning M.R.'s "territorial theory of jurisdiction" is not quarrelled with, but it has no application.

[LORD FRASER OF TULLYBELTON. Argument will be heard from all parties on the first preliminary issue before the second issue is dealt with.]

Gray following. The arguments before the trial judge and the Court of Appeal were the same and were based on (1) internal, linguistic, considerations and (2) the purposive point. The time provisions show that, in the case of an export by aeroplane, the time of export is when the plane gets to the end of the runway. If the defendants are right, the article only then becomes liable to forfeiture; that is absurd in practical terms. It is accepted that

there is a difficulty with "attempted to be exported" if the plaintiff is right, but "exported" does also appear in section 12 (2). There are strong indications in section 12 (3) that automatic forfeiture is intended. That subsection says that where a historic article is forfeited, it "shall be delivered" to the minister. That would be odd wording to use if the article were only in jeopardy. In the proviso there is a reference to the minister returning the article to the person who "was" the owner immediately before the forfeiture. That also is anomalous if the defendants are right: the owner might never have ceased to be the owner at all. The "superfluity" point was not raised below.

The purposive argument has been repeated before the House. Section 12 (2) will always in practice be directed at the person who has decided to smuggle goods out. In that context automatic forfeiture better serves the purpose of the Act.

Paul Baker Q.C. and *Nicholas Patten* for the first defendant. As a pure matter of language "shall be forfeited" could connote either liability to divestment or immediate divestment. In the Customs Acts and the Act of 1962 it means liable to be divested, and "forfeited goods" means goods in respect of which a cause of forfeiture has arisen. When the Act of 1913 was passed, it was well established in English law, and had been for a number of centuries, that "shall be forfeited" meant "shall be liable to be forfeited." Section 12 is set in a very strong historical context.

The plaintiff's "superfluity" argument is based on a misapprehension. Section 12 (1) of the Act of 1962 sets out by applying the whole of the Customs Act, but "subject to the provisions" of the Act of 1962. Section 12 (2) then deals with forfeiture and applies those provisions of the Customs Act relevant to forfeiture; since those provisions are thereby made part of the Act of 1962, their application must be excluded in***39** subsection (1), because that subsection is "subject to the provisions of this Act." Section 12 (1) is therefore not concerned with forfeiture at all. It is section 12 (2) which deals with forfeiture, but there again the application of the Customs Act is modified. Section 5 of the Act of 1962 creates the offence of removing or attempting to remove a historic article, knowing it to be a historic article, without a written permit. It is an offence with mens rea. Section 12 (2) picks that up: goods knowingly exported or attempted to be exported in breach of the section "shall be forfeited." The provisions regulating the process whereby the cause of forfeiture comes about are therefore self-contained within the Act of 1962, and since section 12 (2) is also "subject to the provisions of this Act," the Customs Act is not had regard to for that purpose, and in particular section 70 of the Act of 1966, which creates an absolute offence which bites at a different stage. The Customs Act provisions which are imported are those laying out a code of forfeiture. Section 15 of the Act of 1962 makes the position clear.

Staughton J. accepted [1982] Q.B. 349, 360E, that linguistic considerations pointed to conditional forfeiture, but went on to say, at p. 362D, that that was displaced by "subject to the provisions of this Act." He did not indicate what such provisions led him to that conclusion. There are none; the provisions of the Act are consistent with the meaning based on linguistic considerations. Section 12 (3) is barely workable under automatic forfeiture. It is obviously directed to customs officers who, when they seize an article, must proceed as there stated, rather than under section 286 of the Act of 1966.

The Antiquities Act 1975, which has replaced the Historic Articles Act 1962, deals with the whole matter in much greater detail and undoubtedly provides for automatic forfeiture. However, it is not legitimate to construe the Act of 1962 by reference to that Act.

Section 5 (j) of the Acts Interpretation Act 1924 does not have the wide ambit claimed for it. Its function was to abolish the distinction between remedial and penal provisions. The latter part of the subsection is prefaced by "and shall accordingly ..."; it is there to give effect to the first part.

Staughton J. agreed with this view: see [1982] Q.B. 349, 360-361. In any event the subsection can only be used if there is ambiguity or doubt. It cannot be imposed if the language is clear. In Smith v. McArthur [1904] A.C. 389 there was a deadlock, and the Act was unworkable if a literal construction was given. Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251 was a very special case on an international convention. The underlying idea was the desirability of unifying the rules throughout all the countries concerned. There is no such issue in the present case. The case was introduced by the judge and not by any of the parties.

Even if purpose is considered, it does not assist the plaintiff. The purpose of the Act of 1962 is not stated to be to vest articles in the Crown. If it were, the qualification "knowingly" in section 12 (2) would be unaccountable. The defendants' construction would afford a good measure of protection. The Act of 1962 has an overall deterrent effect. Section 69 of the Act of 1966 defines export so that it is complete by the time the***40** article has left New Zealand territory. A ship could be stopped before it reached the territorial limit.

The Maori Antiquities Act 1908 is a side-issue. The Act of 1962 covered a much wider range; it cannot be suggested that it was simply a consolidating Act.

Colin Ross-Munro Q.C. and *Gerald Levy* for the third defendant. The first defendant's submissions are adopted, but with a difference. Section 12 (1) of the Act of 1962 brings in the whole of the Customs Act, including the forfeiture provisions in section 70 (7) of the Act of 1966. The point of section 12 (2) is to make it quite clear that a historic article which is exported or attempted to be exported in breach of the Act is liable to be forfeited, in short compass, and without having to amend the Customs Act by numerous insertions in it. Effectively, section 12 (2) contains further and better particulars of section 12 (1).

The plaintiff's attempt to establish that "shall be forfeited" in section 12 (2) has a different meaning from elsewhere fails for three reasons. (1) The Maori Antiquities Act 1908 does not help in the construction of section 12 (2). If that is wrong, that Act supports the defendants if anything, since the word "vesting" in section 6 (3) does not appear in the Act of 1962. (2) If the words have a clear meaning, one should not look to the purpose in order to give a strained meaning to the language. (3) Section 12 (1) says that all the provisions of the Customs Act are to apply, which must include, as well as the forfeiture provision, those relating to seizure, notice, the 2-year limit on seizure, territorial limits and condemnation: see sections 279-282 of the Act of 1966.

There are four reasons why the plaintiff's submissions on automatic forfeiture are wrong. (1) If automatic forfeiture were intended, the draftsman could not have been more inept, since there would be no need to refer to the applicability of the Customs Act at all, and it would have been perfectly easy to say expressly that title vested in the Crown. (2) It would be strange, even if not impossible, that in one and the same section there were contained the Customs Act régime of conditional forfeiture and a completely different system of automatic forfeiture. (3) All the Customs Act provisions relating to seizure, condemnation etc. would be inappropriate, but section 12 (2) says that (all) the relevant provisions are to apply "in the same manner as they apply to goods forfeited under the Customs Act." (4) The transfer of title to the Crown would depend on whether the export or attempted export was done "knowingly." That would be an imprecise and unsatisfactory test.

The plaintiff's submissions are not only startling to English eyes but are not justified in New Zealand law and involve bringing in automatic forfeiture and all that is entailed by it by a side-wind and by inference.

In considering a question of foreign law, the House of Lords is entitled to form its own view of the effect of a foreign statute or decree. It will of course pay attention to the opinions of experts and/or the

findings of foreign tribunals, but it is not bound by either. It is a different type of finding of fact from the normal variety, since law is incorporated in it: see Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyd's Rep. 223. If it were a question of, say, Argentinian law, the***41** court as a matter of practical common sense would be bound by what a witness said, since it would not be familiar with the system of law. That is not the present case. In extreme cases the court can reject the opinions of both expert witnesses and come to its own conclusion: see Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1925] A.C. 112, 124-125, 128-129, 134, 145, and in the Court of Appeal [1923] 2 K.B. 630, 643, *per* Bankes L.J. Staughton J.'s approach was correct but he came to the wrong conclusion.

Morritt Q.C. replied.

[LORD FRASER OF TULLYBELTON. Their Lordships do not at present wish to hear argument on the second issue, but they may wish to do so in due course.]

Their Lordships took time for consideration.

April 21.

LORD FRASER OF TULLYBELTON.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Brightman, and I agree with it. For the reasons there stated I would dismiss this appeal.

LORD SCARMAN.

My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Brightman. I agree with it. For the reasons he gives I would dismiss the appeal.

LORD ROSKILL.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Brightman. For the reasons he gives I too would dismiss the appeal.

LORD BRANDON OF OAKBROOK.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Brightman. I agree with it, and for the reasons which he gives would dismiss the appeal.

LORD BRIGHTMAN.

My Lords, this appeal arises out of the trial of a preliminary issue in a suit brought by the New Zealand Government against the exporter and purchaser of a tribal antiquity. The facts as pleaded in the amended statement of claim, upon the basis of which the issue fell to be tried, are as follows. In or about 1972 one Manukonga found in a swamp in the province of Taranaki a valuable Maori relic, described as a series of five carved wood panels that formed the front of a food store. In 1973 Manukonga sold the carving to the third defendant Mr. Entwistle who was a dealer in primitive works of art. The carving was to the knowledge of Mr. Entwistle an historic article within the meaning of the Historic Articles Act 1962 of **New Zealand**. Later in the same year the carving was exported from **New Zealand** by or on behalf of Mr. Entwistle. No permission under the Historic Articles Act 1962 authorising the removal of the carving from **New Zealand** had been obtained by him. In the same year Mr. Entwistle sold the carving to the first defendant Mr. **Ortiz** for $65,000. In 1978 Mr. **Ortiz** consigned***42** the carving to Messrs. Sotheby Parke Bernet & Co. (Sotheby's) in England for sale by auction.

In June 1978 the Attorney-General of **New Zealand** (suing on behalf of Her Majesty the Queen in right of the Government of **New Zealand**) issued proceedings against Mr. **Ortiz** and Sotheby's and (by amendment) Mr. Entwistle. The **New Zealand** Government claims a declaration that the carving is the property of Her Majesty the Queen; as against Mr. **Ortiz** and Sotheby's an order for delivery up of

the carving; and as against Mr. Entwistle damages for conversion.

Under a consent order Sotheby's retain possession of the carving pending the outcome of the action, and proceedings against them have been stayed.

In 1980 the Queen's Bench master, whose decision was upheld on appeal, ordered the trial of two preliminary issues, first, whether on the facts pleaded "Her Majesty the Queen has become the owner and is entitled to possession of the carving... pursuant to the provisions of the Historic Articles Act 1962 and the Customs Acts 1913 and 1966." and secondly "whether in any event the provisions of the said Acts are unenforceable in England as being foreign penal, revenue and/or public laws."

It is not in dispute for the purposes of the preliminary issues that the carving was exported in breach of the Act of 1962. The resolution of the first issue depends on whether, on the true construction of section 12 of the Act of 1962, incorporating certain provisions of the Customs Act, the carving was forfeited immediately it was unlawfully exported, so that it thereupon became vested in the Crown; or whether the unlawful export of the carving merely rendered it liable to forfeiture in the future, the forfeiture taking effect only upon the seizure by the New Zealand customs or police, which has not taken place. There is an express provision in the Customs Act 1913, and it is a necessary implication from a provision in the Customs Act 1966, that forfeiture under those Acts is not complete until seizure.

I turn in more detail to the statutory provisions. The Historic Articles Act 1962 repealed the Maori Antiquities Act 1908, which itself consolidated earlier enactments. The Act of 1962 is described in the long title as "An Act to provide for the protection of historic articles and to control their removal from New Zealand." Section 2 contains a definition of "historic article." It is not in dispute that the carving falls within this definition. The definition is a wide one, and includes not only artifacts, but also documentary matter and certain specimens of animals, plants and minerals. Section 4 enables the Minister of Internal Affairs to acquire an historic article by purchase or gift. Section 5 describes what acts are unlawful in particular relation to an historic article, and it is the only section to do so. Unless a person transgresses section 5, he is at liberty to dispose of or deal with an historic article in the same manner as he may dispose of or deal with any other article. This section, which is crucial to the construction of section 12, reads as follows, so far as relevant:

"(1) It shall not be lawful after the commencement of this Act for any person to remove or attempt to remove any historic article from***43** New Zealand, knowing it to be an historic article, otherwise than pursuant to the authority and in conformity with the terms and conditions of a written certificate of permission given by the Minister under this Act. (2) Every person who contrary to the provisions of this section removes or attempts to remove any article from New Zealand, knowing it to be an historic article, commits an offence, and shall be liable on summary conviction to a fine not exceeding£200...."Sections 6 to 11 deal with applications for permission to remove an historic article from New Zealand and incidental matters. Section 12, which is the section that falls to be construed, reads as follows:

"(1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913. (2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913. (3) Where any historic article is forfeited to Her Majesty pursuant to this

section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions: Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose."Section 16 empowered the Governor-General by Order in Council to make regulations for certain purposes, including regulations providing for such matters as are contemplated by or necessary for giving full effect to the provisions of the Act. Your Lordships have not been made aware of any relevant regulations.

The Act of 1962 is no longer in force. It was repealed by the Antiquities Act 1975 as from April 1, 1976. However, the New Zealand Government do not claim that they are able to base the Crown's claim to ownership on any provision of the Act of 1975, which therefore can be disregarded.

Section 12 of the Act of 1962 was expressed to operate by reference to the Customs Act 1913. The provisions of that Act are to apply to an historic article, the removal from New Zealand of which is prohibited by the Act of 1962, as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Act of 1913. The Act of 1913 was repealed by the Customs Act 1966, which came into operation for all relevant purposes on January 1, 1967. Section 70 of the Act of 1966 is the section which corresponds to section 47 of the Act of 1913. It is common ground (although at one time disputed) that in consequence of ***44** section 21 of the Acts InterpretationAct 1924, section 12 of the Act of 1962 must for present purposes be read as referring to the Customs Act 1966, and in particular to section 70 thereof.

The immediate effect of notionally including, without qualification, an historic article as a prohibited export under section 70 of the Act of 1966 is that a contravention of the prohibition would render the exporter liable to a fine and would render the article subject to forfeiture, in the terms of subsections (6) and (7), which read:

"(6) If any person exports, or ships with intent to export, or conspires with any other person (whether within New Zealand or not) to export any goods contrary to the terms of any such prohibition in force with respect thereto he commits an offence and shall be liable to a fine not exceeding £500 or three times the value of the goods, whichever sum is the greater. (7) All goods shipped on board any ship or aircraft for the purpose of being exported contrary to the terms of any such prohibition in force with respect thereto, and all goods waterborne for the purpose of being so shipped and exported, shall be forfeited."

A further effect of notionally including, without qualification, an historic article in section 70 would be to bring into operation in relation thereto all the other provisions of the Customs Act 1966 which are incidental to subsections (1), (6) and (7). For instance, section 69 defines the time at which goods on board a ship or aircraft are deemed to be exported. Section 212 confers on a person in the employment of the customs the right to question a person who is on board a ship or aircraft as to whether he has in his possession restricted or forfeited goods; "restricted goods" includes prohibited exports. Sections 213 to 218 confer rights of search and discovery of documents. Section 225 regulates the sale of forfeited goods. Section 254 prescribes a penalty for concealing restricted goods on a ship or aircraft. Of particular significance are sections 274 and 275, which read as follows, so far as material:

"274. When it is provided by this Act or any other of the Customs Acts that any goods are forfeited, and the goods are seized in accordance with this Act or with the Act under which the forfeiture has accrued, the forfeiture shall for all purposes relate back to the date of the act or event from which the forfeiture accrued.

"275. (1) Any officer of customs or member of the police may seize any forfeited goods or any goods which he has reasonable and probable cause for

suspecting to be forfeited... (4) No goods shall be so seized at any time except within two years after the cause of forfeiture has arisen."Section 278 requires immediate notice of seizure to be given to a person known or believed to have an interest in the goods. Section 279 provides that goods seized as forfeited shall be deemed to be condemned unless forfeiture is disputed in the prescribed manner. Section 280 deals with proceedings instituted in the Supreme Court for the condemnation of goods seized as forfeited. Section 282 is to the like effect in relation to a magistrates' court. Section 283 provides that conviction of an offence***45** which gives rise to forfeiture shall have effect as condemnation, without suit or judgment, of any goods that have been seized and in respect of which the offence was committed. Section 286 provides that "All forfeited goods shall, on forfeiture, become the property of the Crown ..." Section 287 empowers the Governor-General to waive a forfeiture.

It follows from the wording of section 274 of the Act of 1966, and from the definition of "forfeited goods" in section 2 as goods "in respect of which a cause of forfeiture has arisen," that goods which are declared by the Act to be forfeited are in most instances more accurately described as "liable to forfeiture," and that no actual forfeiture takes place and there is accordingly no transfer of ownership until the goods have been seized. This was, perhaps, more clearly expressed in the corresponding section of the Act of 1913, which reads as follows:

"251. When it is provided by this Act or any other Customs Act that any goods are forfeited, the forfeiture shall take effect without suit or judgment of condemnation so soon as the goods have been seized in accordance with this Act or with the Act under which the forfeiture has accrued, and any such forfeiture so completed by seizure shall for all purposes relate back to the date of the act or event from which the forfeiture accrued."

Counsel for the New Zealand Government conceded before your Lordships (although it was at one time disputed) that there is no relevant distinction between these two sections.

The two preliminary issues were tried by Staughton J. [1982] Q.B. 349The first issue raised a question of foreign law. A question of foreign law is a question of fact upon which the trial judge requires the assistance of evidence from foreign lawyers. The learned judge had the advantage of expert evidence from Dr. Inglis Q.C. on behalf of the New Zealand Government and Mr. Thomas Q.C. on behalf of Mr. Ortiz. The witnesses were divided as to whether the Customs Act 1966 provided for automatic forfeiture or whether seizure was a necessary preliminary. On this issue the judge accepted the evidence of Mr. Thomas that the Act did not provide for automatic forfeiture. That view of the effect of the Act is no longer challenged. There was a similar divergence of view between the experts as to whether or not there was automatic forfeiture under section 12 (2) of the Act of 1962. On that aspect, the learned judge expressed himself as follows[1982] Q.B. 349, 362:

"My conclusions on this issue are therefore, as follows: (1) the words 'shall be forfeited' are equally capable of meaning shall be forfeited automatically or shall be liable to forfeiture; (2) the reference to the Customs Act 1913 and now to the Customs Act 1966 where the same words mean 'shall be liable to be forfeited,' points to the words having that meaning in the Historic Articles Act 1962; (3) that is not conclusive because section 12 of the Historic Articles Act 1962, when it refers to the Customs Act, does so 'subject to the provisions of this Act': (4) the purpose of the Act of 1962 may properly be taken into account by a New Zealand court and points firmly in favour of automatic forfeiture. On these grounds I accept the evidence of Dr. Inglis that it does so provide."***46** The judge then turned to the second issue, which he decided in favour of the plaintiff for reasons which need not be recounted.

Mr. Ortiz and Mr. Entwistle appealed. 2 In reserved judgments the Court of Appeal. ante, p. 13E, unanimously decided that there was no ambiguity in sec-

tion 12 (2) of the Act of 1962; that forfeiture under that section took effect only upon seizure; and that, since the carving had not been forfeited, the Crown was neither the owner nor entitled to possession of the carving.

That decision was sufficient to dispose of the preliminary issues. If the first issue were decided against the New Zealand Government, there was no need to discuss and decide the second issue, as O'Connor L.J. pointed out. The court did, however, deal with the second issue, and expressed opinions thereon. I imagine that this course was taken for the assistance of your Lordships' House, in case your Lordships should form a contrary view on the first issue, in which event it would have been helpful to have had the opinions of the Court of Appeal. It was perhaps with this sort of consideration in mind that the order made by the master directed a trial of the second issue "in any event." My Lords, I take the view that the opinions expressed by the learned Lords Justices on the second issue were, in truth, obiter. Indeed, that would also seem to have been the view of the Lords Justices themselves, because in the report of the case in the Weekly Law Reports, which, as your Lordships know, will have been seen in proof by the Lords Justices, the appeal is treated in the headnote [1982] 3 W.L.R. 570, 571 as disposed of upon the first issue alone. Your Lordships have heard no argument on the second issue, and I venture to think that, in any event, your Lordships would not wish to be taken as expressing any conclusion on the correctness or otherwise of the opinions so expressed.

My Lords, I am in respectful agreement with the decision on the first issue reached by the Court of Appeal, although I express my reasons differently.

Section 12 (1) of the Act of 1962 says:

"Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act ..." That raises the question, what articles are forbidden to be removed from New Zealand by the Act? In my opinion, the answer is, those articles defined by section 2, the removal of which is not authorised by a certificate of permission given by the Minister of Internal Affairs, although there is no offence unless the removal is done knowingly. I shall refer to an historic article, the removal of which is forbidden by section 5 (1), as a "protected chattel."

Continuing with my analysis of section 12 (1), I find that the provisions of the Customs Act 1913 are to apply to a protected chattel***47**

"in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913." This formula, if unqualified, would have the effect of applying to a protected chattel all the provisions of the Act of 1966 which are appropriate. I have already suggested a number of provisions of the Act of 1966 which are thus introduced, notably section 69 (time of exportation), subsections (4) and (5) of section 70 (fine and forfeiture for contravention), and section 274 (relation back of forfeiture and necessity for seizure). The interpretation section is also introduced, the most important definition being that of "forfeited goods" - "goods in respect of which a cause of forfeiture has arisen under the Customs Acts." The definition of "restricted goods," as inclusive of goods the exportation of which is prohibited by the Customs Acts, is also important as it provides the lead-in to a number of sections of the Act of 1966.

However, this application of the Act of 1966 takes effect "subject to the provisions of this Act." The provisions of the Act of 1962 are, therefore, paramount, and in consequence the incorporated provisions of the Act of 1966 are subject to the provisions of sections 5 and 12 (2) and (3) of the Act of 1962.

Section 5 (1) of the Act of 1962 creates the one and only offence which is peculiar to an historic article, namely, the removal of it or an attempt to remove it from New Zealand, with knowledge that it is an

historic article, otherwise than pursuant to a written certificate of permission. For that offence section 5 (2) imposes a liability on summary conviction to a fine not exceeding £200. It is at that point that we find the first qualification upon the general application of the provisions of the Act of 1966 to a protected chattel. Under section 70 (6) of the Act of 1966, the pecuniary penalty for exporting, or shipping with intent to export, any goods contrary to the prohibition in section 70 (1) is a fine not exceeding £500 or three times the value of the goods if greater. Only the lesser penalty prescribed by the Act of 1962 can be imposed for the unlawful removal or attempted removal from New Zealand of a protected chattel.

The application of the Act of 1966 is also subject to section 12 (2) of the Act of 1962. There are two limbs to this subsection. The first limb provides that an historic article "knowingly" exported or attempted to be exported in breach of the Act of 1962 shall be forfeited to the Crown. It is clear from section 5 that the adverb "knowingly" applies not to knowledge of the fact of export or attempt thereat, but to knowledge that the article is an historic article as defined. What the first limb of subsection (2) does, is to introduce the penalty of forfeiture for committing an offence under section 5 (1), as a penalty which is additional to the fine that can be imposed under section 5 (2). But, as in the case of the fine, there is no penalty of forfeiture unless it can be said of the exporter (remover) that he knew at the time the offence was committed that the article was an historic article.

The second limb of section 12 (2) provides, again subject to the provisions of the Act of 1962, that***48**

"the provisions of the Customs Act [1966] relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act [1966]." The effect is to apply to an historic article, known to be such, which is exported or attempted to be exported in breach of section 5 (1), the whole range of provisions of the Customs Act 1966 relating to "forfeited goods," but subject again to the paramountcy of the Act of 1962. These provisions include, most importantly, section 274 which implies that forfeiture takes effect only on seizure and provides that the forfeiture then relates back to the date when the cause of forfeiture arose.

Since the application of such forfeiture provisions is expressed to be "subject to the provisions of this Act," and since section 12 (2) of the Act of 1962 is the enactment which imposes forfeiture for an offence under section 5 (1) of the Act of 1962, it seems to me that section 70 (7) of the Act of 1966 is overridden by section 12 (2) of the Act of 1962. A further minor result of the paramountcy of the Act of 1962 is that the power conferred on the Governor-General by section 287 of the Customs Act 1966 to waive a forfeiture will not apply in the case of the forfeiture of an historic article; such power is vested by section 12 (3) of the Act of 1962 in the Minister of Internal Affairs.

So, as it seems to me, the position of the Crown and the wrongdoer under the Act of 1962 is clear. The offence is created by section 5 (1). The pecuniary penalty is defined by section 5 (2). The penalty "in rem" is created by section 12 (2). The process of forfeiture is regulated in accordance with the provisions of the Act of 1966, in particular, the necessity of seizure (to be followed by actual or deemed condemnation) before the forfeiture is completed, at which stage it relates back to the accrual of the right to forfeit. There being no seizure in the instant case, the conclusion is inescapable that the ownership of the carving and the right to possession thereof have not become vested in the Crown.

Counsel for the appellant sought to argue that subsection (2) of section 12 imposed automatic forfeiture for a "knowing" export of an historic article, as a remedy additional to conditional forfeiture for an "unknowing" but illegal export under the Customs Act 1966 as applied by subsection (1). He accepted that there could be no forfeiture without seizure in the case of an "unknowing" export or attempted export, but he argued that there was no reason in the

case of a "knowing" export or attempted export to introduce into a subsection (2) forfeiture, the requirement of seizure before the forfeiture takes effect. He sought to bolster the argument by reference to the supposed effect of the earlier Maori Antiquities Act 1908, which was said by both expert witnesses to have had the result of imposing immediate forfeiture without seizure if a Maori antiquity were "entered for export" contrary to the Act. It was said that it would be unlikely that the repealing Act, with its stated object of protecting historic articles and controlling their removal from New Zealand, would have deliberately reduced that protection, and lessened the chances of reversing an unlawful removal by requiring seizure before forfeiture. I am, however, by no means convinced that the Act of 1908 on its true construction did provide for forfeiture without seizure,***49** which would be quite contrary to the general pattern of a Customs Act. Reference to the Act of 1908 is of limited value in this case, and I express no opinion upon the point. Counsel also referred to section 5 (j) of the Acts Interpretation Act 1924, which bids the court to give to a statute

"such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act... according to its true intent, meaning and spirit:..." Counsel submitted, and I am disposed to agree, that the recovery of unlawfully exported historic articles would be best ensured if title thereto were to vest in the Crown independently of seizure.

In my opinion there is a fatal flaw in the argument of counsel. There is no offence committed under the Act of 1962 by the export of an historic article unless it is done "knowingly." No cause of forfeiture is capable of arising by reason of an "unknowing" export of an historic article, apart from a forfeiture for an offence under the Customs Act which has nothing to do with the fact that the subject matter of the export is an historic article. There are not two possible causes of forfeiture of an historic article, one cause arising under the Customs Act 1966 based upon an "unknowing" export or attempt thereat, and the other arising under section 12 (2) of the Act of 1962 based on a "knowing" export or attempt thereat. It is only to section 12 (2) of the Act of 1962 that one can look in order to find a cause of forfeiture of an historic article as such. Then, to ascertain the process of forfeiture, one turns to the Act of 1966. There one finds that section 274 requires seizure as a preliminary to forfeiture. The contingent nature of the forfeiture is underlined by the reference in section 12 (2) to "the provisions of the Customs Act 1913 relating to forfeited goods," which must inevitably be read as "the provisions of the Customs Act 1966 relating to goods in respect of which a cause of forfeiture has arisen under the Customs Act." It is not in my opinion possible to reach any conclusion save that (a) the penalty of forfeiture of an historic article as such is imposed only for an offence under section 5 (1) of the Act of 1962, and (b) such forfeiture is not complete until seizure.

I have every sympathy with the appellant's claim. If the statement of claim is correct, New Zealand has been deprived of an article of value to its artistic heritage in consequence of an unlawful act committed by the second respondent. I do not, however, see any way in which, upon a proper construction of the Act of 1962 and in the events which here happened, the Crown is able to claim ownership thereof.

I would dismiss the appeal.Appeal dismissed. (M. I. H.)

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1. Historic Articles Act 1962, s. 5 (1): see post, pp. 42H - 43A.

2. Note. There was also a respondent's notice served by the Attorney-General seeking to affirm the judge's order on additional grounds.

END OF DOCUMENT

EXHIBIT 112

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(Cite as: [1989] 2 F.S.R. 631)

8–10 March and 2 June 1988 9

***631 Attorney General v Heinemann Publishers Australia Pty. Ltd. and Wright 10**

In the High Court of Australia at Canberra 0

Chief Justice Mason 2, Mr. Justice Wilson 3, Mr. Justice Brennan 4, Mr. Justice Deane 5, Mr. Justice Dawson 6, Mr. Justice Toohey 7, and Mr. Justice Gaudron 8

Breach of confidence—National security aim of foreign state—Foreign public law—Whether enforceable in Australian courts—Public policy in Australia—Conflict of Laws—Appeal and action dismissed.

- Official Secrets Act 1911, section 2 .

This was the final stage of the Spycatcher case in Australia, the appeal to the full High Court.

The A.G.'s case was based first on breach of fiduciary duty owed by PW to the Crown. The A.G. submitted that by publishing Spycatcher PW was in breach of that duty and that on the evidence, the British Government had suffered and would continue to suffer detriment as a result. The A.G. also relied on an alleged breach of the equitable obligation of confidence and argued (as he had done on previous occasions) that the mere making of an unauthorised publication by PW would cause detriment to the U.K. Government, irrespective of the content of what was published. This proposition was based both on authentication of fact and prejudice to the security services of friendly governments. The contractual basis for relief rested on terms similar to those obligations already expressed as fiduciary and equitable obligations.

per totam curiam , (1)the appeal would be dismissed.(2) (per**Mason C.J., Wilson, Deane, Dawson, Toohey and Gaudron JJ.**) The A.G.'s case was founded on the peculiar relationship between PW and the British Government in his capacity as a member of the British Security Service engaged in counter-espionage activities. The obligation which the A.G. sought to enforce (though personal to PW) was seemingly of critical importance to the proper working of the service ***632** having regard to the extraordinary and covert nature of its operations. These operations were carried out with the object of protecting the national security interests of the United Kingdom. These considerations were relevant to the A.G.'s claim. (3)There were some claims (and this claim was an example) in which the very subject matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign. Moore v. Mitchell (1929) 30 F. 2d. 600 and Peter Buchanan Ltd. v. McVey [1954] I.R. 89, applied . Government of India v. Taylor [1955] A.C. 491 and Huntington v. Attrill [1893] A.C. 150, considered . (4)The obligations sought to be enforced in this case were public, not private. This was a claim to enforce British governmental interests in its security service and was unenforceable in Australia according to the rule of international law. There were no exceptions to this rule in regard to friendly, foreign states.(5) (per **Brennan J.**) In the absence of contrary statutory provision, an Australian court should, as a matter of public policy, refuse to enforce an obligation of confidence in an action brought for the purpose of protecting the intelligence secrets and confidential political information of a foreign government.
Peter Buchanan v. McVey [1954] I.R. 89followed . Dynamit AG v. Rio Tinto Co. Ltd. [1918] A.C.

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292, considered .

The following further cases were cited:

- A.G. (N.Z.) v. Ortiz [1984] A.C. 1 .
- Banco Nacional de Cuba v. Sabbatino (1964) 376 U.S. 398 .
- Buttes Gas & Oil Co. v. Hammer [1982] A.C. 888 .
- Commonwealth v. J. Fairfax & Sons Ltd. (1980) 147 C.L.R. 39 .
- Dynamit AG v. Rio Tinto Co. Ltd. [1918] A.C. 292 .
- Government of India v. Taylor [1955] A.C. 491 .
- Huntington v. Attrill [1893] A.C. 150 .
- Moore v. Mitchell (1929) 30 F. 2d. 600 .
- Oetjen v. Central Leather Co. (1918) 246 U.S. 297 .
- Peter Buchanan Ltd. v. McVey [1954] I.R. 89 .
- R. v. Governor of Pentonville Prison, ex p. Budlong [1980] 1 W.L.R. 1110 .
- Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [1978] A.C. 547 .
- State of Norway's Applicn. (Re) [1987] 1 Q.B. 433 .
- Underhill v. Hernandez (1897) 168 U.S. 250 .
- Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368 .

This was an appeal from a majority judgment of the Court of Appeal of New South Wales reported at p. 511 ante , dismissing an appeal against orders made by Powell J. reported at p. 349 ante .

RepresentationT. S. Simos Q.C. , W. Caldwell Q.C. , and M. Robinson , instructed by Mallesons Stephen Jaques , appeared for the appellant (the **Attorney General** for ***633** the United Kingdom).M. Turnbull of Malcolm Turnbull & Co. appeared for the respondents (**Heinemann** Publishers Australia Pty. Ltd. and Wright).

MASON C.J., WILSON, DEANE, DAWSON, TOOHEY and GAUDRON JJ.:

The appellant commenced an action in the Supreme Court of New South Wales against the respondents seeking an injunction to restrain them from publishing Mr. Wright's memoirs, Spycatcher, together with an account of profits and other consequential relief. The appellant alleged that Mr. Wright, in writing Spycatcher, had drawn substantially on confidential knowledge and information acquired by him whilst he was an officer of the British Security Service. This allegation seems not to have been disputed by the respondents. The appellant claimed that he was entitled to the relief sought on the footing that the proposed publication of Spycatcher amounted to a breach of fiduciary duty, a breach of the equitable duty of confidence or, alternatively, a breach of a contractual obligation of confidence on Mr. Wright's part, the alleged breach in each instance being of a duty or obligation owed by Mr. Wright to the United Kingdom Government. The respondents denied that the proposed publication constituted a breach of any obligation or duty owed by Mr. Wright to the United Kingdom Government.

At first instance Powell J. held that much of the information in the book no longer retained the quality of confidentiality and that the publication of what was confidential would not cause any detriment to the United Kingdom Government or to its Security Service: A.G. (U.K.) v. **Heinemann** Publishers Australia Pty. Ltd. (1987) 8 N.S.W.L.R. 341; 10

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I.P.R. 129 . As McHugh J.A. observed in his reasons for judgment in the Court of Appeal, Powell J. found that the greater part of Spycatcher dealt with four matters:

- "(1) technology—mainly methods of electronic surveillance and electronic methods of interception;
- (2) operations concerning electronic surveillance and interception involving breaches of civil and international law;
- (3) investigations into Soviet penetration of the service before 1971;
- (4) service as personal consultant to the Director General."

Powell J. found that the information disclosed in Spycatcher was at least 10 years old and that matters concerning technology and operations carried out by the service were at least 20 years old. He concluded that the discussion of technology would be of no use to a technician even if the technology had not been superseded, that the discussion of non-technical operations did not record those operations in detail and analyse the success or failure of such operations and that there had been discussion of many of the matters disclosed in Spycatcher in other materials. His Honour went on to find that much of the information in Spycatcher was already available to the public. He also found that it was difficult to see how disclosure of any technology or operations of the service, in the light of the lapse of time, could detrimentally affect the national security of the United Kingdom. ***634**

Powell J. dismissed the action with costs and released the respondents from certain undertakings they had given at the commencement of the action. The respondents had then undertaken that they would not disclose or publish:

- "(a) any information obtained by the second [respondent] in his capacity as an officer of the British Security Service;
- (b) any book concerning the British Security Service written by the second [respondent] or including information provided by him or any copies extracts or excerpts from the said book or manuscript thereof."

The order releasing the respondents was suspended for days.

The respondents subsequently continued their undertakings on the appellant lodging an appeal to the Court of Appeal against the orders made by Powell J. The Court of Appeal by majority (Kirby P. and McHugh J.A., Street C.J. dissenting) dismissed the appeal with costs: A. G. (U.K.) v. **Heinemann** Publishers Australia Pty. Ltd. (1987) 10 N.S.W.L.R. 86; 75 A.L.R. 353; 10 I.P.R. 153 , p. 511 ante . The Court of Appeal ordered that the respondents be released from their undertakings, but suspended the operation of that order to enable the appellant to seek interlocutory relief in this court pending an application for special leave to appeal.

The appellant applied for special leave to appeal. Pending the hearing of that application the appellant sought a stay of proceedings and orders suspending the order which had been made by the primary judge and the Court of Appeal releasing the respondents from their undertakings. Deane J. refused that application without prejudice to the appellant's right to apply to a Full Court for interlocutory relief: A.G. (U.K.) v. **Heinemann** Publishers Australia Pty. Ltd. (1987) 61 A.L.J.R. 612; 75 A.L.R. 461; 10 I.P.R. 261 , p. 623 ante .

Subsequently, the Full Court granted special leave to appeal, but expressly reserved the right to revoke

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the grant of special leave. Special leave having been granted, the appellant sought interlocutory injunctions, similar in effect to the undertakings previously given by the respondents. The court declined to grant the interlocutory relief sought. By that time Spycatcher or Spycatcher material had been widely published in the United States and, following the refusal of interlocutory relief by Deane J., in Australia. Since then Spycatcher has been published in New Zealand following the recent decision of the New Zealand Court of Appeal (see p. 728 post) affirming the refusal of Davison C.J. at first instance to restrain publication of the book in New Zealand. Litigation concerning the publication of the book is still on foot in the United Kingdom. At first instance Scott J. refused to restrain publication of Spycatcher, his decision being affirmed by the Court of Appeal. An appeal to the House of Lords is pending.

In the New South Wales Court of Appeal Kirby P. and McHugh J.A. differed between themselves as to the basis on which the relief sought by the appellant should be refused. Kirby P. considered that the grant of relief would be inconsistent with the principle that Australian courts do ***635** not enforce the public law and policy of a foreign State. On the other hand, McHugh J.A. decided that, as there was no contract between the parties, the appellant could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom and that the courts in this country will not hear an action which requires them to make such a judgment. Street C.J. acknowledged the existence of the principle that Australian courts will not enforce a foreign government's claim deriving from the entitlement of a state to protection against harm to the public interest of that state, the claim sought to be enforced being, in his Honour's opinion, one of this kind. However, his Honour thought that such a foreign government claim should be enforced when it was supported by the Australian Government as being in the Australian public interest. Evidence had been given by Mr. Codd, the Secretary of the Department of the Prime Minister and Cabinet, that the public interest in Australia would be served by enforcement of the appellant's claim. Street C.J. concluded that the United Kingdom Government was entitled to an account of profits but considered that, on the claim for an injunction to restrain publication of Spycatcher, the court should receive more up-to-date evidence of the Australian Government's attitude towards publication.

Before examining the appellant's arguments in support of the appeal, we need to examine with some precision the nature of the claim which the appellant seeks to enforce in the action and the defences on which the respondents rely.

Mr. Wright joined the security service in September 1955 and remained with the service until January 1976. He was employed until 1964 as a senior principal scientific officer providing scientific and technical support for counter-espionage operations. In 1964 he was posted to the counter-espionage branch, occupying a number of senior positions in that branch until he retired. For the last three years of his service he was employed on the personal staff of the Director General of the British Security Service as a consultant on counter-espionage matters. Sir Robert Armstrong, the Secretary of the Cabinet of the United Kingdom Government, stated in an affidavit that Wright's work: “involved him in frequent and close liaison with the intelligence and security services of friendly foreign countries and in the exchange of information with those services. It was, and continues to be, essentially to the effectiveness of all such liaison and exchanges that they are conducted upon a basis of mutual trust and confidence.”

The terms of Wright's appointment to the service in 1955 are set out in letters between the Director of the Personnel Branch and Wright written in July 1955. Wright accepted an offer made by the Director of the Personnel Branch of a temporary appointment “for a period of three years . . . terminable at all times by one month's notice on either side.” The Director of the Personnel Branch informed him that

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after the expiration of three years he would be "eligible for appointment to the ***636** established staff of the service, with effect from 1 September 1955" if it was decided that his position was to be a permanent one.

On 1 September 1955 Wright signed a declaration acknowledging that his attention had been drawn to certain provisions of the Official Secrets Act 1911 (U.K.) , including the following part of section 2 :

"(1)If any person having in his possession or control any . . . information . . . which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty . . .

- (a) communicates the . . . information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or
- (aa) uses the information in his possession for the benefit of any foreign power or in any other matter prejudicial to the safety or interests of the State, or
- . . .
- (c) fails to take reasonable care of, or so conducts himself as to endanger the safety of the . . . information;

that person shall be guilty of a misdemeanour."

In addition, Wright was aware of circulars and security instructions whose effect was that officers in his position were ordered not to discuss their work with members of the public and that circulation of information was to be "strictly limited to individuals who need to know the information for the efficient performance of their duties" .

On 30 January 1976 Wright signed another declaration. In this document he acknowledged that he understood that the Official Secrets Act applied to him after his resignation and that all information which he acquired or had access to because of his official position was covered by section 2 of that Act unless it had "officially been made public". He also recognised that he was liable to prosecution if he published information not officially made public unless he had obtained "the official sanction in writing" of the security service.

The appellant's case, to the extent to which it rests on breach of fiduciary duty, is that, by reason of the trust, faith and confidence reposed in Wright, he became subject to and bound by fiduciary duty not, without authority, to disclose or use any information obtained by him in the course of his service otherwise than for the purposes of the Crown. The publication of Spycatcher was a disclosure and use without authority, otherwise than for the purposes of the Crown, being for Wright's own profit and advantage. Breach of the alleged fiduciary duty, according to the argument, entitles the appellant not only to injunctive relief but also to a declaration that the respondents hold the profits and advantages derived from the breach of duty in trust for the appellant. Although the primary contention is that the duty owed by Wright is not restricted to matter the disclosure or use of which will cause detriment to the United Kingdom Government, the appellant submits that, on the ***637** evidence, it has sustained and will continue to sustain detriment by reason of the publication of Spycatcher.

The case, so far as it rests on breach of the equitable obligation of confidence, is that the nature and circumstances of the relationship between Wright and the security service gave rise to such an obligation. The obligation, according to the appellant, was that Wright would not at any time disclose or use anything learnt by him in the course of his service without the authority of the security service. The appellant submits that the mere making of an unauthorised publication by an officer or former officer of the security service will cause detriment to the

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United Kingdom Government, irrespective of the content of what is published, in addition to any detriment arising from disclosure of the content itself. This proposition is based on the assertion that an unauthorised publication will disclose or authenticate the fact that the person disclosing is or was a member of the security service. The proposition is also based on the assertion that unauthorised publication will cause friendly security agencies to lose confidence in the service and be less willing to make confidential information available. For breach of this equitable obligation of confidence the appellant claims to be entitled to an injunction without proof of damage.

The contractual basis for the relief sought rests on terms similar to those obligations already expressed as fiduciary and equitable obligations. The appellant submits that, even if the relationship between the security service and Wright was not entirely contractual because, for example, the Crown had the right to terminate his appointment at pleasure. Wright's entitlement, if any, to publish was regulated by an implied contract whose terms and operation survives the termination of his appointment. The appellant submits that, as the breach of the alleged term was a breach of an implied negative stipulation, an injunction should be granted without proof of damage.

The legal and equitable basis of the appellant's case for relief is expressed in these three ways. However, they all take as their foundation the peculiar relationship between the United Kingdom Government and Wright as an officer of the British Security Service, being a security service engaged in counter-espionage activities. Although the obligation sought to be enforced is personal to Wright, it lies at the core of the relationship that subsists between the United Kingdom Government and the officers of its security service, the obligation and its enforcement seemingly being of critical importance to the efficient working of the security service having regard to the extraordinary and covert nature of its operations. Those operations are of course carried on with the object of protecting the national security of the United Kingdom. The role of the security service is set out in a directive dated 24 September 1952 from the Home Secretary to the Director General of the security service as follows: “The Security Service is part of the defence forces of the country. Its task is the defence of the realm as a whole, from external and internal dangers ***638** arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be jdged to be subversive of the state.”

It is of some significance that Wright accepted that he was bound by the provisions of section 2 of the Official Secrets Act and that he accepted an obligation of confidence in terms of that provision. The statutory obligation, which is imposed generally on British civil servants in order to protect the efficient working of the United Kingdom Government, is therefore relevant to the claim for relief that is raised in the action. Without exploring the three suggested bases for the obligation of confidence asserted by the appellant, we are prepared to assume, in accordance with the decisions of Scott J. and the English Court of Appeal, that, as a matter of English law and subject to the defences on which the respondents rely, Wright came under an obligation of confidence to the United Kingdom Government.

The respondents rely on the following as matters of defence:

- (1) the Spycatcher material lacks the quality of confidential material because, by reason of prior publications, it had passed into the public domain;
- (2) no detriment to the appellant would result from publication;
- (3) publication is in the public interest of the United Kingdom;

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- (4) publication is in the public interest of Australia;
- (5) the action is barred by the rule that Australian courts will not enforce a foreign penal or public law; and
- (6) the case involves issues that are non-justiciable.

As the judgments in the Court of Appeal turned on the last two of these defences, it is convenient at this stage to consider them. To some extent they run together.

The principle that domestic courts will not enforce a foreign penal or public law is sometimes described as a rule of public international law, and at other times, as one of private international law. Dicey and Morris, The Conflict of Laws, 11th. ed. (1987), Vol. 1, pp. 100–101 , state the principle in these terms: “English courts have no jurisdiction to entertain an action:

- (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; . . .”

The rule is associated with a related principle of international law, which has long been recognised, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign state within that sovereign's own territory. The statement of Fuller C.J. in Underhill v. Hernandez (1897) 168 U.S. 250 at 252 that “. . . the courts of one country will not sit in judgment on the acts of the government of another done within its own territory” has been repeated with approval in the House of Lords (Buttes Gas & Oil Co. v. Hammer [1982] A.C. 888 at 933) and the Supreme Court of the United States (Banco Nacional de Cuba v. Sabbatino (1964) 376 U.S. 398 at 416). The principle rests partly ***639** on international comity and expediency. So, in Oetjen v. Central Leather Co. (1918) 246 U.S. 297 the Supreme Court said (at 304): “To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations' .”

As Lord Wilberforce observed in Buttes Gas & Oil Co. v. Hammer (at 931–932), in the context of considering the United States decisions, the principle is one of “judicial restraint or abstention” and is “inherent in the very nature of the judicial process.”

The associated rule with which we are presently concerned has traditionally been expressed as a bar to jurisdiction, although the rule might now be more correctly described as one rendering a claim unenforceable. The rule had its foundation in the notion “that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed” : Huntington v. Attrill [1893] A.C. 150 at 156, per Lord Watson. His Lordship went on to point out that the rule applied to a civil action which has for its object the enforcement by the state, directly or indirectly, of punishment imposed for such breaches by the lex fori .

The jurisdictional origins of the rule are well illustrated by the distinction which underlies the line of cases concerning title to, or possession of, property the subject of confiscation or seizure by a foreign goverment. The principle denies jurisdiction in a court to determine a claim of title to the property based on the operation of a statute or executive act of the foreign state on that property ouside the territory of the foreign state. It is otherwise when the claim of title is based on an exercise of sovereign authority with respect to the property within the territory of the foreign state: see the discussion of the cases by Lord Denning M.R. in A.G. (N.Z.) v. Ortiz

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[1984] A.C. 1 at 21–24; see also Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368 , at 428–429, 431, 433.

Whether the principle extends to proscribe the enforcement of foreign public laws as well as foreign penal laws has been a contentious question. In Ortiz , despite Lord Denning's affirmative answer, Ackner L.J. was inclined against it, though his Lordship concluded that the rule of "public international law" applied because the action was an action by the state "to vindicate the public justice" (at 33), concerning, as it did, "a public right" rather than "a private right" at the suit of an individual (at 33–34). Neither O'Connor L.J., nor the House of Lords on appeal, dealt with the question. Earlier the House of Lords had decided in Government of India v. Taylor [1955] A.C. 491 that English courts would not enforce the revenue laws of a foreign state. This extension of the principle has not remained immune from criticism: see Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 Br. Year Book of ***640** Int. Law. 111 ; Mann, "The International Enforcement of Public Rights" (1987) 19 N.Y.U.J. Int. L. & Pol. 603 . With the nature of that criticism we are not presently concerned, except to note that it is indicative of the difficulty of identifying the foreign laws or rights that fall within the rule.

This difficulty has been evident in the endeavours to explain why the principle applies to actions for the enforcement of public laws other than penal and revenue laws. The expression "public laws" has no accepted meaning in our law. Nevertheless Dr. Mann, at 607 in the article to which we have just referred, appears to equate "public laws" and "public rights", an expression which he treats as synonymous with "prerogative rights". The transition from "laws" to "rights" sits somewhat uncomfortably with the long-standing formulation of the rule in its application to "penal laws". It would be more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.

Lord Denning is not the only judge who considers that the rule extends to foreign public laws. In R. v. Governor of Pentonville Prison, ex parte Budlong [1980] 1 W.L.R. 1110; [1980] 1 All E.R. 701 , Griffiths J. (W.L.R. at 1125; All E.R. at 714 –715) considered that the rule prevented the enforcement of foreign public laws as well as foreign penal and revenue laws. In Re State of Norway's Application [1987] 1 Q.B. 433 Kerr L.J. (at 478) described it as "a principle of general international acceptation". International practice certainly supports this view. Extradition treaties and conventions provide for exceptions from the obligation which they impose in the case of offences against public laws. So do treaties relating to the enforcement of foreign judgments.

The argument against this view of the principle is that it is an unnecessary and undesirable limitation on the jurisdiction of the courts of the forum, that it unduly restricts the remedies available to a foreign state and that a limitation on the enforcement of foreign public laws or rights is "of uncertain meaning and of possibly dangerous width" : Carter, supra, at 121–122 . However, if the effect of the rule is merely to prevent enforcement outside the territory of the foreign sovereign of claims based on or related to the exercise of foreign governmental power (*cf.*(1977) 57(II) Annuaire de l'Institut de Droit International 329) , the operation of the rule is neither unsatisfactory nor uncertain.

It is instructive to refer to an explanation of the rule given by Learned Hand J. in Moore v. Mitchell (1929) 30 F. 2d. 600 which differs from that given by Lord Watson in Huntington v. Attrill . Learned Hand J. said (at 604): "to pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which

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would seriously embarrass its neighbour. . . . No ***641** court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

This explanation of the rule, which calls to mind the explanations given of the companion rule in Underhill v. Hernandez , Oetjen v. Central Leather Co. and Buttes Gas & Oil v. Hammer , was taken up by Kingsmill Moore J. in Peter Buchanan Ltd. v. McVey [1954] I.R. 89 (noted at [1955] A.C. 516). Kingsmill Moore J. considered (I.R. at 106-107; A.C. at 528–529) that, just as it was necessary for the domestic court to reserve the right to reject the foreign law on the ground that it conflicted with public policy or affronted the morality of the domestic forum in cases between private persons, so it was also necessary to reserve an option to reject the foreign law when the action sought to enforce "governmental claims". He continued (I.R. at 106; A.C. at 529) ". . . if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications."

So he concluded (I.R. at 107; A.C. at 529): "Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance."

The explanation of the rule given by Learned Hand J. and Kingsmill Moore J. has been criticised on the ground that it goes too far in denying judicial enforcement of a foreign law even when the validity or the morality of the foreign law is not in issue: Mann, supra, at 610 . True it is that there are some claims to enforce a foreign state's governmental interests that will not involve the risks mentioned by Learned Hand J. and Kingsmill Moore J. But there are some claims in which the very subject matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign. These risks are particularly acute when the claim which the foreign state seeks to enforce outside its territory is a claim arising out of acts of that state in the exercise of powers peculiar to government in the pursuit of its national security.

The most obvious examples of such a claim are those arising out of the relationship between a foreign state and members of its military forces engaged in hostilities against another state in circumstances where this country is not directly involved. It would be a source of potentially vast detriment to Australia's national interests and foreign relations if our courts were under a common law obligation effectively to exercise jurisdiction at the suit of the first state to enforce legal rights against a member of its armed forces to prevent disclosure of information or desertion to the other state. ***642**

The attempted enforcement by a foreign state of an obligation of confidentiality on the part of a member or former member of its security service is but another, even if slightly less, obvious example of such a claim.

No doubt an Australian court in appropriate circumstances will enforce an obligation of confidentiality on the part of a member of the Australian Security Intelligence Organisation (ASIO), that organisation having been established for the purpose of protecting Australia's security. But even in such a case the court may be called upon to consider whether the Australian public interest in publication overrides the interest in preserving confidentiality: see Commonwealth v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39; 32 A.L.R. 485 . Likewise, if an action to enforce an obligation of confidence owed by a member or former member of a foreign state's security service were to lie in the courts of this country, an Australian court could be called upon to determine whether the Australian public interest in disclosure of the relevant information required pub-

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lication since the public interest in freedom of information and discussion is a material factor to be considered when a restraint on publication is sought. A question would then arise whether the Australian court should inquire into and determine what, if any, damage to the foreign state had been or would be caused by disclosure, including any detriment to its public interest. Such an inquiry might require an Australian court to resolve an issue which it could not appropriately entertain or competently determine, namely, what was, on balance, in the public interest of the foreign state. Moreover, if the Australian court were to decide that disclosure would be detrimental to the public interest of the foreign state but in the public interest of this country, the invidious task would remain of determining whether detriment to the foreign state should be given any, and if so what, weight against the local public interest. Even if one were to ignore questions of damage to, and the public interest of, the foreign state, the Australian court would be required to resolve the question whether the public interest of this country should prevail over the prima facie right of the foreign state to prevent disclosure. A situation in which an Australian court could be called upon to determine whether the prima facie rights of a foreign state should be overridden by a superior Australian public interest in disclosure would inevitably involve a real danger of embarrassment to Australia in its relationship with that state.

Spycatcher contains material concerning the operations of the British Security Service which might well sustain a finding that publication is in the Australian public interest. By way of illustration there is material which, if true, indicates that the freedom of service operations from political control and supervision should be qualified, that the service has been penetrated by foreign agents and that the service engages in unlawful activities when the means are thought to justify the ends. These are matters of public interest to Australia because ASIO has a close and co-operative relationship with the British Security Service. ***643**

The appellant argues that the obligations sought to be enforced here are private, not public, obligations in that they have their source in equitable principle, the fiduciary relationship and the common law of contract. Moreover, it is said that a member of the British Security Service would come under an obligation of confidence regardless of the provisions of the Official Secrets Act . Thus the appellant argues that the imposition of duties and obligations by that Act and the acceptance of them by Wright in the terms of section 2 of that Act do not give the United Kingdom Government's claim the character of a claim to enforce governmental interests. The appellant's arguments to that effect do not, however, withstand close examination.

For the purposes of the principle of unenforceability under consideration the action is to be characterised by reference to the substance of the interest sought to be enforced, rather than the form of the action: *cf.*Buchanan at 104, 107; A.C. at 527, 529 ; Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. at 439. Thus, to concentrate on the private law character of the causes of action or grounds for relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operations of the British Security Service by enjoining disclosure of information relating to those operations and by discouraging revelations by others. As a security organisation whose charter evidently includes clandestine counter-espionage activities, the service has a responsibility to protect the national security of the United Kingdom. These days the collection of intelligence is generally considered to be a vital element in the maintenance of national security and the continued co-operation of intelligence sources is an essential feature of the collection of intelligence. Accordingly, the United Kingdom Government has a strong interest in preserving the secrecy of the service's operations and the appearance of confidentiality. Absent that appearance, potential sources of information might become unco-operative and uncommunicative.

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Viewed in this light, the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign state. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its security service as "part of the defence forces of the country". The claim for relief made by the appellant in the present proceedings arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable.

It is perhaps tempting to suggest that, because of the close relationship between the United Kingdom and Australia, an exception should be made to enable the United Kingdom to enforce in our courts an obligation of the kind now in question. But what if a less friendly or a hostile state were to resort to our courts for a similar purpose? Our courts are not competent to assess the degree of friendliness or ***644** unfriendliness of a foreign state. There are no manageable standards by which courts can resolve such an issue and its determination would inevitably present a risk of embarrassment in Australia's relations with other countries.

It is not an acceptable answer to this objection to suggest that the courts might act on an executive certificate to the effect that a foreign plaintiff is a friendly state. That solution would require the executive to make invidious comparisons which might well lead to embarrassment in Australia's foreign relations. More to the point, under that proposal, the enforceability of a claim by a foreign state would depend on the discretion of the executive. Quite apart from the likelihood of international embarrassment, it would be subversive of the role of the courts and of the constitutionally entrenched position of the judicature in this country if the enforceability of a claim were made, by a general rule of the common law, to depend on an executive decision whether a particular plaintiff should be able to obtain the judicial relief which it seeks.

In any event the principle of law renders unenforceable actions of a particular kind. Those actions are actions to enforce the governmental interests of a foreign state. There is nothing in the statement of the principle, nor in the underlying considerations on which it rests, that could justify the making of an exception or qualification for actions by a friendly state. The friendliness or hostility of the foreign state seeking to enforce its claims in the court of the forum has no relevant connection with the principle.

Street C.J. was, as we are, conscious that there may be significant consequences for Australian national security interests in bringing an action of the present kind by a friendly state for an injunction or an account of profits within the reach of the principle of international law. His Honour, after taking account of the Australian Government's positive support for the enforcement of the appellant's claims and Mr. Codd's evidence that enforcement of the claim would serve the public interest of Australia, concluded that the local sovereign could decide on an ad hoc basis the extent of the assistance to be rendered to the foreign sovereign. The local sovereign could do this "by lifting the jurisdictional fetter on the local courts" . There are two answers to this approach. First, the notion that effective access to the courts should depend on a decision of the executive is as unacceptable as the related notion that the enforceability of a claim should depend on an executive decision that the claim should be able to succeed. Secondly, the possibility of detriment to Australia's national security interests cannot transmogrify the character of the claims. So far as friendly states are concerned, the remedy, if one is thought to be desirable, is to be found in the introduction of legislation.

For the foregoing reasons we would dismiss the appeal.

Brennan J.:

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I am in general agreement with the judgment of the majority but I would identify the governing principle in a somewhat different way. The case is unusual and the particular features of the case ***645** which call for consideration should be briefly stated. The action is brought on behalf of the Government of the United Kingdom (which is, for the purposes of this litigation, a foreign government) to protect that government's intelligence secrets and to prevent or impede a former officer of its security service from disclosing confidential political information without its consent, the disclosure of intelligence secrets or of any information of the stated kind being allegedly harmful to the discipline of the service and to British security which is the concern of the service. In describing the United Kingdom Government as "foreign", I do not depreciate the historical, institutional and ethnic ties between this country and the United Kingdom. The description of the United Kingdom Government as "foreign" merely makes the point that Australia and the United Kingdom are independent in their internal government and in their conduct of foreign affairs: *cf.* Lord Denning's description of New Zealand as a "foreign state" in Attorney General (N.Z.) v. Ortiz [1984] A.C. 1 at 20. The threshold problem in this case is whether an Australian court should enforce an obligation of confidence (a term intended to embrace the several obligations which the appellant seeks to enforce) owed to a foreign government and thereby protect that government's intelligence secrets and confidential political information. I have no doubt that, in the absence of a contrary statutory provision, an Australian court should refuse to enforce an obligation of confidence in an action brought for the purpose of protecting the intelligence secrets and confidential political information of a foreign government. I would identify this as the governing principle which applies whatever government might invoke the jurisdiction of the court and whatever be the source of the obligation of confidence which the government seeks to enforce.

An obligation of confidence of the kind in issue in this case is likely to arise under the law of the plaintiff foreign state. In this case it was said that the obligation of confidence arose under the law of the United Kingdom, and that may well be so. Although the system of law which gives rise to the obligation of confidence is ultimately immaterial to the application of the governing principle by an Australian court, the law which determines a domestic court's approach to the enforcement of obligations arising under foreign law is both consistent with and illustrative of the principle.

At the outset, a distinction can be drawn between two bases on which the court might refuse to enforce such an obligation of confidence though it is an obligation recognised by foreign law. The first basis is that it would be contrary to the public policy of the forum state to enforce the obligation; the second is that the court denies the capacity in international law of the relevant provision of the foreign law to give rise to the obligation sought to be enforced. The distinction is between a refusal to enforce what is recognised as an existing obligation and a denial of the existence of the obligation sought to be enforced. Sometimes the first basis is expressed as a rule that foreign laws offensive to the policy of the domestic law will not be enforced, domestic public policy prevailing over ***646** the offensive foreign law. As Sir Hersch Lauterpacht observed in Netherlands v. Sweden ; The Convention of 1902 ICJ Reports 1958, 54 at 92 : "in the sphere of private international law the exception of ordre public , of public policy, as a reason for the exclusion of foreign law in a particular case is generally—or, rather, universally—recognised."

Where the court refuses to enforce an obligation on the first basis, the court accepts the capacity of the foreign law to give rise to a legal obligation but declines to enforce the obligation inconsistently with the public policy of the domestic law. Thus in Dynamit AG v. Rio Tinto Co. Ltd. [1918] A.C. 292 , the House of Lords refused enforcement of a contract relating to trading with the enemy while assuming that German law, as the proper law of the

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contract, might have held the contract to be enforceable as consistent with German public policy. English public policy prevailed over German law. The question whether the court should refuse to enforce an obligation arising under foreign law is not answered by reference to any similarity between the relevant provisions of the foreign and domestic laws but by reference to the exigencies of the public policy of the domestic law and the actual effect which application of the foreign law would have. As Professor Kahn-Freund (Selected Writings (London, 1978), p. 234) wrote: “Every legal system which permits or commands its courts to apply foreign law must make reservations, reservations attaching not so much to the recognition or application of foreign institutions or rules in abstracto as to the effect which their application, recognition or enforcement would have in the case before the court.”

The second basis, unlike the first, denies the capacity of foreign law to govern the transaction which gives rise to the claimed obligation. Examples may be found in cases which refuse recognition of the efficacy of foreign laws which expropriate property situated outside the territory of the foreign country: see the cases reviewed by Lord Denning M.R. in Attorney General (N.Z.) v. Oritz.

The first basis is material to the present case; the second is not. The problem is not whether the law of the United Kingdom gives rise to an obligation of confidence but whether the effect of applying the law which gives rise to the obligation would be inconsistent with the exigencies of public policy under the law of New South Wales.

It is clear that independent countries may have differing interests in matters of security and foreign relations. Therefore, it could be prejudicial to the security of the Australian people and damaging to the foreign relations of this country if Australian courts were to enforce every claim which might be made on behalf of any foreign government to protect its intelligence secrets and confidential political information. Nobody suggests that the law exposes our nation to such peril. The public policy of the law throughout Australia precludes an Australian court from enforcing a claim which is damaging to Australian security and foreign relations. To give effect to this public policy, a court must be able to discriminate between the cases where it would and cases where it would not be ***647** damaging to Australian security and foreign relations to protect the intelligence secrets and confidential political information of the foreign government. But a court does not have the capacity to decide for itself whether Australian security and foreign relations are served by permitting (perhaps encouraging) disclosure of the intelligence secrets and the confidential political information of foreign governments or by prohibiting such disclosure. Nor can the court devise for itself satisfactory criteria and procedures for determining the circumstances in which disclosure should be permitted or encouraged and the circumstances in which disclosure should be prohibited. Unless, in cases of the present kind, the court were to inquire into and assess for itself whether Australian security and foreign relations are to be served by permitting or prohibiting disclosure—an inquiry and assessment which a court is quite unfitted to undertake—the court is constrained to seek and accept the opinion of the executive government of the Commonwealth upon the matter. Of course, the court sometimes takes account of and defers to the views of the executive on matters which are the peculiar responsibility of that branch of government: see Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [1978] A.C. 547 at 616–617, 650–651. There is no objection to that course, provided the executive's views are limited to matters within the executive's area of responsibility—in this case national security and foreign relations—and provided the seeking and expression of the executive's views are not likely to embarrass the executive in discharging its responsibilities in connection with those matters. However, if the court were to adopt a practice of seeking and acting on the expression of an opinion by the executive in cases of the present kind, the practice would itself be a possible source of embarrassment to the exec-

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utive in the discharge of its responsibilities. Whenever proceedings in an Australian court were in contemplation by a foreign government for the enforcement of an obligation of confidence owed by one of its security agents, an opinion would have to be obtained from the executive on the question whether Australian security and foreign relations would be damaged by enforcing that obligation. The inquiry might be an embarrassment to the executive. And if the executive were to express an opinion, any divergence between the measure of support given by the executive to the foreign government's claim and the judgment of the court might be a source of international misunderstanding.

In these circumstances and in the absence of legislative direction, the only course which a court might properly take to ensure that Australian security and foreign relations are not damaged is to refuse to enforce all claims made by a foreign government for the protection of its intelligence secrets and confidential political information. That was the course taken in Peter Buchanan Ltd. v. McVey [1954] I.R. 89 (noted in [1955] A.C. 516) with respect to the revenue claims of a foreign government. Kingsmill Moore J. explained the reason (I.R. at 106; A.C. at 528–529): “In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles ***648** of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum . . . If then, in disputes between private citizens, it has been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary, to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign state. But if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in is foreign relations and even of provoking international complications.”

Observing that taxation might be used for a variety of political purposes, his Lordship concluded (I.R. at 107; A.C. at 529): “So long as these possibilities exist, it would be equally unwise for courts to permit the enforcement of the revenue claims of foreign states or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.”

If it be unwise and unsafe for a court to pass upon the compatibility of domestic public interest with the purposes of foreign taxation, how much more unwise and unsafe it is for a court to pass upon the effect which protection of a foreign government's intelligence secrets and confidential political information would have on Australian security and foreign relations. The public policy which leads a court to refuse enforcement of revenue claims by a foreign government is no less compelling when the claim is made to protect intelligence secrets or confidential political information.

It does not matter whether the obligation of confidence on which the foreign government relies arises under its own laws or under the laws of this country. In the present case, the same result would follow whether the United Kingdom Government had recruited and employed Mr. Wright in Sydney under a New South Wales contract or in London under an English contract. The principle is of general application. Public policy requires that Australian security and foreign relations be the overriding consideration to which any obligation of confidence owed to a foreign government is subject and the court, as a branch of government administering domestic law, ought not to undertake the function of assessing the impact which the enforcement of such an obligation might have on Australian security and foreign relations. It is not for the court to balance

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the interests of foreign governments with the interests of our own. It is the duty of the court to refrain from enforcing an obligation of confidence owed to a foreign government lest Australian security and foreign relations be prejudiced. It hardly needs to be said that no such consideration inhibits the enforcement of obligations of confidence owed to the government of this country.

In stating the principle, I have noted the absence of contrary legislative direction. It is for the Parliament, not for the courts, to say whether ***649** Australian security and foreign relations can be served by enforcing obligations of confidence owed to a foreign government with respect to that government's intelligence secrets and confidential political information. It is for the Parliament, not for the courts, to say whether there are any criteria and procedures which could be employed by the courts so as to avoid embarrassment to the executive in discharging its responsibilities with respect to national security and foreign relations. If the Parliament were to enact a law which provided access to Australian courts for foreign governments seeking to protect their intelligence secrets and confidential political information—a proposition advanced merely as an hypothesis—the considerations presently inhibiting the courts from giving effect to obligations of confidence owed to foreign governments would no longer be valid. On that hypothesis, responsibility for safeguarding Australian security and foreign relations would be transferred from the courts to one of the political branches of government. Presumably, it would be necessary to provide for the executive to certify an opinion on which the court might act to grant the foreign government the protection it sought. I say “might act”, for the court would necessarily have to determine whether the foreign government had a legal right, under the law governing the transaction, to the protection claimed.

In this case, an opinion was expressed in evidence on behalf of the executive that the interests of Australia would be served by the granting of the protection sought by the United Kingdom Government. This may have been a case—I do not say it was—in which no damage would have been done to Australian security and foreign relations by granting the relief which the appellant sought. But for the reasons stated, there is no case in which an Australian court should enforce an obligation of confidence owing to a foreign government in order to protect its intelligence secrets and confidential political information. If a practice of acting on the executive's opinion were adopted in this case, on what ground could the court refuse to act on such an opinion in the next? The case would be a precedent for possible future executive embarrassment. It would be inappropriate to attempt to answer the question whether it would be contrary to Australian public policy to enforce the obligation allegedly owed to the United Kingdom Government. The appellant's claim for protection (whether injunctive or by way of accounts or damages) ought to have been refused simply on the ground that the court would not, in the absence of statutory direction, protect the intelligence secrets and confidential political information of the United Kingdom Government.

I therefore agree that the appeal should be dismissed.Appeal dismissed with costs. ***650**
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EXHIBIT 113

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2009/0149

IN THE MATTER OF STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION)

and

IN THE MATTER OF THE INTERNATIONAL BUSINESS CORPORATION ACT, CAP 222 OF THE REVISED LAWS OF ANTIGUA AND BARBUDA

IN THE MATTER OF AN APPLICATION FOR THE REMOVAL OF THE LIQUIDATORS

ALEXANDER M. FUNDORA

Applicant

NIGEL HAMILTON-SMITH
PETER WASTELL (JOINT LIQUIDATORS)

Respondents

Appearances:

Mr. Anthony Astaphan, SC and with him Ms. Nicolette Doherty and Mr. Craig Christopher, instructed by Mr. Dan Wise of Martin Kenney & Co. of the British Virgin Islands, for the Applicant.
Mr. Douglas Mendes, SC and with him Mr. Kendrickson Kentish.

2010: March 2-3
June 8

DECISION

[1] Thomas, J.: The Joint Liquidators of Stanford International Bank (SIB) are at the centre of these proceedings.

The context of SIB

[2] SIB is an International Corporation incorporated in Antigua and Barbuda under the International Business Corporations Act[1] ("the IBC Act") and engaged in International Banking. It attracted investors from several countries over the years of its operation. SIB's chairman and sole shareholder is R. Allen Stanford. SIB is now in the process of liquidation.

[3] The SIB liquidation is a large multi-jurisdictional process. In this regard, the evidence is that SIB had some 27,000 investors/creditors from 113 countries who invested in excess of US $7 billion principally in a wide variety of certificates of deposit (CDs).

[4] It is alleged that SIB is at the centre of a massive Ponzi scheme fraud, which involve many other entities and companies owned or controlled by R. Allen Stanford.

[5] Ms. Karyl Van Tassel, a certified US Public Accountant, who gave evidence in the proceedings before the English High Court stated in her second affidavit gives this description of the alleged Ponzi scheme:

> "Although S.I.B was part of the fraud, it is also the case that the flow of funds between and among the companies was such that their assets and liabilities will be exceedingly difficult, expensive and time consuming to unscrable… S.I.B was the mouth of the Ponzi scheme… the other Stanford banker dealer entities and [Stanford Trust Company}… all helped feed the scheme. Thereafter, the funds were shunted around the Stanford Financial Group many times among multiple entities."

[6] Nigel Hamilton-Smith and Peter Wastell were on 19th February, 2009, appointed Receiver-Managers of SIB by the Financial Services Regulatory Commission (FSRC) pursuant to Section 287[2] of the International Business Corporation Act[3] ("the IBC Act"). And on 26th February, 2009, Ralph Janvey was appointed US Receiver by a US Court of all entities owned or controlled by R. Allan Stanford

[1] Cap 222 (Revised Laws of Antigua and Barbuda).
[2] Exhibit ADB-6, tab 14 at page 400
[3] Cap 222 (Revised Laws of Antigua and Barbuda).

which are located both in the United States of America and in Antigua and Barbuda.

[7] On 15th April, 2009, the same persons who were appointed Receiver-Managers were appointed Joint Liquidators of SIB by the High Court upon the application of the FSRC.

[8] The Joint Liquidators are in the process of having the Order of the High Court of Antigua and Barbuda registered and recognized in the various jurisdictions where SIB has assets. This quest is being opposed by the US Receiver.

[9] Thus far, the Joint Liquidators have succeeded in the UK where the High Court granted an Order recognizing and enforcing the Order of the High Court of Antigua. But in the Province of Quebec, Canada, the Joint Liquidators did not succeed in obtaining a similar Order. Instead, the recognition was granted to the US Receiver and the appeal to the Quebec Court of Appeal was unsuccessful.

The Application

[10] Before the Court, is an Application made pursuant to the IBC Act and/or the Banking Act[4], ("the Banking Act") and or the inherent jurisdiction of the Court. The Applicant is Alexander M. Fundora who seeks:

1) the removal of the Joint Official Liquidators of Stanford International Bank Limited ("SIB"), Nigel Hamilton-Smith and Peter Wastell from their roles as Joint Official Liquidators forthwith in accordance with the draft Removal Order *al Annexe* "A" to the said application;

2) the appointment of Marcus A. Wide of Price Waterhouse Coopers LLP, Canada as sole Liquidator of S.I.B with all the powers, duties and responsibilities of a liquidator as contained in the IBC Act and any other relevant legislation and in accordance with the powers, duties and

[4] Cap 222 (Revised Laws of Antigua and Barbuda).

responsibilities set out in the draft appointment Order *al Annexe* "B" to the said application.

3) the applicant be awarded his reasonable costs arising from, and incurred in, "the preparation" of both applications to be paid by [the outgoing Joint Liquidators] [out of the Antiguan Estate of S.I.B in Liquidation], such costs to be assessed if not agreed.

[11] The pleaded grounds of the application are as follows:

1. The Joint Liquidators have failed to act in the best interests of the Estate and/or the creditors and should accordingly be removed by this Honourable Court.

2. In summary, the Joint Liquidators have, *inter alia*:
    a) destroyed, and employed improper practices in relation to computer and electronic data in Canada;
    b) failed to co-operate with foreign agencies and office holders, notably the U.S. Receiver, the S.E.C. and the Canadian Autorite des Marches Financiers (the "A.M.F.");
    c) acted outside of the remit of Receiver-Managers;
    d) demonstrated a disregard for the Canadian jurisdiction and courts; and,
    e) as a result, occasioned serious harm to the liquidation Estate and the creditors.

3. A number of instances of the Joint Liquidators' wrongdoing were recognized and censured by the Superior Court (Commercial Chamber) Province Quebec, District of Montreal (the "Canadian Court") in two decisions of Auclair J of 11 September, 2009, in Case No. 500-11-036045-090 (the "Auclair J Judgment" and the "Second Auclair J Judgment").

4. *Inter alia*, the Canadian Court found, by the Auclair J's judgment, that:

a) the Joint Liquidators do "not deserve the trust of the Court" ([37]);
b) the conduct of Mr. Hamilton-Smith personally was "reprehensible" and "in no way offers any assurances for the future of this case" ([37]);
c) the Joint Liquidators were disqualified from acting in Canada (para. [59]);
d) it "did not believe" the Joint Liquidators (para [60]);
e) the Joint Liquidators did "not deserve the confidence of the Court" as they acted with "an absence of good faith" and had questionable motives (paras. [58] and [61]; and,
f) the Joint Liquidators acted "with an absence of respect towards the Canadian public interest, represented by the Court and the regulatory authorities" (para [61]).

5. The Applicant contends that the Joint Liquidators should therefore be removed from office because, *inter alia:*

a) the US Receiver has already taken steps to have the Auclair J Judgments recognized in the US and England. If so recognized, this potentially offers other jurisdictions a reason to prefer recognition of the Receiver over the Joint Liquidators (if they remain in office), meaning that assets which would otherwise come into the Antiguan Estate may be lost;

b) the reputation of the Joint Liquidators will now hinder them as they pursue recognition and asset recovery in other jurisdictions and attempt to work with law enforcement and regulatory authorities globally;

c) the Joint Liquidators have lost the confidence of the jurisdiction where the majority of payments of interest and capital redemptions were made in relation to the alleged fraud;

d) the Joint Liquidators' conduct has already caused loss of around US $20 million from the Antiguan Estate. Any such further losses must be prevented;

e) the risk of recurrence of improper actions is extremely high, given the nature of the ongoing liquidation, involving as it will, similar tasks involving computer data and liaising with foreign regulatory bodies;

f) the gravity of Joint liquidators' actions is so serious that the Joint Liquidators must be removed from office to demonstrate that this Honourable Court will not tolerate or condone its officers acting in such a manner;

g) they have lost the confidence of the creditors of the estate, in particular of creditors totaling over US $77 million;

h) the Joint Liquidators have caused the estate to incur further costs and lose time as a result of the Canadian Court's Order for them to provide a report into their actions in Canada; and,

i) the Joint Liquidators' misunderstanding of their remit is so fundamental, that the risk of further grave errors is high.

6. The Applicant accordingly submits that this Honourable Court should treat the factual findings of Auclair J as *res judicata* and, based on those factual findings, should remove the Joint Liquidators in accordance with the legal test for removal of a liquidator, namely that there is due or sufficient cause.

7. Alternatively, in the event that this Honourable Court is not minded to treat Auclair J's factual findings as *res judicata* the Applicant contends that this Honourable Court should in any event reach the same factual conclusions

as Auclair J with regard to the Joint Liquidators' conduct. Based on those factual findings, the Joint Liquidators should nevertheless be removed, applying the legal test for removal of Liquidators to those factual conclusions.

In terms of the appointment of Marcus A. Wide the following is stated:

8. In the event that this Honourable Court grants the Application for the removal of the Joint Liquidators, the Applicant also makes an application that Marcus A. Wide of Price Waterhouse Coopers LLP, Canada, be appointed as sole Official Liquidator.

9. The Applicant contends that Mr. Wide has the requisite experience and integrity to undertake this appointment, and that he is also a suitable choice in terms of cost, as further set out in the written submissions, Consent to Act of Mr. Wide and the Affidavit of Mr. Wide sworn in the earlier petition before the Antiguan High Court of 19th March, 2009.

ISSUES

[12] It is clear that, essentially, the issue for determination is whether or not the application should be granted for the removal and replacement of the Joint Liquidators. But in arriving at that determination, the following issues must also be answered:

1) Whether this Court can consider itself bound by the facts found by the Quebec Courts?

2) Did the Liquidators act improperly in the handling of computer data held on computers in SIB office in Montreal, Canada?

3) Whether Messrs Hamilton-Smith and Wastell acted outside of their remit as Receiver-Managers?

4) Did the Receiver-Managers/Liquidators disregard the jurisdiction of the Canadian Courts?

5) Whether this Court is bound by the UNCITRAL model insolvency Laws?

6) Does the applicant have standing to make an application for the removal of the liquidators; and what is the legal test for the removal of a liquidator?

7) Has the Applicant shown due cause?

8) Should the Liquidators be removed?

9) Who should replace the present Liquidators?

ISSUE NO. 1

Whether this Court can consider itself bound by the facts found by the Quebec Courts?

[13] This issue involves an overview of the nature and content of the decisions of the Canadian Courts in issue.

[14] On 6th April, 2009, the Joint Liquidators applied for and obtained an *ex parte* Order before Registrar Flamand of the Superior Court of Quebec recognizing the Antiguan Receivership Order.

[15] On 16th April, 2009, the US Receiver Janvey, filed and served a motion to revoke and rescind the decision of Registrar Flamand (motion to revoke). And on 22nd April, 2009, the Joint Receiver Managers filed a motion seeking the appointment of a Foreign Representative, the Recognition of a foreign Order and Judicial Assistance in the Court under Part XIII of the Bankruptcy and Insolvency Act of Canada from the recognition of: (a) the winding-up Order of the Antiguan Court in respect of S.I.B.; (b) their status as Joint Liquidators of S.I.B as being similar to the status of "foreign representative" under the BIA; and (c) their powers as Joint Liquidators.

[16] Justice Claude Auclair sitting in the Supreme Court of Quebec (District of Montreal), in respect of the motion to revoke, set aside the Order made by Registrar Flamand on the following grounds: (a) it was issued at a time when the Joint Liquidators acted as Receiver-Managers and not as Receiver Managers and not as liquidators; (b) the mandate of Receiver-Managers was now terminated (c) the Joint Liquidators were not trustees and as such did not have the right to US as Interim Receivers in Canada.

[17] In this decision, the learned Judge also: (a) recognized the US Receivership Proceedings; (b) recognized Janvey as the Receiver of S.I.B and the then entities; (c) ordered that Ernest A. Young be appointed Interim Receiver.

[18] With respect to the motion seeking the appointment of a Foreign Representative and other matters, Auclair J held that the Joint Liquidators' conduct disqualified them from acting in Canada and precluded them from pursuing the motion as they could not be trusted by the Court. The Court also made the following findings:

a) the representatives of the Joint Liquidators erased computer data from S.I.B's Montreal Office during the process of taking imaged copies of computer data on servers, desktops and laptops;

b) the imaged copies of the Montreal computer data were removed from the Canadian Jurisdiction, without permission, making it impossible for the Canadian Court to ever confirm their accuracy;

c) with regard to the computer data, it was unacceptable for the Joint Liquidators and/or their representatives to argue that it was destroyed to protect confidentiality, when alternatives to deletion of the data, such as secure storage of servers, were readily available;

d) Mr. Hamilton-Smith's evidence would not be believed by the Court particularly with regard to his claim that he had informed Janvey of the proposal to delete data after imaging it;

e) the reported termination of S.I.B's Montreal Office lease (and the allegation that the computer hard-drives were justifiably wiped clean to manage the risk of confidential customer data leaking out) was merely a pretext offered after the event by the Joint Liquidators;

f) the Joint liquidators acted as Receiver-Managers in Canada before seeking or obtaining the necessary permission from the Canadian Court.

g) the Joint Liquidators failed to disclose all material information to Registrar Chantal Flamand at the *ex parte* hearing before April, 2009. This information included: (i) that Janvey had already been appointed by an American Court as Receiver of S.I.B in the US; (ii) that the Joint liquidators were not licensed trustees in bankruptcy pursuant to the BIA;

(iii) that Janvey and the Joint Liquidators were engaged in a dispute over the control and possession of the Canadian assets belonging to the creditors (valued at more than $20 million US);

h) the Joint Liquidators, personally and/or through their representatives repeatedly ignored requests for information from the A.M.F., the US Receiver and the SEC when they did answer requests from the A.M.F., they responded saying that "proceedings should be instituted in Antigua" knowing that these would be dismissed, as no treaty existed between the two countries.

i) the Joint Liquidators obtained the Flamand Order *ex parte* and without notice to the A.M.F., SEC on the US Receiver.

The doctrine of *res judicata*

[19] Both sides seek to bring the doctrine of *res judicata* to bear on the case.

[20] In a leading text[5] on administrative law, the authors explain the principles and distinctions that attend the doctrine in this way:

> "One variety of estoppels *res judicata*. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are stopped from questioning it. As between one another, they may neither pursue the same course of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel.' It is that which presents most difficulty, since an issue 'directly upon the point' has to be distinguished from one which 'came collaterally in question' or which was 'incidentally cognisable.' In any case, there must be a list or issue and there must be a decision."

[21] In Halstead v Attorney General of Antigua and Barbuda, Chief Justice, Sir. Vincent Floissac said that the doctrine applies in the following circumstance:

> "[A] right or cause of action or an issue had arisen or could or should have been raised in previous civil proceedings and that right or cause of action or issue was expressly or impliedly determined on its merit by a final and inclusive judgment of a court or competent jurisdiction. In that case, the parties to the previous civil proceedings and their privies are *inter estoppel per rem judicatam* from relitigating that same adjudicated right or course of action or issue in consequence proceedings unless there are special

[5] H.W.R Wade and C.F. Forsyth, Administrative Law, (7th Edition)

> circumstances entitling one of the parties or privies to re-open that adjudicated right or cause of action or issue in the interest of Justice."

[22] As explained by Wade and Forsyth[6], *res judicata* law has two limbs: cause of action estoppel and issue estoppel. This relates to the ordinary circumstance; and given the present issues, the further question is whether findings of fact by a foreign court would give rise to issue estoppel. This was answered in the affirmative in Carl-Zeiss Stifting v Rayner and Keeler (No. 2) by Lord Reid who said that he saw "no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment." The applicable tests were articulated in Thomas and Agnes Carvel Foundation v Carvel and another[7] by Levison J as follows:

> "A foreign Judgment will give rise to an issue estoppels in subsequent English proceedings if (i) the judgment is a final and conclusive judgment on the merits of a court of competent jurisdiction; (ii) the issue in question is the same and was necessary for the decision of the foreign court; and (iii) the parties to the English litigation are the same parties (or their privies) as in the foreign litigation."

[23] These principles are in alignment with what the House of Lords had earlier enunciated in Arnold v National Westminister Bank PLC[8] .

[24] In the face of these principles which evoke the doctrine of *res judicata,* in relation to the Canadian judgments, it is the contention of the Applicant that the doctrine applies in relation to the findings of fact. The grounds are as follows:

a) The decisions are final in the particular Court despite the appeal launched and no stay was granted – Beatty v Beatty [1924] [1924 1KB 807, 815 – 816].

b) As to the same parties, the Applicant had the right to intervene in the Canadian proceedings as an interested party – House of Spring Garden Ltd v. Waite [1990] 3 WLR 347. Further or alternatively, the applicant had an interest in the previous litigation and/or its subject matter in accordance with the test laid down in Carl Zeiss (Per Lord Reid at 910) and therefore is also a privy.

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[6] Op cit, at page 276, supra
[7] [2008] 2 WLR 1234
[8] [1991] 2 A.C 93

c) The issues are identical namely the conduct of the Joint Liquidators in relation to computer data in Canada and their behavior with regard to the foreign regulatory bodies.

[25] For the Respondents, there is no dispute that the Quebec Court is a Court of competent jurisdiction. And there is also no dispute that the judgments of the Court denying the Respondents' motion that winding-up order issued by the High Court of Antigua and Barbuda and the liquidators appointed by the Court be recognized as a "foreign proceeding" and "foreign representative", respectively, was final and conclusive on its merits.

[26] The Respondents however, challenge the findings of fact made by the learned Judge at first instance or the basis that they are not final and conclusive for the following reasons:

1) In the Quebec proceedings, the question for determination was whether the Respondents were guilty of such misconduct as would justify their removal as Liquidators. As such, the Respondents did not and were not required to put before the Court all such facts and evidence as would bear on that question;

2) There was no cross-examination of witnesses and accordingly no basis upon which the Court could determine finally and conclusively the facts upon which the applicant in this case seeks to rely;

3) Although the Respondents sought leave to appeal against the findings of fact and the ultimate decision, the Quebec Court of Appeal did not consider those facts and dismissed the Liquidators' applications on other grounds.

[27] As far as the question whether the issue in question is the same and was necessary for the decision of the foreign Court is concerned, the Respondents say that the issue is the same, namely whether the Respondents were guilty of the

conduct attributed to them by the Quebec Court. However, the further contention is that the findings of fact made by the Quebec Court were not necessary for the decision made.

[28] Finally, on the issue as to whether the parties are the same, the Respondents submitted that parties in the Quebec litigation are not the same as the parties to the present application.

Analysis

[29] The principle of judicial restraint compels the Court to consider merely the requirement that the parties must be in both proceedings.

[30] It will be recalled that the rule in this regard is that a party or its privies would qualify for the purposes of this rule. But there are qualifications and exceptions as shown by Gleeson v J. Wippel & Co. Ltd.[9] when Megarry V.C. had this to say:[10]

> "Second it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other; but it does seem to me that, 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 the proceedings to which the other is party. It is in that sense that I would regard the phase 'priority of interest.'"

[31] In support of their contention that *res judicata* is applicable, the Applicant submits that on the issue of the same parties, the Applicant had the right to intervene in the Canadian proceedings as an interested party and therefore falls under the rule enunciated in House of Spring Garden Ltd. v Waite as being a deemed party. And further or alternatively, the Applicant had an interest in the previous litigation and or its subject matter in accordance with the test laid down in the Carl-Zeiss case per Lord Reid at page 910 and therefore also a privy.

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[9] [1971] 1 WLR 510
[10] Ibid at page 515

[32] For the avoidance of doubt, the headnote in the House of Spring Garden case must be quoted to the extent of its materiality:

> "… on the facts, the judge had correctly held that the first and second defendants were estopped from alleging that the prior Irish judgment was obtained by fraud and, since the judgment was a judgment against the defendants jointly and severally, the third defendant even though he did not join in the Irish proceedings to set it aside was well aware of those proceedings and was privy to them and, therefore, in the absence of new evidence affecting the issue of fraud the third defendant was similarly estopped. Nana Ofori Asta II v Nana Abi Brusre II [1958] A.C 95 PC and Carl Zeiss, Stifting v Rayner & Keeler Ltd. (No. 2) [1967] 1 AC 853, H.L (5) applied."

[33] What the House of Spring Garden case illustrates is the application of the legal proposition of 'privy' in the context of estoppel. To adopt the language of Megarry V.C in the Gleeson case[11] [that does not arise] 'unless there is a sufficient degree of identity between the successful defendants and a third party.' Chief Justice Sir. Vincent Floissac uses similar language in the Halstead case.[12]

[34] In the case at bar and having regard to the two Canadian decisions, there is no degree of identification between the Applicant and the Respondents in those cases.

[35] In the first of the two Canadian judgments rendered on September 11, 2009, the "Petitioners" were the present Respondents in the case at bar, A.M.F intervened and the motion was opposed by the US Receiver.

[36] The Petitioners sought the following reliefs[13]:

a) "a recognition of the winding-up Order pursuant to sections 267 and seq. of Part XIII, International insolvencies, of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 ("the BIA");

b) a recognition that their status a Liquidators of Stanford International Bank Limited (in liquidation) ("the Bank") in Antigua and Barbuda granted under the Winding-Up Order is similar to the status of a "foreign representative" to an estate in a "foreign proceeding" pursuant to section 267 and seq. of the BIA;

c) a recognition of their powers as Liquidators through the issuance of an order *inter alia:*
    I. staying any present or future proceedings against the bank or any of its property in Quebec, and generally in Canada, and authorizing the Liquidators to institute or continue any present legal proceedings initiated by the Bank in Quebec, and generally in Canada;

[11] [1990] 1WLR 347, supra
[12] [1995] 50 WIR 98, supra
[13] Exhibit "ADB6" to the Affidavit of Andrew D. Blackburn, Tab 3

II. ordering the turnover to the liquidators of any property, assets and any documents, computer records, electronic records, programs, disks, books of account, corporate records, minutes, correspondence, opinions rendered to the Bank, documents of title, whether in an electronic media or otherwise held in the name of or traceable to the bank and;

III. availing the Liquidators of the facility to discover and trace any assets or property of the Bank that are located in Quebec and generally in Canada, (whether such assets or property are possessed in the name of the Bank or have in any way been misappropriated, fraudulently transferred and/or otherwise concealed from the Liquidators);

d) any further relief necessary to assist the Liquidators in the due carriage of their duties under the Winding-Up Order and under Sections 267 and seq. of the BIA …"

[37] In the second Canadian judgment also rendered on September 11, 2009, the Applicant is Ralph S. Janvey with various 'Stanford entities'[14] as Respondents and L'Authorite Des Marches Financiers (A.M.F.) as Intervener.

[38] The lack of any degree of identification between the present Applicant and the Respondents in the first Canadian case rests on the fact that although the US Receiver and A.M.F. were not strictly Respondents, there is no commonality of legal purpose. Indeed, the present Respondents then were seeking a certain recognition under a certain Canadian state, being the Bankruptcy and Insolvency Act, R.S.C 1985, c. B-3. ("the BIA")

[39] In the second Canadian judgment, it is recorded that the Applicant, Janvey, was asking the Court to:

[a] "Quash the April 6, 2009 Order of Registrar Flamand;
[b] Recognize Janvey as foreign representative of the proceedings instituted abroad pursuant sections 267 BIA and following;
[c] Give effect to the American Court Orders appointing Janvey as Receiver;
[d] Nominate Ernst & Young, a Canadian Bankruptcy Trustee, interim receiver of the Canadian Assets of the debtors;
[e] Order that the interim receiver assist Janvey in his duties in Canada;
[f] Any additional remedies which are necessary to the foregoing relief."

[40] Mr. Fundora then, never sought or was party to any of the foregoing reliefs in either of any of the Canadian cases. And after that long excursion, the short point is that the House of Spring Garden case does not assist the Applicant. In that

[14] Named are: Stanford International Bank Limited, Stanford International Bank, Ltd. Stanford Trust Company Limited, Stanford Group Company, Stanford Capital Management, LLC, Stanford Financial Group, Stanford Group Bldg. Inc, Bank of Antigua, Robert Allan Stanford, James M. Davis, and Laura Pendergest-Holt and L'Autorite Des Marches Financiers, Intervener.

case, estoppels extended to a defendant who was not a part to certain later proceedings; but all of the defendants had been held to jointly and severally liable which is the fact that satisfies the notion of a sufficient degree of identity.

Conclusion

[41] In Carl Zeiss Stifting v Rayner & Keeler (No.2) Lord Upjohn noted that:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

[42] As noted above, one of the conjunctive requirements that would raise to issue estoppel is if, in this case, the parties are the same in the Canadian proceedings as in these proceedings. In this regard, it is the determination of this Court that the parties are entirely different and given the conjunctive nature of the requirements, it follows that issue estoppel does not arise. And the principle of judicial restraint would also apply so that there is no compulsion to examine the other requirements.

[43] In the result, it is the further determination of this Court that it is not bound by the findings of fact or otherwise of the Superior Court of Quebec and the Quebec Court of Appeal.

ISSUE NO. 2

Did the Liquidators all improperly in the handling of computer data held on computers in the SIB Office in Montreal, Canada?

[44] Given the nature and complexity of this issue, the Court considers it necessary to examine the technical parameters of imaging of computer data and the circumstances in which the Receiver-Managers/Liquidators engaged an IT expert and the sequel thereto.

Imaging

[45] All of the IT experts[15] who gave evidence in these proceedings spent much time debating the issue of imaging or the process; but the Court has no desire to go between these opinions to find truth. Instead, the Court accepts as a fact that there can be no debate as to fact that imaging is a part of the IT landscape. In this regard, the Court is guided by the following contained in the analysis and expert opinion of Mark Kirby[16]: "… using a computer image is a perfectly acceptable methodology for preserving data in an evidential final. Provided proper procedures are followed the use of a compiled image as evidence is universally accepted. Courts in the United Kingdom, Australia and the United States of America to name but three jurisdictions."

[46] On the question of imaging and seizing, Mark Kirby earlier in his said expert opinion deposed thus:

> "4. ACPO[17] guidelines defines computer imaging as 'the process used to obtain all of the data present on a storage media (e.g. hard disk) … in such a way as to allow it to be examined as if it were the original data!' Forensic computing specialists such as those in this case rely upon a mathematical validation to verify that the image of a computer disk drive and relevant files exactly match the contents of the original computer. Such comparisons help resolve questions that might be raised during litigation about the accuracy of the restored computer image.
>
> 5. When a computer is 'imaged' the file or files that comprise the image are usually made on a separate hard drive. The hard drive (containing the files is usually taken back to a forensic computing lab where the image can be analyzed using specialist software, some of which is free and some of which is commercially available.

[15] See for example Affidavit and second Affidavit of Alistair Bruce Kelman, Core Bundle, Tab 11 & 12.
[16] Exhibit "MK" to the Affidavit of Mark Kirby
[17] Exhibit "MK" to the Affidavit of Mark Kirby

6. Seizing computers usually means unplugging them from a network and electricity supply and taking them away for storage and subsequent analysis at a convenient time.

7. In the early days of forensic computing (the late 1990's) it was regarded as preferable to seize computers and take them away for analysis. However as computers became more and more essential to business the practice of seizure was no longer practical. It was no longer realistic or necessary to deprive businesses of the use of their IT systems when a perfectly acceptable (to the Courts) methodology existed to collect evidence on scene and take it away for examination at a later date.

8. It is my own preference, as well as the considered opinion of the computer forensic specialist community, that business computers should be seized only if there is an overwhelming technical or legal reason for doing so. There are inherent risks in moving computers. Hard drives are mechanical devices and particularly vulnerable to damage when moved. Likewise there are often problems with the computers own internal battery which is meant to save important data such as time and other key data which the computer may need to use when restarting. Temperature and humidity will also have a bearing on a computer in storage."

[47] On the other hand, Alistair Bruce Kelman, a Barrister and IT Expert, in his affidavit[18] deposes the following at paragraph 19 under the heading: "The Necessity of Imaging Computer Systems":

"19. The fragile nature of computer evidence and the case with which it can be modified means that particular care has to be taken by the police in a criminal case or private party seeking to rely on such computer evidence in civil litigation, in 'freezing the scene', that is to say preserving the evidence in any case involving computers. The UK Association of Chief Police Officers (the 'ACPO') provided a first edition of a Good Practice Guide for computer based evidence in March 1998.

It has since been revised and is now based around the following four principles:

Principle 1: No action taken by law enforcement agencies or their agents should change data held on computer or storage media which may subsequently be relied upon in Court.

Principle 2: In circumstances, where a person finds it necessary to access original data held on computer to do so and be able to give evidence explaining the relevance and the implications of their actions.

Principle 3: An audit trail or other record of all processes applied to computer based electronic evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result.

Principle 4: The person in charge of the investigation (the case officer) has overall responsibility for ensuring that the law and these principles are adhered to."

These four principles apply as much to contentions with disputes as to investigations by the criminal authorities."

[18] Sworn to on 23rd October, 2009

Engagement of an IT Expert

[48] James David Coulthard in his first affidavit[19] details the commencement of his professional involvement with the Liquidators in this way:

> "5. I was instructed on this matter on 20th 2009. My colleague Stephen Hirst and I travelled to Antigua with Mr. Dulien to assist the Liquidators (who had been appointed receiver-managers of SIB (the "Receiver-Managers') to examine the Antiguan IT System of SIB. We worked at the premises of SIB and asserted in gaining an understanding of the IT Systems there and how they worked.
>
> 6. I reported directly to Stephen Hirst of Stroz. Another colleague, Byron Lloyd-Jones was also present in Antigua.
>
> 7. In early March, 2009, I was instructed by Vantis to travel to Montreal. I arrived in Montreal and first visited the offices of SIB there on 5th March, 2009.
>
> 8. Since arriving in Antigua we had requested from the SIB staff and 'IT Manifest; which would show the IT equipment which was owned by SIB. However, we never received the complete list. My purposes in travelling to Montreal were: (1) to establish what SIB computer equipment was in the Montreal Office; (ii) to image the computer equipment in the office, as directed by the Receivers-Managers; and (iii) to securely erase relevant data to prevent access to that data by unauthorized third parties."

[49] As noted above, the Applicant takes issue with a number of actions by the Liquidators which essentially relate to: (a) destruction of computer data, (b) failure to co -operate with certain agencies, (c) acting outside their remit; (d) disregard of the Canadian jurisdiction, (e) causing the breakdown of trust and corporation and, (f) overall harm to the estate and the creditors. The matter of the destruction of computer data must now be addressed in terms of submissions, analysis and conclusion.

Destruction of, and improper practices relating to, computer and electronic data in Canada.

[50] The matters which tell to be considered can be narrowed down to the following: (a) three servers at the Montreal office of SIB were not imaged and not copied, (b) four desktops and laptops were not imaged but were securely erased, (c) the e-mail servers and Blackberry enterprise servers were not imaged; (d) the IT specialists did not appear to have seen instructed by the Liquidators to search for, collect and image the Blackberrys and data sticks.

[19] Filed on 1st January, 2010

[51] According to the Applicant, the Joint Liquidators provided the following purported explanations for their actions …:

> "(a) the 4 desktops which were erased were not imaged 'as their contents would have been captured by the imaging of the servers' admissions para. 7;
>
> (b) the servers were to be left at S.I.B Montreal's premises and the Joint Liquidators were concerned that the landlord might repossess the premises and/or exercise powers of on the servers (Admissions para. 6)
>
> (c) the date was deleted in advance of a sale of the machines (Hamilton-Smith second Affidavit before the English High Court; para 84, at page 392 of ADB-6 at tab 13)."

[52] The Applicant goes on to say that: "Taken collectively, the Joint Liquidators' actions in relation to the computer data were at best reckless and at worst undertaken deliberately and in extreme bad faith …."[20]

[53] In terms of the evidence, the Applicant refers to IT Expert, Mr. Bruce Kelman's contention that the Joint Liquidators' actions were not in accordance with standard forensic practice and behavior which is to be expected of competent and reasonable Liquidators when dealing with the preservation and examination of IT evidence and records …"[21] Further, reliance is also placed on Mr. Kelman's expert opinion that the erasing but not imaging of four computers as being 'extraordinary';[22] and his conclusion that it is 'incorrect' to say that the four desktops were erased but not imaged as 'their contents would have been captured by the imaging of the servers'. Mention is also made of the Kelman's further conclusion that although data would probably have been captured by the server, it is not possible to tell whether there is additional data without copying at the machine.[23]

[54] With respect to 'erasing of hardware when it imaged copies,' 'alternative action' and 'justification', the Applicant identifies the following aspects of Mr. Kelman's evidence. In terms of the first item, it was described as 'folly of the most extreme kind, with regard to the alternative action to erasing the evidence is that storage at

[20] Paragraph 67 of the Revised written submissions of Alexander Fundora
[21] First and second Affidavit of Bruce Kellman, core bundle 1 at tab 11 & 12.
[22] Kellman's first Affidavit at para. 13
[23] Alistair Kelman's first Affidavit, at para. 13

little cost would have sufficed; and with respect to the justification for selling the contention, advanced is that such actions was 'foolish' in this context as the hardware would have been worth an insignificant amount.

[55] In terms of the matter of Blackberrys and USB devices, Mr. Kelman attached great importance to these items in terms of obtaining information for tracing frauds.[24]

[56] In addressing the methods of data handling employed by the Liquidators, Mr. Kelman contends that as far as the originals are concerned, these must be retained as the need may arise to return to the original machine.[25] Mr. Kelman also contends that ACPO standards were broken by the Liquidators and have made the work of investigators more difficult and has led to the loss of very relevant evidence;[26] and at the same time may have potentially affected the admissibility of the evidence and other related issues in future civil and criminal cases.[27]

[57] The Applicant next highlights what is termed "Direct contradictions in the Joint Liquidators" as revealed in the evidence generally.

[58] In this regard, the evidence relating to the matter of the repossession of the Montreal Office of SIB as revealed in the Admissions by the Joint liquidators and an e-mail from Walton Peat (Vantis) and Robert Vallieres (A.M.F) dated 3rd March, 2009, are highlighted. Also in this regard, is the question whether 'all' data was imaged, as stated in the Admissions as opposed to the Capcon Report where it is stated otherwise.[28]

[59] It is also the contention of the Applicant that Mr. Nigel Hamilton-Smith's evidence contains misleading statements and inaccurate explanations regarding the data destruction. Essentially, these relate the use of certain words and phrases in that context such as 'secured imaged', all IT equipment had been imaged and safe-

[24] Ibid at paras 16 & 16
[25] Ibid at para 24
[26] Alistair Kelman's first Affidavit, at paras. 19, 55 & 56
[27] Ibid, at paras. 22, 24 & 25
[28] At para 71 of the Revised written submission of Alexander Fundora

guarded, 'standard practice in an insolvency situation,' in advance of a sale of the computers, and done in conjunction with Canadian legal advice from Ogilvy Renault'.

[60] As far as the Respondents' submissions are concerned, they have divided the issue under into "complaints" by the Applicant and addressed them. They are as follows:

i. "3 of the servers at the S.I.B Montreal Offices were forensically imaged and then securely erased;
ii. 4 desktops were securely closed but not imaged;
iii. the Liquidators did not instruct the IT Specialist to search for, collect or image Blackberry devices or servers;
iv. the Liquidators did not instruct the IT specialist to search for, collect on image Data sticks;
v. it was entirely necessary to destroy the original data on the servers. The Liquidators had only to remove the servers from the Office and take them to a safe place;
vi. the fear that someone could have authorized access to the original servers was not a justification but a pretext;
vii. the Liquidators did not advise the A.M.F., of the Court hearing of the *ex parte* motion or the U.S Receiver that the servers had been erased;
viii. the Liquidators removed electronic data from the jurisdiction of the Canadian Courts and regular authorities;
ix. the Liquidators' motives were questionable, being 'unspoken and unspeakable';
x. the Liquidators acted with an absence of good faith;
xi. the actions of the Liquidators were not in accordance with the standard practice or behavior which is to be expected of competent and reasonable liquidators when dealing with the preservation and examination of IT evidence and records."

[61] *Ab initio,* the Respondents say that they admit to the facts alleged at paragraphs (i), (ii) and (vii) on the basis of the explanation below; but they deny the remaining allegations.

[62] The Respondents accept that four computers were erased and not imaged and the following reasons are advanced for that action. First, the Montreal Office was merely a sales office. Secondly, the servers in Montreal were disaster recovery only as to enable basic operations to continue in the event of a major incident in Antigua. Accordingly, they were unlikely to have any banking data stored on them. Thirdly, all banking information was routed through the Antiguan servers. It is

submitted by the Respondents that it was in these circumstances that the decision was taken to not image these four computers.[29]

[63] As far as paragraphs (iii) and (iv) (relating the Blackberrys and data sticks) the argument is that these allegations are not supported by any evidence. They say further that the Applicant "impliedly concedes that these allegations are speculative" as it is merely stated that the IT Specialist did not appear to have been instructed by the Joint Liquidators to search for, collect or image Blackberries and data sticks.

[64] Regarding paragraphs (v), (vi), (vii), (ix) and (x), the submission is that these allegations are "founded" upon the findings of the Quebec Superior Court, while the allegation contained in paragraph (xi) is based upon the evidence of the Applicant's 'alleged expert witness', Mr. Kelman.[30]

[65] The matter of the estoppel with regard to the judgments rendered by the Quebec Superior Court has already been determined; but despite the fact this Court is of the view that there is evidence upon which a determination can be made with respect to the matters which and concern paragraphs (v), (vi), (viii), (ix) and (x) aforesaid.

[66] Insofar as paragraphs (v) and (xi) are concerned, these relate to the matter of wiping data instead of preserving the equipment. In this regard, the Respondents submit that they do not accept that the confidentiality of the data stored on the equipment could have been preserved by leaving the equipment on the premises but removing the power leads so that they could be turned on, as Mr. Kelman contends. Additionally, the Respondents' other basis for their decision to wiping the data rather than preserving the hardware are the danger that the landlord of the premises might detrain the equipment; the making of exact copies of the data obviating the need to retain the equipment and the fact that the landlord's attention might be drawn to the removal of the said equipment.

[29] Revised written Submissions of the Liquidators, para. 37
[30] Revised written submissions of the Liquidators at para 14.

Analysis and Conclusion

[67] At this stage it is necessary to recall that the issue under consideration is the Applicant's contention that the destruction of, and improper practices relating to, computer and electronic data in Canada. In this regard, as noted above, it is the submission of the Applicant that taken collectively, the Joint Liquidators' actions in relation to computer data were at best reckless and at worst, undertaken deliberately in extreme bad faith.

[68] In the Applicant's submissions, reliance is placed on the evidence of Alistar Bruce Kelman. At paragraphs 10 and 11 of his first Affidavit, he deposes thus:

> "10. For reasons which I set out below I do not consider the above opinions and representations of Vantis concerning the handling of electronic evidence are in accordance with standard forensic practice or behavior which is expected of competent and reasonable Liquidators when dealing with the preservation and examination of IT evidence and records.
>
> 11. Firstly it is folly of the most extreme kind to rely upon just the forensic images and not to preserve the hardware on which the computers are running. As I set out below, there are numerous problems with merely relying on images. Images can become corrupted in the process of transfer and this fact may well not be discovered before the hardware is deleted. Furthermore, in high profile high value cases it is always best to apply the utmost caution. The purported reasons for 'wiping', the preservation of confidentiality while the hardware remained resident in the building, could have been addressed by other means such as the removal of power leads from all computers so that they could not be turned on while in the building, (and removing the battery packs from laptops for a similar reason). This would have cost nothing.
> Putting the hardware into secure storage so that the landlords did not seize it for non-payment of rent would have been the normal sensible process in accordance with the basic investigation function of 'freezing the scene' that is to say, collecting and preserving evidence pending it's subsequent analysis.
>
> 12. Secondly, the purported justification for erasing the data so that the computers could be sold, thereby raising money in the liquidation is nonsensical. Second-hand computers and servers have little more than scrap value. Second hand computers come with no warranty or software.
>
> 13. Thirdly, with regard to the desktops and laptops which were not imaged but nevertheless wiped I find this conduct extraordinary. All desktops and laptops should have been imaged, when police arrive at the scene of a crime they gather all evidence in the process of freezing the scene. Vantis argued that the four unimaged machines were also captured by the servers and therefore did not require imaging. This is incorrect, although the majority of data would probably have been duplicated by the servers it is not possible to tell whether there is additional data on the machine itself without looking at it. Furthermore, particularly with laptops, the copying of data to the servers is not continuous but only occurs from time to time when the laptop or desktop synchronizes itself with the data on the servers. Typical examples can be emails which have been written on a laptop but await sending in the outbox of the laptop's Microsoft Outlook

> installation and other records held in draft. The universal normal process is therefore to image desktops/laptops even if they are not 'slave to the server'.
>
> 20. It will be noted that in going about their activities Vantis appear to have comprehensively broken the first three of the ACPO's principles upon which the entire science of forensic computing analysis is based, whether in the criminal or civil arena."

[69] Mr. Mark Kirby[31] is the counter to Mr. Alistair Bruce Kelman and in his expert report he gives his opinion on imaging as opposed to seizing of computers; and he also gives his opinion on the first and second affidavits of Alistair Bruce Kelman.

[70] Insofar as imaging and seizing are concerned, it is Mr. Mark Kirby's preference for and considered opinion that business computers should be seized only if there is an overwhelming technical or legal reason for so doing. He goes on to develop his opinion about the risks involved in moving computers that have been seized and in addressing the specifics in the case presented to him. His opinion is that: "Based on the documentation supplied to me in this case it is my view that imaging the computers as opposed to removing them to storage in this case was a perfectly acceptable course of action and in accordance with accepted practice."

[71] In giving his opinion, a specific paragraph of Kelman's first and second Affidavits, Mr. Kirby commented as follows: "With respect to paragraph 10[32], he disagreed and maintained that using a computer image is a perfectly acceptable methodology for preserving data in an evidential format. And critically he says that: "Provided proper procedure is followed the use of a computer image as evidence is universally accepted in Courts in the United Kingdom, Australia and the United States to name but three jurisdictions." He also disagrees with paragraph 11[33] of Mr. Kelman's first Affidavit. This is his response at paragraph 12:

> "It is my experience that when dealing with investigations involving business information technology it is actually preferable to leave hardware on site and rely solely on computer images. I cannot emphasize enough that this practice is commonly accepted by

[31] In exhibit "MK1" to the Affidavit of Marc Kirby under curriculum vitae it is stated that the said Marc Kirby is Senior Lecturer, Centre for forensic computing , Cranfield University. An International expert in Hi Tech crime who created the first multi agency national computer forensic unit of the world.

[32] At paragraph 10 of his first affidavit Mr. Kelman is saying basically that handling of electronic evidence are in accordance with standard forensic practice or behavior

[33] At paragraph 11 of his first Affidavit Mr. Kelman speaks to the failure to preserve the hardware after the images were made.

> experienced forensic examiners. Even if computers in this case were seiged, best practice would dictate they be imaged and any evidence would be derived from that image. From all the paperwork in this case I see no grounds to doubt hat images obtained are a full copy of what was on the computers before they were wiped."

[72] Commenting on Mr. Kelman's contention that the first three ACPO's principles have been comprehensively broken by Vantis, Mr. Kirby gives this opinion:

> "Mr. Kelman's assertion that the ACPO Principles have been broken in this case is incorrect. The principle that applies in this case is Principle 2 which allows examiners to access live machines provided that they are competent to do so and can explain the consequences of their actions to a Court. Mr. Coulthard's comments at paragraph 28 of his first Affidavit that he kept handwritten contenpraneous notes exhibited at 'JDC3' to Mr. Coulthard's second Affidavit, and can confirm that he has complied with ACPO Principle 3 by keeping an audit trail of his actions. I would point out that there is one omission from Mr. Coulthard's contenpraneous notes. This omission relates to the two attempts to image the servers with the forensic tools 'Rapton' and 'Helix 3, as mentioned at paragraphs 18 and 19 of Mr. Coulthard's first Affidavit, and paragraph 31 of his second affidavit. Whilst in a perfect world, Mr. Coulthard would have mentioned these actions in his notes, his failure to mention them does not, in my view, amount to a breach of ACPO Principle 3."

[73] In his "Overall Opinion and Conclusion", Mr. Kirby says that:

> "34. I have a great deal of experience in the field of forensic computing. I teach it to law enforcement students from around the world who attend my courses at Cranfield University. I have over ten years of experience in carrying out forensic data recovery (and examination) in the UK and many other jurisdictions around the world and I co-authored and updated the ACPO guides from 2001 to 2006. This experience has led me to the following conclusions which I hope will be of assistance to the Court.
>
> - Mr. Kelman's arguments with respect to the ACPO guides being broken are wrong.
> - Mr. Kelman's affidavits indicate that his approach is outdated. His suggestion that it is best practice to always recover hardware is wrong. There may be times when it is desirable such as a pedophile case, but by and large in the modern world, it is not always possible or desirable to seize equipment. This is my view and those of other agencies in the UK who regularly deal with corporate enterprise investigations.
> - The ACPO Best Practice guidelines were not broken by Mr. Coulthard.
> - The data that Mr. Coulthard recovered in "computer image" format was recovered according to the best practice. It was verified and thus represents an exact copy of the machines in question.
> - I see nothing in any of Mr. Coulthard's Affidavits, to indicate that the evidence he recovered is unreliable."

[74] It will be recalled that the liquidation of SIB involves some 27,000 creditors who are owed in excess of US$7 billion. In these circumstances, the matter of civil or criminal proceedings, or both, represent a serious possibility. This brings into focus the question of the imaging of three servers at the Montreal office of SIB and then they were wiped.

[75] It is common ground that James David Coulthard, a computer forensic consultant and software developer was employed by the Receiver-Managers/Liquidators through Stroz Friedberg Limited ("Stroz").

[76] In his first Affidavit in detailing[34] his activities after being "instructed on this matter on 20th February, 2009, "deposed further that his purposes in travelling to Montreal were to: (i) establish what SIB Computer equipment was in the Montreal Office; (ii) to image the computer equipment in the Office as directed by the Receiver-Managers; and (iii) to securely erase relevant data to prevent access to that data by unauthorized third parties.[35]"

[77] The Respondents have admitted that the three servers were forensically imaged and then securely erased. This leaves the narrower question to be answered, which is, whether the hardware should have been retained. And the experts have advanced what they consider to be cogent reasons to support their view.

[78] For the Respondents, the accuracy of an imaged copy is such that the retention and that in any event virtualization exists to restore the original document.

[79] Mr. Coulthard, in his second affidavit paragraph 24, describes the process of virtualization in this way:

> "Briefly, through the virtualization process, digital forensic images that have been taken of date on a computer can be used to restore the data without the need for the original hardware. Virtualization software recreates the original system from the forensic images which can then be examined without resorting to the hardware."

[80] But while the expert evidence tendered on behalf of the Applicant does not dispute the use of imaging technique, certain problems or potential problems are identified. These include the loss of data because of its fragile nature and technical difficulties that may arise during the process of imaging. The proposition is also advanced that the absence of the hardware may even pose a difficulty with regard to the admission of evidence in this context. This is doubted by Mark Kirby who purports to rule that such evidence is admissible. The immediate response to

[34] At paras. 5-8
[35] At para 8

this is to say that Mark Kirby has no authority to make such a statement; and if even he had, he would not make it on behalf of what appears to be all courts in England.

[81] The nature and context of this liquidation has an important bearing on the issue of the relation of the hardware. In particular, the fact of 27 000 customers who are owed an excess of US $7 billion. The Court therefore agrees with the Applicant that the hardware should have been retained for the reasons given by Mr. Kelman. To say as Mr. Martin James Baldock deposes that "the approach with which Mr. Kelman apparently supports ceased to be the usual practice more than five years ago."[36]

[82] Further, even though virtualization is now available, there is no evidence as to what the process costs as this will be at the expense of the creditors.

[83] Mr. Mark Kirby in his expert report also says that the hardware should be retained if there is an overwhelming, technical or legal reason for doing so. He later is more specific by maintaining a paedophile case as one circumstance in which such retention is required[37]. At the same time and in the same context, Mr. Alister Bruce Kelman speaks of high profile cases[38]. But in the view of the Court, regardless of the label or description used, this liquidation qualifies as a case where the hardware should have been retained.

[84] The other aspect of the issue is the matter of the four computers that were not imaged but were erased. Mr. Kelman says that such action does not accord with standard forensic practice and behavior and even describes the action taken as being "extraordinary". These aspects of Mr. Kelman's opinion leave no doubt as to the incorrectness of such action in the experts' opinion.

[85] The Respondents accept that four computers were erased but not imaged and the following reasons were advanced for the action taken: First, the Montreal Office

[36] See Affidavit of Martin James Baldock, sworn on 15th January, 2010 @ para. 7 – Core Bundle, Tab 24
[37] At paras. 8 & 34 of his Expert Report.
[38] At para. 11 of his first Affidavit, supra

was merely a sales office. Secondly, the servers in Montreal were disaster recovery only so as to enable basic operations to entrance in the event of a major incident in Antigua. Accordingly, they were unlikely to have any banking data stored on them. Thirdly, all banking information was routed through the Antigua servers.

[86] In the circumstances, it is submitted by the Respondents that it was in that context that the decision was taken not to image.

[87] Mr. Coulthard has made it clear that he acted at all times on the instructions of the Receiver-Managers. In this connection, he points to the Affidavit of Geoffrey Paul Rowley[39] who deposed as follows at paragraph 9(j);[40]

> "Given the concerns that have been conveyed by our legal advisors that the assets were at risk of being distrained against foe unpaid rent and severe charges (as mentioned in paragraph [9] [f]) and the exhibit to [9] [g] above, it was decided by the receiver that the best course of action after the data was to remove it from the servers which would not remain under the direct context of the recovery managers. That served the dual purpose of ensuring that data on the servers could not be misused and the receiver managers did not need to incur expense in storing the servers to ensure that the data was not misused. Mr. Coulthard was therefore instructed to carry out the deletion process. Mr. Coulthard was familiar with the requirement from his work for the West Yorkshire Police, (which is one of the reasons why he was chosen for the role)."

[88] The reasons for the non-imaging and erasing must now be addressed in greater detail.

The Montreal office was merely a sales office.

[89] The Court takes the view that while this is a fact in a narrow sense, when looked at in a wider perspective an entirely different picture emerges. For one thing, the evidence that some payments were made through Canada; and while there were only 224[41] clients from Canada, these two factors must have some significance. As such, the relatively low figure alone cannot be indicative of whether or not the computer had data. By the same token, their location in the

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[39] Geoffrey Paul Rowley is a licensed insolvency practitioner and partner at the company, Vantis Business Recovery Services – see NJHS-1 referred to below.

[40] Affidavit of Geoffrey Paul Rawley in response to the Application of Urgency, being exhibit (NJHS1) to the Affidavit of Nigel Hamilton-Smith filed on 15th January, 2010.

[41] Report to the Antigua High Court by Joint Receiver-Managers on the Stanford International bank Ltd., dated 16th march, 2009 at page 215.

Office cannot reasonably be used as an evidence of the presence or absence of data relevant to the liquidation or other civil or criminal proceedings.

The computers were for disaster recovery only.

[90] While this may be the case, there is no evidence to suggest that this was the only purpose they served in a sales office connected with SIB: Indeed it is well documented[42] in the evidence as to the part financial advisors played in the sale of certificates of deposit (CDs). Again, the fact that a Liquidation may go beyond the recovery of assets cannot be ignored.

All the banking information was routed through the Antigua servers.

[91] By definition, a sales office cannot be confined to banking information so that in the Court's view this reason falls short of being credible. On the whole, the Court does not consider the reasons for the non-imaging and erasing of the four computers to be convincing. The Court is fortified by the evidence relating to the circumstances of erasing and the apparent urgency to vacate the rented premises occupied by SIB's Montreal Office where the computers lay.

[92] As noted before, Mr. Coulthard has made it clear that he acted on the instructions of the Respondents and that his primary duties were to image and delete the computer. He also deposed that it was the Respondent's decision to place the erasing of the four computers on automatic mode so as to save money by not incurring further rents. On this account, Coulthard was suppose to and did leave Montreal on 8th March, 2009. Importantly, however the self-executing mode was estimated to last not more than a few days[43]. However, on 27th March, Mr. Daniel Roffman, who was hired by the US Receiver to locate collect and preserve data and information relating to SIB, visited the Montreal Office and as part of his account, Mr. Roffman deposed as follows at paragraphs 9 and 13 of his Affidavit[44]:

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[42] In the said Report also at page 215 it is stated: "We are advised that nearly 100% of the bank's clients were referred to ISB by Stanford Financial advisors."
[43] See "Admissions" at para 8, Core Bundle Tab 19
[44] Affidavit of Daniel E. Roffman, Core Bundle Tab. 18

> "9. During the tour of the Montreal Office, Giraldeau took me into the Computer server room of the Montreal Office and I observed a computer monitor on which appeared the message 'Server Erasing is in progress 76%.
>
> Upon seeing the monitor screen, I asked Giraldeau who else had been in the server room. Giraldeau advised me that Vantis employees had entered the server room in order to '… secure the servers.' I requested that Giraldeau allow me to 'image' the hard drive of computers in the space so as to have access to the data contained on those drives. In response to my request, Giraldeau stated that Ogilvy would have to speak to Vantis about this, and invited me to speak with Mr. Himo.
>
> 13. Based on my observation of the Montreal Office and my conversations with Giraldeau, it would appear that some electronically stored business records have been compromised or possibly even destroyed."

[93] In the "Admissions"[45] signed by attorneys on behalf of the Liquidators/Petitioners and the US Receiver, Ralph Janvey, it is stated in part that: "The desktop computers in the guest office, the work room and at the reception were not imaged as their contents would have been captured by the imagery of the servers.[46]"

[94] That may well be so, but there is no evidence as to certainty before the Court. Added to that, Mr. Kelman deposes the following in relation to the matter of the imaging servers:

> "Although the majority of data would probably have been duplicated by the servers it is not possible to tell whether there is additional data on the machine itself without looking at it. Furthermore, particularly with laptops the copying of data to the servers is not continuous but only occurs from time to time when the laptop or desktop synchronizes itself with the data on the servers. There can thus be times where records and data is held locally on the desktop or laptop but has not been synchronized with the servers. Typical examples can be e-mail which have been written on a laptop but await sending in the outbox of the laptop's Microsoft Outlook installation and other records held in draft. The universal process is therefore to image desktops/laptops even if they are a 'slave to the server'.[47]

[95] On the question of the storage of the computers, the Respondents submit the following:

> "21. In theory, it would have been possible to place the computer equipment into storage. However, this ignores the fact that the Liquidators were advised by their IT consultants that by imaging the servers they were retaining an exact copy of the data, and that therefore there was no need to go to the expense of placing the hardware into storage. In addition, as set out in paragraph 24 of Nick O'Reilly's affidavit, attempting to move the equipment was most likely to come immediately to the Landlord's attention (it owned the whole building) and perhaps prompt the Landlord to take pre-emptive distraint action

[45] Core Bundle Tab 19
[46] Ibid, at para. 7
[47] First paragraph at para 13

against the assets. It can further be seen from the report of Mr. Kirby (paragraph 8) that removing sensitive IT equipment would have its own risks:
'There are inherent risks in moving computers. Hard drives are mechanical devices particularly vulnerable to damage when moved. Likewise there are often problems with the computers own internal battery which is meant to save important data such as time and other key data which the computer may need to use when restarting." Given these reasons, the Liquidators did not consider it appropriate in the circumstances to place the IT equipment into storage and instead choose to image and delete I'."

[96] The matter of outstanding rents with respect to the SIB's Montreal Office and the need to vacate the premises urgently was one of the reasons given for the non-retention of the hardware. But in the view of the Court, the narrative does not add up because of the following:

1) In terms of storage of the hardware mention was made of the need for special conditions 'temperature and humidity levels' as prerequisites.

2) The whole notion avoiding further rents or vacating the Office is contradicted that the computers were still in place on 27th March, 2009 when erasing should have been completed 'within a few days (at most).'

3) The non-availability of funds is contradicted the Joint Receiver-Managers Report dated March 16th, 2009. The long title is: "Report to the Antiguan High Court by the Joint Receiver-Managers on Stanford International Bank." Which shows under the "Cash Balances" that SIB held cash in several bank including the Bank of Antigua in the amount of US $9,984,971.[48] Based on inquiries made about the cash balances, the following is stated in the Report with respect to Bank of Antigua:

> "Bank of Antigua have made deductions from the account of US $6,737, 520 in relation to credit card debit card account issued to SIB customers along with a further $500,000 retention of further debts. The balance has been released to the Receiver-Managers to meet ongoing operational costs of SIB and professional costs that are being incurred by the Receiver-Managers."[49] The sum shows that US $2,747,451. would have been available to the Receiver Managers prior to the date of the Report being March 16, 2009. The report further indicated that the monthly salary costs "are in excess of US $180,000." And there was need to reduce staff levels."

[48] At page 218
[49] Ibid

[97] The sums show that US $2,747,451 would have been available to the Receiver Managers prior to the date of the Report being March 16, 2009. The report further indicated that the monthly salary costs "are in excess of US $180,000." And there was need to reduce staff levels.

[98] Finally, the Court would address the theoretical difficulties associated with the storage of computers by saying that such difficulties are not insurmountable.

The matter of the Blackberry devices and data sticks.

[99] The essence of this sub-issue is the Applicant's contention that the IT Specialist were not instructed to collect or image the Blackberry devices or servers and data sticks. The Respondents' response to this rests, in part, on what Mr. Coulthard had deposed, which is that at the Montreal Office he searched for but did not find, these devices.[50]

[100] The matter of the Blackberry devices and the data sticks does not start or end with what Mr. Coulthard has deposed, it goes back to the period he spent in Antigua with the Receiver-Managers. According to Coulthard, he was instructed in the matter on 20th February, 2009 and travelled to Antigua with two colleagues to assist the Liquidators … to examine the Antiguan IT System of SIB."[51] Coulthard deposes further that: "We worked at the premises of SIB and assisted in gaining an understanding of the IT Systems there and how they worked". And further still, in commenting on Alistair Kelman's observations[52] on "Blackberrys" and "data Sticks" deposed thus:

> 44. "… I note that, as part of the search of the office that I conducted on the day I arrived in Canada, I did not find any Blackberry devices. I therefore did not collect or image any Blackberrys. As I have mentioned above, I am experienced in search and seizure procedures carried out in any career with the police, and I am therefore aware of how to carry out a search of such devices and I did so in this case.
> 45. … I note that, as part of the search that I conducted of SIB's Montreal Office, I did not find any data sticks, or USB storage devices, despite going through desk drawers and desks."

[50] Affidavit of James David Coulthard, Core Bundle Tab. 25 @ para. 44.
[51] Ibid at para. 5.
[52] Affidavit of Alistair Bruce Kelman, Core Bundle, Tab 11 at para. 9.2.3

[101] Given the time spent in Antigua in becoming familiar with SIB's system and Coulthard's experience working with the police plus the experience of the Liquidators, the question must be why the matter of Blackberrys and data sticks did not arise in the context of a sales office. But in the Court's view, the matter does not end at this point.

[102] Mr. Geoffrey Rowley in his affidavit at paragraph 9 (a) – (e), deposes as to the circumstances after the appointment of the receiver of SIB in relation to the Montreal Office:

> (a.) "Shortly after their appointment on the evening of 19th February, 2009 the receiver-managers were made aware of the existence of the SIB branch office located in Canada where 5 employees were based. The Canadian branch office was principally a sale office for SIB and as a result of the SEC's freezing order in the United States the receivership of SIB, its day-to-day activities had already ceased.
>
> (b.) The receiver managers were informed by an employee at the Montreal branch that SIB was registered with the office of the Superintendent of Financial Institutions ('OSFI') the Canadian Federal regulator. The receiver-managers were further informed that OSFI had already served notice on SIB's breach in Montreal verifying the terms of its operating license. It was understood that the effect of the variation was that no further business could be conducted through the branch office and its role was restricted to dealing with customer queries.
>
> (c.) The receiver-managers subsequently arranged for two members of their team to attend the Montreal branch accompanied by local Canadian Counsel (Ian Ness and Masir Caron, both partners at Ogilvy Renault LLP) of the two members of the receiver-managers team who attended the premises in Montreal, one, Mr. Nick O'Reilly is a partner at Vantis, as well as being a chartered Certified Accountant and a Licensed Insolvency Practitioner. Mr. O'Reilly is an experienced solvency professional having over 25 years experience in corporate insolvency and fraud cases. Mr. O'Reilly was accompanied by Mr. Matthew Peat, an experienced manager from Vantis.
>
> (d.) As the Montreal branch of SIB had no further function, the receiver-managers overall strategy was to mothball its operations and continue to run the receivership out of SIB's principal premises in Antigua. The key objective of the visiting team was, therefore, to deal with the employees at the branch office, to preserve any bank records or data held on the computers and servers, and to ensure that OSFI was appraised of the situation.
>
> (e.) As planned therefore, the visiting team flew to Canada on 22nd February, 2009 and attended the premises on 23rd February, 2009, where Mr. O'Reilly spoke to the employees, before sending them home …"

[103] Without a doubt, the quotation from Mr. Rowley's affidavit is prolix but it serves to make the following points: (1) Mr. O'Reilly, the experienced insolvency practitioner spoke to five employees at the SIB Office along with another experienced manager from Vantis. (2) Also in attendance, were two partners from the law firm of Ogilvy Renault LLP). (3) And in all of this, there is no evidence that the five

employees were questioned about Blackberrys and data sticks before they were sent home.

[104] The Respondents have taken issue with the following conclusions by Mr. Kelman.[53]

> 54. "For reasons which I have set out the failure of Vantis … to preserve and image the Blackberries and Blackberry Enterprise server, the failure of Vantis to collect and preserve all mobile media by conducting leaving interviews with staff in which such material were handed over … are very serious matters.
>
> 56. Vantis' dismissal of the SIB's Montreal staff without leaving interviews and associated magnetic media and mobile phone retention has led to the loss of what is likely to have been very relevant evidence to support or undermine information retained in the imaging process. It has also destroyed what is normally a fruitful route of inquiry in investigations – the ability to place e-mails, addresses and SMS messages in the context of the life of the staff who are caught up in the investigation."

[105] The attendant reasoning is that there is no evidence to support such a conclusion.[54] The evidence is supplied by Nicholas Hugh O'Rilley, a partner at Vantis Business Recoveries, in his affidavit filed on 12th February, 2010, deposed as to the duties he performed with Mr. Peat at the Montreal Office of SIB between 23-24 February, 2009. Such duties included a meeting with the SIB employees and he goes on to say at paragraph 17 that:

> "As part of these conversations, I asked the employees about the ownership of their mobile phones, and was informed that they were owned personally rather than SIB. As there was no indication to the contrary, I accepted this to be the case. There was also no indication that anyone in the office had a Blackberry and this was confirmed from looking through the invoices received at the premises which showed no charges associated with Blackberries."

[106] The Liquidators did not advise the A.M.F of the Court hearing of the *ex parte* motion or the US Receiver that the servers had been erased.

[107] The Respondents accept this 'complaint' and explain it in this way.[55]

> "While it is accepted that the Liquidators did not inform the A.M.F or the US Receiver immediately, that the data had been erased, it is respectfully submitted that this omission is entirely understandable and excusable given that the Liquidators had been advised by a reputable expert that that data, while erased from the computers in Montreal, had not been destroyed but instead had been copied to standards acceptable for admissibility in

[53] First Affidavit of Alistair Bruce Kelman, Core Bundle, Tab II at para. 84
[54] Revised written submissions of the liquidators, filed February 25, 2010 at para. 15.
[55] Ibid at para. 43

> a Court of Law. In the Liquidators minds, therefore, they were in possession of exact of the data erased and it is therefore reasonable to expect that it would not occur to them to inform anyone of the erasure."

[108] In the circumstances the foregoing ends the matter or 'complaint'.

[109] The actions of the Liquidators were not in accordance with the standard of forensic practice or behaviour which is to be expected of competent and reasonable Liquidators when dealing with the preservation and examination of IT evidence and records.

[110] As noted above, the Respondents say that the above contention or 'complaint' is based on the opinion of Applicant's 'alleged expert,' Mr. Alistair Kelman.

[111] It is common ground that the ACPO guidelines are used in the area of computer forensics and it is clear to the Court that Mr. Kelman seeks to measure the Liquidators' conduct by reference to the ACPO guidelines. They are consisted by the following four principles:

> "Principle 1: No action taken by law enforcement agencies or their agents should change data held on computer or storage media which may subsequently be relied upon in Court.
>
> Principle 2: In circumstances, where a person finds it necessary to access original data held on Computer to do so and be able to give evidence explaining the relevance and the implications of their actions.
>
> Principle 3: An audit trail or other record of all processes applied to computer based electronic evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result.
>
> Principle 4: The person in charge of the investigation (the case officer) has overall responsibility for ensuring that the law and these principles are adhered to."

[112] The Applicant relies on Mr. Kelman's opinion insofar as the handling of data is concerned. Included are: The need to retain the original hardware. The conclusion that ACPO principles 1-3 have comprehensively broken by the Liquidators. The further conclusion that the Joint Liquidators have made investigation difficult coupled with the loss of "what is likely to have been very

relevant evidence." And finally, the actions have potentially affected the admissibility of evidence in future criminal and civil cases.[56]

[113] The Respondents submit the following:

> "25. Mr. Mark Kirby is one of the co-authors of the ACPO guidelines which Mr. Kelman claims Mr. Coulthard failed to follow. He is "an international expert in Hi tech Crime who created the first multi-agency national Computer Forensic Unit in the World" (pg. 1 of exhibit MK 1 to his affidavit). He was the head of the UK National Hi-Tech Crime Unit from September 2001 to April 2006 and the Computer Forensics Manager of the UK Serious Organised Crime Agency from April 2006 to May, 2007. He is presently a Senior Lecturer in Forensic Computing and a Research Leader in Forensic Computing at Cranfield University (see his CV at MK1).
>
> 26. Having examined all the relevant affidavits, Mr. Kirby concludes that the views expressed by Mr. Kelman that in imaging and wiping the databases Mr. Coulthard failed to follow the best practices and failed to comply with the ACPO guidelines, were plain and simply wrong. With respect to compliance with ACPO guidelines, he concludes:
>
> > "Mr. Kelman's assertion that the ACPO Principles have been broken in this case is incorrect. The principle that applies in this case is Principle 2 which allows examiners to access live machines provided they are competent to do so and can explain the consequences of their actions to a Court. Mr. Coulthard's comments at paragraph 28 of his first Affidavit that he kept handwritten contemporaneous notes of his actions. I have seen the contemporaneous notes exhibited at 'JDC3' to Mr. Coulthard's second Affidavit, and can confirm that he has complied with ACPO Principle 3 by keeping an audit trail of his actions." - para 14
>
> "Further in relation to paragraph 55 (of Mr. Kelman's first affidavit), as the person who wrote most of the guides, I can categorically say they were not broken – para. 25.
>
> 27. On the question of the alleged need to preserve original hardware, Mr. Kirby says:
>
> > It is my own preference, as well as the considered opinion of the computer forensic specialist community, that business computers should be seized only if there is an overwhelming technical or legal reason for doing so. There are inherent risks in moving computers. Hard drives are mechanical devices and particularly vulnerable to damage when moved. Likewise there are often problems with the computer's own internal battery which is meant to save important data such as time and other key data which the computer may need to use when restarting. Temperature and humidity will also have a bearing on a computer in storage." (para 8)
> >
> > "Paragraph 50 [of Mr. Kelman's 1st affidavit] again refers to the need to keep original equipment. I again disagree. The use of virtual techniques has made this unnecessary when undertaking investigations of business IT." (para 21)
> >
> > "I have a great deal of experience in the field of forensic computing. I teach it to law enforcement students from around the world who attend my courses at Cranfield University. I have over ten years of experience of carrying out forensic data recovery (and examination) in the UK and many other

[56] Revised written submissions of Alexander M. Fundora, filed 26th February, 2010 at para. 70.

> jurisdictions around the world and I co-authored and updated the ACPO guides from 2001 to 2006…
>
> … Mr. Kelmans affidavits indicate that his approach is outdated. His suggestion that it is best practice to always recover hardware is wrong. There may be times when it is desirable such as a pedophile case, but by and large in the modern world, it is not always possible or desirable to seize equipment. This is my view and those of other agencies in the UK who regularly deal with corporate enterprise investigations." (para 34)

28. On the question of admissibility to the imaged data in Court Mr. Kirby says:

> "I have been presenting forensic evidence to courts in England since 2001. In all of those cases the evidence has been derived from computer image. I am not aware of any Court in the United Kingdom declining to allow computer forensic evidence derived from a properly verified computer image." (para 9)
>
> "Paragraph 53 [of Mr. Kelman's first affidavit] discusses the possibility of the failure of forensic tools in general. In my ten years experience in this field no major forensic tool (free or commercial), including the "FTK Imager" version 2.5.4 used by Mr. Coulthard to image the servers and computers in Montreal, has been discredited in court in the United Kingdom." (para 22)
>
> "I agree that the process of wiping is unlikely to be reversed if it was carried out to international standards. However the court does have the computer images (i.e. the mirror images) that were taken prior to wiping, so there will be no need to attempt to recover data from wiped machines." (para 24)
>
> "I cannot agree with the general sentiments that the computer images obtained by Mr. Coulthard are to be regarded as unreliable. It is my opinion that provided the computer images underwent verification during the imaging process then the evidence that they contain is reliable. It is my view that Mr. Coulthard followed ACPO Principles 2, 3 and 4 and therefore my opinion is that no ACPO procedures were broken." (para 26)
>
> "In paragraphs 20 and 21 Mr. Coulthard explains the verification process and states that all images were verified. This is without doubt the most important part of the process. If the files are verified then in my opinion (and that of any court in the UK where I have used computer image evidence) they are exact copies of all data that was on the equipment at the time the operation was carried out." (para 31)

29. Overall, Mr. Kirby concludes that:

> "Based on the documentation supplied to me in this case it is my view that imaging the computers as opposed to removing them to storage in this case was a perfectly acceptable course of action and a in accordance with accepted practice." (Para 10)
>
> "Even if the computers in this case were seized, best practice would dictate they be imaged and any evidence would be derived from that image. From all the paperwork in this case I see no grounds to doubt that the images obtained are a full copy of what was on the computers before they were wiped." (para 12)

[114] It was noted before that Mr. Kirby expressed the opinion that the Joint Liquidators were not in breach of the ACPO principles by virtue any of Mr. Coulthard's

actions. However, the Court has already determined that given the nature of this liquidation it gave rise to an exceptional legal circumstance posited by Mr. Kirby or a high-profile case as proffered by Mr. Kellman, for the retention of the hardware, being the four computers that were not imaged but erased. Additionally, the Court determined that by virtue of the length of time the erasing lasted, there may be a mass of evidence lost. In this connection, the evidence as that the Liquidators and their IT expert held the view that a mere two additional days were required to complete the erasing.

Conclusion

[115] Therefore, having regard to the content of Principle 1 of the ACPO guidelines which forbids the changing of data held on computer on storage media which may be subsequently relied upon in court, it is the determination of this Court that the action of the Joint Liquidators with respect to the erasing of the computer hardware was not in accordance with standard forensic practice and as such they acted improperly.

ISSUE NO.3

Whether Messrs Hamilton-Smith and Wastell acted outside of their remit as Receiver-Managers?

Submissions

[116] The Applicant contends that at the time of their actions, between 5 and 27 March, 2009, or thereabouts, the Joint Liquidators were Receiver Managers, and that their subsequent appointment as liquidators took place on 15th April, 2009. They say further that by virtue of section 221 (b) of the IBC Act Receiver-Managers are required to take custody of the property of the corporation and take immediate steps to stabilize the operation thereof. This should have been done by 26th February, 2009.

[117] In contrast, says the Applicant, by virtue of section 308 (1) (a) of the said Act, a liquidator has power to sell, by public auction or private sale, any property of the corporation. The Applicant's submissions continue in this way:[57]

> "That the Joint Liquidators improperly considered their role at the time to be one of liquidation is plain from Mr. Hamilton-Smith's comment at paragraph 84, bullet 3 of his 2nd English Affidavit, where he refers to the preservation of the contents of the servers "before the information is deleted in advance of a sale of the computers." He further stated (paragraph 84 bullet 3) that erasing is "standard practice in an insolvency situation" (emphasis added). The same was evident from the 16 March, 2009 Report of the Receiver-Managers to the Antiguan Court (See Pages 44 to 55 of Exhibit ADB-5 at Tab 1) which states (page 6) that "we are presently liaising with our lawyers in Canada to deal with the sale of the assets located in the Canada Office…."
>
> "The Joint Liquidators had no power whatsoever to erase original computer data with a view to sale, when their remit was merely of stabilization of the business. The Joint Liquidators in fact undertook the exact reverse of their duties by destroying property rather than preserving it. The Joint Liquidators acted not only outside the remit of their mandate from the Antiguan Court, but in obvious breach of this Honourable Court's Order and the duties and powers laid down in the Antiguan IBC Act."

[118] The Respondents deny the allegation that they exceeded their remit as Receiver-Managers and submit the following:[58]

> "The Liquidators, as Receiver-Managers, did not sell any assets. The complaint there arises from a passage in Mr. Hamilton-Smith's affidavit lodged in the UK proceedings in which he said that it is standard practice to preserve data before deletion "in advance of a sale of the computers." (see page 392 Exhibit ADB 6). First of all, it is clear that Mr.

[57] At paras. 90 & 91 of the Revised Written Submissions of Alexander M. Fundora, filed 26th February, 2010.
[58] At paras. 81 & 82 of the Revised Written Submissions on behalf of the Liquidators, filed 25th February, 2010.

> Hamilton-Smith was not saying that he had any immediate plans to sell the equipment. He was referring to what he considered to be standard practice. Secondly, as he explained in paragraphs 28 (c) and 46 of his first affidavit, he was acting on the assumption that there was a real possibility that SIB would soon be put into liquidation when the question of sale would arise. It is difficult to appreciate how any misconduct on the part of the liquidators can be teased out of these circumstances.
>
> The Applicant contends that the Receiver-Managers function was limited to stabilizing SIB's business and this did not include erasing data. The Liquidators are of a different view (see para. 48 of the first Hamilton-Smith affidavit). Mr. Hamilton-Smith is of the view that "the very act of imaging and deleting (and thereby safeguarding) the servers was in order to "stabilize" the operations of SIB to ensure that no information or data was lost to the estate" (see also paragraph 26 of the second Hamilton-Smith affidavit). The Liquidators acted on advice from its IT Specialist that imaging would safeguard the data. It is respectfully submitted that Mr. Hamilton-Smith is correct in law in thinking that safeguarding the data in the way he did was part and parcel of his duties as Receiver-Manager to stabilize the business. But even if he is wrong, he acted in good faith, and it can hardly be suggested that by so acting he is guilty of misconduct justifying his removal."

[119] That the Receiver-Managers made mention of the sale of computers (receiver-managers) is not in doubt as both parties acknowledge this fact. Where they differ is as to their interpretation of what was said or done in this regard.

[120] Given the fact that a receiver-manager is a creature of statute, being the IBC Act, the analysis must begin with the relevant sections of that Act.

[121] Section 287 (1) of the IBC Act provides for the appointment of a Receiver-Manager for a corporation in certain prescribed circumstances. The subsections (2) and (3) of the same section provide that:

> "The receiver-manager appointed under subsection (1) may seize the management and content of the business of a corporation under this section by placing a notice to that effect on the premises of the registered office of the corporation and by putting agents of the appropriate official or receiver-manager into the offices of the corporation or by designating officers of the corporation to be officers of the receiver-manager or by both such measures.
> (3) A Corporation aggrieved by a seizure under this section may institute proceedings in the Court for the recovery of the administration and control of the corporation, and the Court may make such order in respect thereto as to it seems just and consistent with the purposes of this Act."

[122] Section 288 of the IBC Act is in these terms:

> "288. (1) Within thirty days after a receiver-manager has seized the administration and control of a corporation under this Division, the receiver-manager shall begin proceedings in the Court for the liquidation and dissolution of the corporation under section 300 or for the re-organization of the corporation under this Act, as the circumstances require.

> (2) On an application to the Court by a receiver-manager of a corporation under this division for the liquidation and dissolution of the corporation, the court has all the powers of the court under section 304 notwithstanding that the corporation is not able to pay or adequately provide for the discharge of all of its obligations, but subject to section 286 and section 289."

[123] By way of summary, then, section 287 (2) gives an appointed Receiver-Manager a power to seize the management and control of the business of a corporation and prescribes the manner in which this is to be done. On the other hand, section 288 places a duty or obligation on a receiver-manager (so appointed) after the seizure to institute proceedings in the High Court either for the dissolution or re-organization of the corporation. And logically, the determination of such an application is a matter entirely for the High Court. Of some significance, too, is the Court's observation that the word 'stabilize' does not feature in the said section. However, by a benevolent construction of the word, it could arguably be a reference to the seizure of the management and context of the business; but it cannot be seen as a word contained in the section 287 of the IBC Act.

[124] As Receiver-Managers in their Report to the High Court dated 16th March, 2009, they speak in this mode. "We are presently liaising with our lawyer in Canada to deal with the sale of the assets located in the Canada office which is limited to office and IT equipment."[59]

[125] On 16th March, 2009, the Receiver-Managers were still governed by section 288 (1) of the IBC Act and, as such, their sole concern, after the seizure, was to approach the High Court-nothing more.

[126] Much later on, in an affidavit filed on 25th January, 2010, Mr. Nigel John Hamilton-Smith deposes at paragraph 28 c that:

> "Mr. Blackburn levels further criticism at the Liquidators for the statement that the servers were deleted to allow a sale, because the Liquidators, at the time Receiver-Managers, did not have the power to sell. This point goes nowhere because the servers were not sold or ordered for sale by the Receiver-Managers. Under the IBCA, our appointment as Receiver-Managers was always likely to last only a matter of 90 days and Mr. Wastell and I acted on the assumption that there was, at the very least, a reasonable probability of SIB being placed into liquidation at the end of the receiver-managership. Accordingly,

[59] Exhibit ADB-5 To the first Affidavit of Andrew D. Blackburn, Tab 1 @ page 49

> we were thinking ahead to that possible liquidation and identifying assets of SIB which might be available to raise funds for the liquidation (to the extent funding was not readily available).
>
> Finally, Mr. Fundora's application suggests that there was some kind of nefarious agenda behind the imaging and deletion of the data in Montreal, but he is unable to identify any motive for this. In fact, the Liquidators acted, under advice, in what they believed to be in the best interests of creditors – there was no other motive and none has been suggested."

[127] As noted before, the Court interprets the obligation on the receiver-managers as being limited to seizing the administration and control of the corporation and within 30 days thereafter instituting proceedings with a view to liquidation or re-organization. This is why the limitation of 30 days assumes great significance. And there is no discretion in the Receiver-Managers, period. Once they fail to carry out the mandate of section 288 (1), this lets in the corporation to institute proceedings which can also be commenced by the corporation after the seizure.

[128] In the circumstances, it becomes difficult to understand how the Receiver-Managers can anticipate the High Court and act on it, especially since at the time they were yet to be appointed as liquidators.

[129] Accordingly, the Court finds that the arguments tendered on behalf of the Respondents are not viable given the statutory context. Therefore, except for the word 'stabilize,' the Court agrees with the following submission by the Applicant:

> "Plainly, the role of receiver-manager in the circumstances was at most one of 'stabilization' of the business (in the terms of the Antiguan Order paragraph 5) and to take the assets into custody and control and not to take steps to liquidate and sell off assets. The role receiver-manager is one of preservation, either to keep the business running, or in case a liquidation occurs at some stage in the future. Indeed, if liquidation of the assets was within the remit of a receiver-manager, the subsequent appointment of a liquidator (ant the power to sell) would be pointless."

Conclusion

[130] It is therefore the determination of the Court that prior to being appointed as liquidators, the Receiver-Managers exceeded their remit by making preparation for the sale of assets of the corporation and by deleting data from the corporation's computers.

[131] As a final note, there is no evidence to indicate the whereabouts of the subject computers which were last at the office by Mr. Roffman on or about 27th March, 2009. This is in spite of the fact that Mr. Nigel Hamilton-Smith sworn an affidavit in this matter as late as 12th February, 2010, and made mention of the issue of SIB's IT equipment in Canada.[60]

ISSUE NO.4

Did the Receiver-Managers/Liquidators disregard the jurisdiction of the Canadian Courts?

[132] On this issue, the Respondents place heavy reliance on the advice of their counsel to the effect that the Liquidators did not act unlawfully in taking steps to safeguard the data.[61] In support Geoffrey Riley deposes as follows:

> "… Even assuming that the Liquidators were wrong in law to act as they did, they acted in good faith and at all times under the guidance of their lawyers at a hectic point in time at the start of the receivership. Mr. Hamilton-Smith accepts that with the benefit of hindsight he should have sought recognition first, but given the uncertain state of the law and the need to take quick action, the fact that no loss has occurred, and the absence of advice to obtain recognition the Liquidators cannot be considered to have misconducted themselves (see paragraphs 10, 49 and 50 of the first Hamilton-Smith affidavit and paragraph 22 of his second affidavit). Moreover it is not unusual for receiver-managers in a multi-jurisdictional environment to take steps in advance of seeking recognition (paragraph 20-21 of the second Hamilton-Smith affidavit)."

[133] Geoffrey Rowley in giving evidence on behalf of the Respondents concedes the point by deposing[62] that: "The early days of the receiver-managers' appointment over SIB … were very busy and hectic and the decisions regarding the Montreal Office were made in good faith, although, with the benefit of hindsight; it would have been advisable for the receiver-managers to have sought to be recognized by the Canadian Court first."[63]

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[60] Second Affidavit of Nigel Hamilton-Smith in response to the Application to remove the Liquidators sworn to on 12th February, 2010, Core Bundle II, Tab 1 at paras. 28 & 29.
[61] Revised written Submissions of the Liquidators at para. 87. See also Julie Himo's second Affidavit paras. 8-13, Core Bundle II, Tab 2.
[62] See affidavit of Geoffrey Paul Rowley, as Exhibit NJHS1 to the affidavit of Nigel Hamilton-Smith In Response to the Application to remove the Liquidators at para. 10.
[63] See affidavit of Geoffrey Paul Rowley, as Exhibit NJHS1 to the affidavit of Nigel Hamilton-Smith In Response to the Application to remove the Liquidators at para. 10.

[134] The Applicant in seeking to identify the 'wrongs' committed by the Respondents, submit that they: "(i) undertook actions in Canada without the permission of the Canadian Courts and removed computer material from its jurisdiction without its knowledge or permission, (ii) failed to inform Registrar Flamand of material facts (for example the existence of a U.S. Receiver) on 6th April, 2009 when finally making their *ex parte* application for recognition, and (iii) made untruthful statements and testimony before Auclair J at the hearing leading to the 11th September, 2009, judgment."

[135] For reasons given before, the Court will not dwell on the matter of hearing before Auclair J. And, as far as the alleged failure to make material facts known to Registrar Flamand is concerned, Mr. Philippe Giraldeau[64] has deposed that:

> "1. I am one of the Canadian legal counsel of the law firm of Ogilvy Renault LLP, having been appointed by Nigel Hamilton-Smith and Peter Nicholas Wastell with regard to the matter of Stanford International Bank Ltd and Stanford Trust Company Ltd. (hereinafter the "Bank");
>
> 2. On Monday, April 6, 2009, I attended, with my colleague Ms. Julie Himo, at the office of the Registrar, Chantal Flamand, of the Commercial Division of the Superior Court of Quebec, district of Montreal, in order to present our client's *Motion seeking the appointment of a foreign representative, the recognition of a foreign order for judicial assistance and for the appointment of an interim receiver;*
>
> 3. In light of my attendance at the above-mentioned hearing with Ms. Himo, I make this affidavit to conform that I have read Ms. Himo's affidavit dated January 16, 2010 and that the statements Ms. Himo makes at paragraphs 10 to 20 of her affidavit regarding the above-mentioned hearing and Motion are true;
>
> 4. More specifically, I can confirm that Registrar Flamand
>
> a. did indeed review every Exhibit attached to the Motion;
> b. asked Ms. Himo about the U.S. proceedings and was informed by Ms. Himo that a U.S. Receiver was appointed as receiver of the Bank, among other entities …"

[136] At paragraphs 10 to 20 of her first affidavit, Ms. Julie Himo details the procedure followed at the hearing of the *ex parte* motion filed by the Respondents (as Receiver-Managers) and heard by Registrar Flamand.

[137] Contextually, paragraphs 19 and 20 are especially significant where Ms. Himo deposes that:

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[64] See Affidavit of Philippe Gireldeau, Core Bundle 1, Tab 27

> "19. I was not given instructions to withhold nor did I withhold any information from the Registrar, including the fact that a U.S. Receiver has been appointed as such in the United States.
>
> 20. It was urgent for the Receiver-Managers to seek recognition of their status until such time as the Winding-Up Order appointing them as Liquidators would be issued by the High Court of Antigua because there was a number of urgent issues to be dealt with in Canada, including dealing with the landlord of the premises where the bank operated in Montreal and where the Bank's assets were stored, as alleged at paragraph 24 through 28 of the motion, as well as class action proceedings which had been filed against the bank in the Province of Alberta, Canada, as alleged at paragraph 30 of the motion (see Exhibit R-6 of the motion)."

[138] Despite the admission by the Respondents and despite the urgency relied on by the Respondents, the Court considers it prudent to identify the statutory context. Part XIII of the Bankruptcy and Insolvency Act[65] deals exclusively with international insolvencies which by its definitions and substantive provisions would apply to the Respondents.

[139] In particular, the two following definitions are relevant:

> " 'foreign proceeding' means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally';
> 'foreign representative' means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection, with a foreign proceeding that are similar to those performed by a trustee, liquidation, administrative or receiver applied by the Court.'"

[140] Clearly, the Respondents would qualify as a "foreign representative" for the purposes of the BIA. Accordingly, sections 268 (2), (3) (4) and (6) which read thus:

> " Limitation or trustee's authority
> (2) If a foreign proceeding has been commenced and a bankruptcy order or assignment is made under this Act in respect of a debtor, the Court may, on application and on any term, it considers appropriate, limit the property to which the authority of the trustee extends to the property of the debtor situate in Canada and to any property of the debtor outside Canada that the Court considers can be effectively administered by the trustee.
>
> Power of the Court
> (3) The Court may, in respect of the debtor, make such order and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceedings.

[65] R.S., 1985, c. B-3

> Terms and conditions of orders
> (4) An order of the Court under this part may be made on such terms and conditions as the Court considers appropriate in this circumstances.
>
> Court not compelled to give effect to certain orders
> (6) Nothing in this part requires the Court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign Court."

[141] In a futile effect to defending their actions, Mr. Nigel Hamilton-Smith deposed as follows at paragraph 21 of his second affidavit:[66]

> "21. In paragraph 87 (c) of his first affidavit, Mr. Blackburn criticizes the Liquidators for only applying for recognition on 6th April, 2009. In any experience, it is quite usual for insolvency practitioners operating in a multi-jurisdictional environment to investigate what assets are available to them in a given jurisdiction before applying for recognition in that jurisdiction. The same *modus operandi* was adopted by the US Receiver, who only applied for recognition in Canada as a response to the Liquidator's application. Our actions in Canada were undertaken in conjunction with Canadian legal advice from Ogilvy Renault; when it became necessary to apply for recognition, I was advised that this was the case and advised my Canadian lawyers accordingly."

[142] In order to complete the picture, it is appropriate to quote from Ms. Himo's second affidavit where she deposes as to the Respondents' actions and the relevant law:

> "8. I am unaware of any principle at law which would lead me to conclude that because the Liquidators were not licensed trustees under the BIA, their actions with regard to the assets and records of the Bank located in Montreal prior to the presentation of the motion were illegal. This is an important issue that I will advise the Liquidators to raise should the Supreme Court of Canada grant their eventual application for leave to appeal;
>
> 9. More specifically, section 271 (3) of the BIA merely provides that the court may, on application by a foreign representative, appoint a trustee as interim receiver. Part XIII of the BIA does not require that a foreign representative generally act through a Canadian trustee. At the time of our Motion before Registrar Flamand, no Canadian case law addressed this issue;
>
> 10. During the hearing on the motion on April 6, 2009 and in our Motion at paragraphs 24 to 29, I informed Registrar Flamand that the Liquidators already took action to close the Montreal office and that one of the principal reasons the Liquidators were seeking recognition of their appointment was to deal with the landlord of the premises where the bank operated in Montreal and to take precautionary measures to safeguard property located in Canada."

[143] The legal advice given to the Respondents is of no concern to this Court except to say the basic issue turns on vires or the treatment of a clear prohibition. And it is one thing to investigate what assets are available and it is quite another matter to

[66] Second affidavit of Nigel Hamilton-Smith, Core Bundle II, Tab 1.

image and erase computer data and then ship out the discs to the United Kingdom – even before the application for recognition which was filed in 6th April, 2009.

Conclusion

[144] It is therefore the determination of the Court that the Respondents disregarded the jurisdiction of the Canadian Courts by undertaking actions in Canada with respect to SIB, otherwise than in accordance with the Bankruptcy and Insolvency Act and removed computer data also without the knowledge or permission of the Courts in Canada.

ISSUE NO. 5

Whether this Court bound by the UNCITRAL model insolvency laws?

[145] In proceedings in the UK with respect to SIB, Mr. Justice Lewison in the course of rendering his judgment in the said matter with respect to the UNICTRAL model insolvency laws and said this:

> "On 30 May, 1997, the United Nations Commission on International Trade Law ("UNICTRAL") adopted the text of a model law on cross-border insolvency, which was approved by a resolution of the United Nations General Assembly on 15th December, 1997. The model law is not binding in any jurisdiction, although the UN recommends that in the interest of uniformity as few changes to the text as possible be made."[67]

[146] The Respondents make this the following submission on the issue:

> " 172. The Applicants contend that because of the multi-jurisdictional and international nature of the liquidation, reference should be made to the UNCITRAL model laws. The Respondents' short answer to this point is that none of the UNCITRAL model laws has been ratified or enacted in Antigua and Barbuda. The provisions of the model laws are therefore of academic interest only and are enforceable in an Antiguan Court of law – see Reg. v. Home Secretary, Ex p. Brind [1991] 2 WLR 588."

[147] In the absence of any statute in Antigua and Barbuda giving effect to the model law, the Court agrees that the UNCITRAL model insolvency laws are not binding.

[67] [2009] EWHC 1441 (Ch) at para. 3.

[148] In this context it is appropriate to mention that under the Laws of Antigua and Barbuda, there are two regimes for the incorporation and related matters in relation to companies and corporations. One is governed by the Companies Act 1995[68] while the other falls under the IBC Act.

[149] The matter of the English Insolvency Rules 1986 which arose in the case of Hugh C. Marshall Snr. v Antigua Aggregates and others[69] concerned the procedure and the law to be followed with respect to a company incorporated under the Companies Act coupled with the absence of insolvency rules being enacted. In contrast, the issue here relates to the removal of a liquidator which is expressly provided for by section 304 of the IBC Act. As a consequence, neither the Hugh C. Marshall Snr. case nor the English Insolvency Rules 1986 are relevant to this matter.

Conclusion

[150] This Court is not bound by the UNCITRAL model insolvency laws.

[68] Act No. 18 of 1995.
[69] Civil Appeal No. 23/1999

ISSUE NO. 6

Does the Applicant have standing to make an application for the removal of the liquidators; and what is the legal test for the removal of a Liquidator?

[151] As far as the matter of standing is concerned, the relevant provision of the IBC Act is section 304. It bears the marginal note "Court Powers" which it grants in wide terms. However, for present purposes the material words are as follows:

> "304. In connection with the dissolution or liquidation and dissolution of a corporation, the Court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all of its obligations, make any order it thinks fit, including, without limiting the generality of the foregoing:
>
> (a) an order to liquidate,
>
> (b) an order appointing a liquidator, with or without bonding, fixing his remuneration and replacing a liquidator …"

[152] The section is silent as to who has standing to make an application for the dissolution of liquidation of a corporation. But it cannot be that this opens the floodgates. To begin, who is the applicant?

[153] In his sixth Affidavit, Mr. Alexander M. Fundora, the Applicant gives his place of residence as 839 South West 72nd Avenue, Unit No. 116 Miami, Florida 33143, United States of America. He deposes further that he is a creditor of S.I.B and that he holds deposits in the form of certificates of deposit with S.I.B totaling US $2,779,526.57 (US $2,484,401.78 in principal).

[154] Applications for the removal of liquidators is a prominent constituent of company law in its various aspects. Such applications are based on the relevant statutory provisions and over time the courts in varying jurisdictions have, in interpreting these provisions, given ruling as to who has standing.

[155] The question of *locus standi* arose in the case of Deloitte & Touche AG v Johnson and Another.[70] In that case, the Applicant was neither a creditor nor a contribution and this was challenged on the basis of lack of standing. The Privy Council gave this ruling:

[70] [1999] 1 WLR, I605

> "Section 106(1) of Companies law did not limit the category of person entitled to apply for the removal of an official liquidation by the court on due cause being shown, and the plaintiff had the requisite statutory qualification to make the application for the removal of the company's liquidators. Since the plaintiff had alleged that the liquidators had an interest which conflicted with their duty to the company and its creditors, but not that they owed any duty to the plaintiff, only the creditors had a legitimate interest in complaining of such a conflict of interest. Also, since the liquidators were able and willing to continue in Office and the creditors were the only persons with a legitimate interest in having them removed, had not applied for their removal the plaintiff was not entitled to invoke the court's statutory jurisdiction under section 106(1)." [71]

[156] Lord Millett for the Board concluded on this note:

> "Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of any insolvent company on the application of a contributory who is not also a creditor: see In re Cobenstoke Ltd (No. 2) 1990 B.C.L.C 60. This case was criticized by the plaintiff: Their Lordships consider that it was correctly decided."[72]

[157] Based on the ruling in the Deloitte & Touche case, this Court in Financial Services Regulatory Commission v Peter Queeley and Hugh Henry,[73] in construing the said section 304 of the IBC Act ruled that the Applicant Commissioner did not have standing to seek to remove a liquidator.

[158] In this case, the factual matrix is different in that the uncontradicted fact is that Mr. Alexander M. Fundora, is a creditor of S.I.B., and by virtue of this fact the Court agrees with the Applicant's submission that he has sufficient interest to make the application based on the ruling of the Privy Council in the Deloitte & Touche AG case. In any event, it is settled law that only persons with a positive interest in the outcome of a liquidation could apply to show due cause of the removal of a liquidator.[74]

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[71] Ibid
[72] Ibid at page I6II
[73] Claim no. ANUMSC2005/0400 per Blenman J.
[74] See: Johnson and Dinan v Deloitte and Touche A.G [1997] CILR 120; 7(3) Halsbury's Laws of England (4th Edition) para. 2376

Legal test for removal

[159] The second aspect of the issue concerns the legal test for the removal of a liquidator. This has two aspects: the statutory prerequisites and the grounds for removal.

Statutory prerequisites

[160] Having regard to section 304, as outlined above, the immediate question is whether this Court is satisfied that the corporation (SIB) is able to pay or adequately provide for the discharge of all of its obligations.

[161] This is necessarily an accounting function, however, there is no accounting statements before the Court. What does exist, is a number of affidavits which speak to matters accounting and the general financial position of SIB. The Court must do the best it can in the circumstances. Of some significance in this regard, is the fact that there were no submissions by either party on the statutory aspect of the issue.

[162] In Reports[75] to the High Court of Antigua, this identical statement is made:

> "Dividend Prospects for Creditors as all the Court recognition proceedings have either not been adjudicated upon, or the decision is subject to appeal and often assets being land with an anticipated long tail realization period we are still unable at this stage to estimate the level of any distribution to creditors."

[163] In a further Report[76] to the High Court of Antigua and under the caption: "Conclusion on the Insolvency of SIB," the following is stated:

> "Since our appointment we have been able to establish that SIB has outstanding investor liability balances totaling some $7.2 billion.
>
> It has not been possible to identify assets that total an amount close to the liabilities owing to investors and there will be further liabilities to suppliers such as telephone, utilities, tax authorities, employees, software providers which have yet to be fully established, although our current estimate that such liabilities are in excess of US $1 million.

[75] Report to the Antiguan High Court by the Joint liquidators of the Stanford International Bank Limited filed on 9th October, 2009 and 15th January, 2010 at pages 231 and 3 respectively.
[76] Report to the Antiguan High Court by the Joint Receiver-Managers on Stanford International Bank Ltd., at pages 220-221.

> The Receiver-Managers have therefore concluded that SIB is insolvent and is not capable of being re-organized via Receivership. We therefore believe that SIB should be placed into liquidation without delay in order that the appointed liquidators can continue the work required to realize the assets of SIB, agree to creditor claims of SIB and in due course return monies to creditors."

[164] Extracts from a letter dated 13th May, 2009, from the Liquidators to creditors reveal that the Liquidators advised in these terms: "The records of SIB indicate that as of February 19, 2009, SIB had 27,992 active clients. Including accrued interest to February 19, 2009, the Bank's records indicate a total of US $7.2 billion is owed to depositors. At present we therefore summarize our current estimate of the maximum value of the Bank's assets as follows. Total assets could therefore be below US $1 billion against depositors liabilities of US $7.2 billion."

[165] In a Report filed on 15th January, 2010, the Liquidators say at page 2 that: "The Liquidators have agreed claims of 7,119 investors totaling US 2.6 billion and the adjudication of claims received and enquiries from investors are being processed on a daily basis. Attached to this report is an analysis detailing the level of usage of the claims system.

[166] We continue to deal with e-mail enquiries responding to investor queries both in English and Spanish Investors are now able to view their accounts, register their claims and change their address details via the Online Claims Management System."

[167] Ms. Karyl Van Tassel, a certified public accountant deposed[77] to a variety of relevant matters:

> " 7. Mr. Hamilton-Smith agrees in paragraph 11 (a) that SIB and other Stanford International Group companies were involved in a massive 'Ponzi' scheme, yet he spends the balance of his affidavit essentially contending that SIB observed corporate formalities.
>
> 12. With more than $7 billion in claims, CD holders will be by far the largest class of claimants by dollar amount; dwarfing all other claims against SIB and other Stanford entities.

[77] Second Affidavit of Karyl Van Tassel, Exhibit ADB-6 to the First Affidavit of Andrew D. Blackburn, Tab 14 at para. 7, 12 & 13.

13. There is at present more than $6 billion shortfall between SIB CD proceeds and the prior assets of all Stanford entities combined. I know from those transactions that my team has been able to trace funds left in SIB's accounts and were widely dispersed to many other Stanford entities and from those entities yet further. Based upon our analysis to date roughly $1 billion simply cannot be accounted for. The financial records of these entities are confusing, incomplete and do not begin to tell the story of what happened to all the proceeds. While some additional assets may be traced and separated that will likely not to be feasible as to all."

[168] In commenting on what Mr. Hamilton-Smith said about SIB holding $10 million at Bank of Antigua on account, Ms. Van Tassel deposed that:

"(VII) SIB and other Stanford entities experienced extreme cash flow problems during the three months immediate proceeding the receivership tier 2 investment were being liquidated to raise cash yet it appeared that the $10 million in the Bank of Antigua account was not used to any appreciable extent prior to receivership."

[169] In their Report[78] to the Antigua High Court, the Joint Receiver-Managers, under the rubric "Operations Undertaken by SIB in Antigua" and "Cash Balances" state the following:

"The Bank Records indicate that it has $104,421,957 in loans outstanding against clients Certificate of Deposit ("CD"). It is not considered that it will be possible to realize value for these loans since they are collateral against clients' own deposits with the Bank.

The records of the Bank further indicate that as of February 19, 2009 the Bank had 27,992 active clients. Including accrued interest to February 19, 2009 the Bank's records indicate a total of $ 7,206,209,579 as invested by clients and held in the following products:

[Product]	US $ Million
Fixed CD	4,952
Flex CD	1,994
ILCD	13
Express A/c	227
Performance A/c	1
Premium A/c	19
TOTAL	7,206

Our investigators have established that at the close of business on Wednesday February 18, 2009 SIB's records detained the following cash balances being held.

Bank	Country	US $
The Toronto Dominion Bank	Canada	18,918,662
Trustmatic National Bank	United States of America	1,888,857
HSBC Bank plc, HSBC Bank,	United Kingdom	5,246,601

[78] Report to the Antiguan High Court by the Joint Receiver-Managers on Stanford International Bank Ltd., Exhibit ADB-5 of the first Affidavit of Andrew D. Blackburn, Tab 1 at pages 47-48 and 50-51

Panama S.A.		
Bank of Antigua	Antigua	9,984,971
Commercial Bank	United States of America	5,457,680
TOTAL BALANCES		46,594,623" [79]

[170] The measure of the foregoing will be brought into the equation at the stage of the analysis and conclusion.

The test for removal

[171] Again, as with the matter of *locus standi*, section 304, is silent on the grounds upon which as liquidator may be removed by the Court. The power, 'make any order it thinks fit,' is wide but cannot be unfettered. A further point is that wording of section 304 differs from other statutory provisions concerning the removal of liquidators. In the circumstances, the decision based on other statutory must provide guidance to the Court.

[172] An outline of some of the statutory provisions would assist the matter section 106 (1) of the Companies Law (1995 Revision, Cayman Islands provides that; "Any official liquidation may resign or be removed by the Court on due cause shown; and any vacancy in the office of official liquidation appointed by the court shall be filled by the court." Section 93 of the Companies Act 1862, England reads: "Any official liquidator may resign or be removed by the Court on due cause shown." Similarly, section 242 (1) of the Companies Act 1948, England provided that: "A liquidator appointed by the court may resign or, on cause shown, be removed by the Court." And section 304 (2) dealing with voluntary liquidation, reads: "The court may, on cause shown, remove a liquidator and appoint another liquidator." Finally, section 108 (2) of the Insolvency Act 1986, England says that: "The Court may, on cause shown, remove a liquidator and appoint another."

[173] On a review of the authorities cited and submitted,[80] it is clear that the recurring words for the removal of a liquidator is 'due cause.' And one of the earliest

[79] The said Report reveals that all the Banks except HSBC Bank Panama S.A and Commerce Bank, responded to the confirmation sought as to the account numbers and the balances.

authorities based on the relevant legislation is the case of In Re Adam Eyton.[81] And in the context of the Commonwealth Caribbean and, in particular, the Territory of the Cayman Islands, Justice of Appeal Telford Georges (as he then was) in Johnson and Dinnan v Deloitte Touche made this ruling on the point:

> "A review of the cases establishes that the process of resolving an application for the removal of a liquidator raises three stages: (a) Does the applicant has the locus standi to apply? (b) Had due cause been shown and (c) If such cause has been shown, should the court exercise its discretion to remove the liquidators? The issues as to whether or not due cause has been shown and whether the discretion should be exercised are far more frequently canvassed that the issue of standing. That issue is often controversial, the application being usually made by a creditor or contributory."[82]

[174] And in the context of the section 304 of the IBC Act, Madam Justice Louise Blenman in Financial Services Regulatory Commission v Queeley and Henry[83] after an extensive review of the authorities on the appropriate test came to this conclusive at paragraph 55 of her judgment:

> "The burden is on the applicant to show good cause for removal of a liquidator, I am of the view that the statutory provision confers a wide discretion on the Court which is not dependant on proof of particular breeches of duty by the liquidator."

Application of the test

[175] The *locus classicus* must be the case of In Re Adam Eyton Limited.[84] The headnote to the case reads:

> "The jurisdiction of the Court to remove a liquidator under ss. 93 and 141 of the Companies Act, 'on due cause shown' is not confined to cases where there is personal unfitness in the liquidator. Whenever the court is satisfied that it is for the general

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[80] 11. *FSRC v Queeley and Henry* (2006) Claim Number ANUMSC 2005/0400;
12. UK Insolvency Act 1986 at section 172;
13. *In Re Adam Eyton* (1887) 36 Ch. D. 299;
14. UK Insolvency Rules 1986 at page 155, Rule 4. 120-CVL;
15. *Hugh C. Marshall Snr v Antigua Aggregates Ltd.* Antiguan Court of Appeal, Civil Appeal No. 23 of 1999;
16. *Deloitte & Touche v Johnson* [1999] 1 WLR 1605;
17. In Re Marseilles Extension Railway and Land Co. (1867) LR 4 Eq. 692;
18. Re Keypak Homecare Ltd [1987] BCLC 409;
19. Shepheard v Lamey [2001] BPIR 939;
20. Re Buildlead Ltd (in liq.) [2004] (No.2) EWHC 2443 (Ch) [2006], BCLC 9;
21. SISU Capital Fund Ltd v Tucker [2006] B.C.C. 463;
22. AMP Music Box Enterprises Ltd v Hoffman [2002] (Ch) [2002] BCC 996;
23. Re Edennote Ltd. [1996] B.C.C. 718;
24. Re AMF International Ltd. [1995] BCC 439;
25. Re A&C Supplies Ltd and Others [1998] 1 BCLC 603.

[81] [1997] CILR 120

[82] Ibid at 146-147

[83] Supra

[84] Supra

> advantage of those interested in the assets of the company that a liquidator be removed, it has power to remove him, and appoint a new one."

[176] And Lord Justice Cotton, with whom the rest[85] of the Court agreed, ruled thus:

> "Now in my opinion, it is not necessary, in order to justify the Court under this section in removing the liquidator, that there should be anything against the individual. In my opinion, although of course unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls in the case of In Re Sir John Moore Gold Mining Company [12 Ch.D. 331], which has been cited, intended to give an exhaustive definition. In fact he points out that, and what he says is this: 'I should say that, as a general rule they point to some unfitness in the person – it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up – some unfitness in the wide sense of the term. He does not intend to exhaust all the grounds, but, in my opinion, and I believe the rest of the Court agree with me, if the court is satisfied on the evidence before them that is against the interest of the liquidator, by which I mean all those who are interested in the Company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place."

[177] Of perhaps importance are these words of Lord Justice Bowen:

> "In many cases, no doubt, and very likely, for anything I know in most cases, unfitness of the liquidator will be the general form which the cause will take upon which the Court in this class of case acts, but that is not the definition of due cause shewn. In order to define "due cause shewn" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interests of the liquidation. That should be thoroughly understood, I think, as of great importance; and in that sense it seems to me this case is of interest because it clears, once and for all, away the misconception upon which the argument of the Appellant's counsel was based."

[178] Learned Senior Counsel on both sides have cited authorities on the narrow question of the Application of the test of the removal of a liquidator. However, in the view of the Court, there can be no dispute in the conclusion that this decisions on the point subsequent to the Re Adam Eyton case are really re-statement of the principle or variations thereof.

[179] In this regard, In Re Buildlead Ltd (No. 2)[86] Etherton J. expressly acknowledged that "the torchstone for an appraisal of whether cause has been shown of the removal of a liquidator is the principle stated by Bowen LJ in Re Adam Eyton."

[85] Being Bowen, L.J. and Fry, L.J.
[86] Supra

And in Shepheard v Lamey[87] the necessity to prove misfeasance or incompetence was ruled out. Rather, the Claimant only had to establish that there may be a case of misfeasance or incompetence.

Conclusion

[180] It is the determination of the Court that the Applicant has standing to make the application of the removal of the Liquidators. It is the further determination of the Court that the test for the removal of a liquidator is due cause.

ISSUE NO. 7

Has the Applicant shown due cause?

[181] The Applicant begins his submissions with certain references to the judgments referred by the Court in Quebec. For reasons given above, this particular submission will not be brought into the equation in terms of findings made therein.

[182] In terms of the matter 'due cause' it is the Applicant's submission that:

> "The Antiguan High Court has confirmed in *Queeley and Henry* that the correct test was one of 'due cause'. In view of the nature and purpose of liquidation, it must be the case that the benchmark for removal of a liquidator need not reach the standard of misconduct or misfeasance. Due cause includes or ought to include, as shown below, conduct which may adversely affect the ability of liquidators to perform especially in cross-border liquidations, the process of liquidation or affects or may jeopardize creditors."[88]

[183] The Applicant goes on to detail principles[89]derived from the cases concerning "sufficient cause" or "due cause."

> "127. The following principles set out what constitutes "sufficient cause" or "due cause": [The cases refer to the test for removal under a number of different Insolvency Act Rules, such as voluntary winding up, compulsory, and applications to the court and/or by meeting of creditors. Courts have confirmed that the same principles apply in all cases – see Warren J at [87] in *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2170 (Ch)(See 21 of the Legal Authorities)].
>
> a. interests of the liquidation: "cause" is to be measured by reference to the real, substantial, honest interests of the liquidation and to the purpose for which the liquidator is appointed *(Re Adam Eyton Ltd, ex p Charlesworth* (1887) LR 36 ChD per Bowen LJ at p306 and approved in *Queeley and Henry* at [54]);

[87] Supra
[88] Revised written Submission of Alexander M. Fundora at para 126
[89] Ibid at para 127

b. no misconduct necessary: the words "due cause" do not require anything amounting to misconduct or personal unfitness. It is sufficient if it can be shown that it was on the whole desirable for the liquidator to be removed (per Malins VC in *Re Marseilles Extension Railway and Land Co* (1887) LR 4 Eq 692 at p694 (*See* Tab 17 of the Legal Authorities) quoted with approval by Millet J in *Re Keypak Homecare Ltd* (1987) 3 BCC 558 at p563 (See Tab 18 of the Legal Authorities);

c. standard of proof: in *Shepheard v Lamey* [2001] BPIR 939 at 940 (*See* Tab 19 of the Legal Authorities) Jacob J said that "all one has to find is some good cause why a person should not continue as a liquidator. You do not have to prove everything in sight; you do not have to prove, for example, misfeasance as such; you do not have to show more than there may well be a case of misfeasance or, indeed, incompetence". This was echoed in *Re Buildlead Ltd* (in Liquidation) (No. 2) [2005] BCC 138 at 156 per Etherton J (See Tab 20 of the Legal Authorities) who stated that the court has a wide discretion to remove a liquidator, which is not dependant on the proof of particular breaches of duty by the liquidator (also approved in *Queeley and Henry* at [55]);

d. the level of skill required: the court expects a liquidator to be efficient, vigorous and unbiased in his conduct of the liquidation and should have no hesitation in removing him if satisfied that he has failed to live up to those standards, unless it can reasonably confidently be said that he will live up to those requirements in the future (per Warren J in SISU Capital Fund Ltd v Tucker [2005] EWHC 2170 (Ch) at [85] (See Tab 21 of the Legal Authorities);

e. court's duty to remove: although removal of a liquidator may necessarily involve criticism or a liquidator, courts should not shy away from this. Indeed, a court has a duty to remove a liquidator in appropriate cases as it sends a clear message to liquidators that they have an important function which should be effectively conducted (see AMP Music Box Enterprises Ltd v Hoffman [2002] EWHC 1899 per Neuberger J at p 1001 (See Tab 22 of the Legal Authorities));

f. regard to wishes of creditors: the court should have regard to the wishes of the majority of those interested in deciding whether to remove an office holder (See Re Edennote Ltd [1996] BCC 718 (CA) Per Nourse LJ at p725H (See Tab 23 of the Legal Authorities)). A Liquidator will be removed if the creditors no longer have confidence in his ability to realize the assets of the company – but that loss of confidence has to be reasonable before the liquidator will be removed (Re Edennote Ltd [1996] BCC 718Nourse LJ at 725); and,

g. cost and delay: the court must also bear in mind that replacement may involve undesirable consequences in terms of cost and delay (*see AMP Music Box Enterprises Ltd v Hoffman* [2002] EWHC 1899 per Neuberger J at pp. 1,001C – 1,002A).

[184] On the specific issues that go to the matter of due cause, the following submissions are made by the Respondents:

> "The Alleged Mishandling of Computer Data
>
> 162. The Respondents answer this allegation in some detail in the affidavits of Geoff Rowley, Nigel Hamilton-Smith, James David Coulthard, Nick Kirby and James Martin Baldock. These affidavits reveal that:

i) The Respondents were aware of their legal obligation to maintain the confidentiality of the records of SIB under the laws of Antigua and Barbuda, the place of the bank's incorporation;

ii) There was a need to preserve data in the Montreal Office of SIB because of ongoing and possible fraud investigations. As Receiver-Managers the Respondents had engaged in the same exercise in Antigua;

iii) The Montreal office of SIB was occupied under a lease, the landlord was owed rent, and the insolvency of SIB exposed the bank to the risk of the computers and other property being the subject of a distress levy. The Respondents received legal advice that the assurances which they had received from the Landlord were not legally binding;

iv) The Respondents determined which computers and servers should be imaged, which was a question of both ownership and proportionality. The three servers not belonging to SIB were not imaged or deleted for this reason. Four computers (located in the mailroom, guest office, at the reception and belonging to the Secretary) were considered unlikely to contain any relevant data and therefore did not justify the cost of imaging and verification.

v) The Respondents retained and acted on the advice of an experienced IT professional in imaging the data on the servers and deleting the said data from the computers;

vi) The IT professional consulted acted in accordance with industry standards and employed best practices;

vii) Only servers owned by SIB were imaged;

viii) No blackberries nor USB memory devices were found at the Montreal office and that is why no such devices were imaged;

ix) An automatic erasure process was used to erase data from the servers because this was the most cost effective method;

x) The Liquidators give strict instructions that the imaging and deletion were to be done in according with the standards required by a criminal prosecution and assured that this would be done;

xi) Mr. Kirby, the author of the industry standards testifies that those standards have been complied with and that the imaged data is admissible in a court of law and;

xii) All of the imaged data was preserved and has been handed over to the Canadian authorities in compliance with a court order.

163. In short, all of the criticisms made by Mr. Kelman, the Applicant's witness, have been answered with reasonable explanations. The Liquidators acted at all times upon the advice of professionals and there is no credible independent evidence that their actions have indeed prejudiced the creditors of SIB.

Did Messrs. Hamilton-Smith and Wastell acted outside of their remit as Receiver-Managers?

164. The specific criticism of the Respondents, are raised by Mr. Blackburn, is that while acting in the capacity of Receiver-Managers, the Respondents were contemplating a sale of assets of SIB including the computer servers.

165. This allegation is answered by Mr. Hamilton-Smith who makes it clear that this aspect of the matter has been misconstrued. Clearly the Respondents were contemplating a sale of assets once the company was put into liquidation. It was entirely reasonable for them to have such a sale in contemplation (see paras 46-48 of the first affidavit of Nigel Hamilton-Smith). There is no merit in this allegation.

Did the Liquidators disregard the jurisdiction of the Canadian Courts?

166. It is alleged that upon filing an *ex parte* motion in the proceedings in Canada, the Respondents failed to serve the AMF with notice of the application. It is also alleged that the Respondents took action in Canada (the removal of the computer data) before their status was recognized by the Canadian Courts. Finally, it is alleged that they made untruthful statements before Auclair J in Quebec proceedings.

167. The affidavits of Nigel Hamilton-Smith, Mdm. Julie Himo and Philippe Giraldeau completely refute these allegations. Mdm, Himo in particular makes it clear that neither she nor the Respondents were aware of an ongoing formal AMF investigation and that this remained the case until 9th July, 2009. She has also deposed that the AMF had not disclosed the investigation order to them (see paras 21-29 of her affidavit).

168. Mdm. Himo explains why this was done (paras 3-9 of her affidavit): there was no reason in law to serve the AMF; she was informed that the US Receiver had been made aware of the attempts by the Respondents to secure the property of SIB in Canada and that the AMF had not disclosed the investigation order. Mr. Hamilton-Smith also explained that there was an urgent need to assume control of the property of SIB, that is, to ensure that the assets were secure and that potentially confidential information was not lost and did not fall into the hands of third parties (see para 53 of the affidavit of Nigel Hamilton –Smith).

169. Mdm. Himo's first affidavit is confirmed by Philippe Giraldeau who also attended the hearing before Registrar Flamand."

Analysis

[185] The evidence taken as a whole, the findings by the Court, together with the submissions on the matter of the removal of the liquidators, give rise to the following further matters to be considered as grounds for such removal or otherwise of the liquidators:

1) Destruction of evidence/mishandling of computer data.
2) Rent.
3) Acting outside of their remit.
4) Disregard of the Canadian jurisdiction, including the disregard of the regulatory bodies.

5) Efficiency of the Liquidators.
6) Litigation – the *ex parte* application.
7) Support for retention or removal of liquidators
8) Credibility of the Liquidators
9) Presence on absence of good faith.

[186] The foregoing must now be analyzed *seriatim*.

Destruction of evidence/mishandling of computer data.

[187] The Court has already found as a fact that non-imaging and erasing of four computers may have resulted in the loss of data. It is also the finding of the Court that the liquidators estimated that the erasing of the four computers under the supervision of Mr. Coulthard would only need a further few days (at most) from 8 March, 2009. But Mr. Roffman has deposed, and remains uncontradicted that on 27 March, 2009, on a visit to the SIB Montreal office, he saw a computer message indicating that the erasing was 76% complete. As concluded, this leads to the reasonable inference that, contrary to the Liquidators estimation, that the computers did not have data, they in fact contained a vast amount of data. With this comes a further inference that such action may have resulted in a loss of evidence which may be relevant to any civil action by the 224 Canadian creditors or any criminal proceedings.

[188] Indeed, on 6 March, 2009, Bennet James LLP wrote to Nigel Hamilton-Smith, Vantis Business Recovery Services in these terms[90]:

> "Dear Messrs. Hamilton-Smith and Wastell:
>
> Re: Dynasty Furniture Manufacturing Ltd., as representative plaintiff v. Stanford et al Class Proceeding in the Court of Queen's Bench of Alberta, Canada Action No. 0901- 02821
>
> We are solicitors in Canada who have commenced class proceedings in Canada for those Canadians who have investments with Stanford International Bank Ltd. and its affiliated companies. The class proceedings we have commenced also names as defendants Messrs. R. Allen Stanford and James M. Davis, and Mr. Laura Pendergrast-Holt. Attahced is a copy of the statement of claim we filed on February 25, 2009 in

[90] Exhibit "ADB-5" To the first affidavit of Andrew D. Blackburn at page 250

> respect of this class proceeding in the Court of Queen's Bench of Alberta in the Province of Alberta, Canada.
>
> We understand that Vantis PLC, and in particular the Vantis Business Recovery Services Division, has been appointed by the Financial Services Regulatory Commission in Antigua and Barbuda as receivers of Stanford International Bank Ltd. and Stanford Trust Company Ltd.
>
> As class counsel for Canadian investors in this matter, we ask that you contact us should there be any developments that affect or that could affect the rights of the investors we represent.
>
> Yours Truly,
> Bennett Jones LLP"

[189] And at paragraph 1 of the "Plaintiff's" Statement of Claim the following is pleaded:[91]

> "The Plaintiff, Dynasty Furniture Manufacturing Ltd. (hereinafter, the "Representative Plaintiff" or "Plaintiff"), is a corporation incorporated pursuant to the laws of Alberta. The Plaintiff invested approximately U.S. $1,000,000 of its own money in the Investment Scheme (as described below). The Plaintiff brings this action on its own behalf and on behalf of all persons other than the Defendants who invested in any of the defendant corporations or who purchased investment products offered or promoted by any of the Defendants (Class Members")."

[190] The Respondents in their submissions have identified various aspects of the evidence to say that they have addressed the issue. Much of it has already been identified, but the Court must restate the fact that the Respondents contend that they acted in good faith and also that they acted on the advice of an IT expert. However, as noted before, Mr. Coulthard has made it clear in his affidavit that he acted on instructions of the Receiver-Managers/Liquidators.

[191] As regards the matter of the disposal of the hardware, the two experts differ; but both agree that it should be retained in certain circumstances. Mr. Kirby calls it a compelling legal reason while Mr. Kelman speaks of high-profile cases. The Court therefore concluded that given the nature of these proceedings with US $7 billion in investments and in excess of 27,000 investors, it will fall into either category.

[192] The Court made no findings on the issue of the Blackberrys and the staff at the Montreal Office as Mr. Kirby made it clear that he did interrogate the staff prior to

[91] ADB5 at para 251

their departure and they all indicated that the devices they had were personal, but they had no Blackberrys.

Rent

[193] Part of the motivation to deleting data was stated or given as the need to stop paying rent for the Montreal Office. But all of this is contradicted by the finding by the Court that the erasing was supposed to last no more than a further two days from 8 March, 2009, after which, by implication, the office would have been vacated. But up to 27th March, 2009, it was still occupied. Further, the evidence reveals that the sum of US $9,984,971 held in an SIB account at bank of Antigua was made available to the Receiver-Managers after certain deductions were made. This left a sum in excess of US $2 ,747,451 and the rent owed at this time was in the vicinity of Can. $30,000.00. This is not to disregard other obligations. In any event, further rent was owed at least up to 27th March, 2009. The critical fact is that in the context of the availability of some funds, the payment of rent was never a valid or genuine reason given to the importance of securing the computer data. Even further, there were funds available to pay for the storage of the computer hardware.

Liquidators acting outside their remit

[194] This turns on the issue of a contemplated sale of computer hardware prior to their appointment as Liquidators. The Court concluded such action did not arise as they had specific prescribed duties to perform within thirty days.

[195] The submission by the Respondents is that such action is reasonable in the circumstances. The Court disagrees as it amounts to anticipating a decision of the Court regarding the appointment of liquidators. And this is so even though no actual sale may have taken place.

Disregard of the Canadian Jurisdiction

[196] Essentially, this relates to the fact that the Receiver-Managers performed duties in Canada which is regulated by the Insolvency and Bankruptcy Act without the necessary recognition required thereunder. This is admitted so that there is no contest in this regard. A central part in this issue is the admission as that the discs containing the data/evidence was taken out of the jurisdiction, also without the permission of a Canadian court of Law. And the fact that it was later return does not give rise to comfort as questions arise as to the content of the discs after they were returned. Nor is this Court impressed by the fact that the discs were returned in a sealed packet. What is more is that fact that the Liquidators deposed that they are experienced in cross-border liquidation.

Efficiency/Inefficiency

[197] There are two issues that point in this direction. First, the matter of the erasing of the data that was supposed to last no more than a few days. This point to the further issue that neither the Liquidators nor Mr. Coulthard had any idea as to the quantum of data stored. The second relates to the latitude given to the IT expert. In this regard, in his affidavit seeks to defend the hiring of an IT expert. He deposes as follows[92]:

> "I do not profess to be a computer expert; nor does my joint liquidator, Mr. Wastell, and it is not for us to comment on these technical issues. I will say however that I consider our actions in appointing an experienced and expert firm of IT consultants to have been entirely reasonable and I do not see how the making of such an appointment could form the basis of an allegation of misconduct."

[198] The evidence is that in the 'technical matters' of erasing the remaining four computers, it was the Receiver-Managers who took the view that "the automatic process should be allowed to continue without my being present as it would have been likely to have taken a further two days after 9 March 2009 for the process to be completed, incurring unnecessary costs if I had stayed".[93] In fact, after a further seventeen days, the erasing was only 76% complete.

[92] Core Bundle, Tab 28 at para. 24.
[93] Affidavit of James Coulthard, Core Bundle Tab 25 @ para. 46

[199] The question of efficiency is also alluded to by Mr. Allistair Kelman in a letter to Martin Kenny & Co. dated 19th January, 2010, when he said this: "While I can understand why Mr. Coulthard in the interest of efficiency imaged servers and computers simultaneously it is clear that such activities reduced his ability to supervise the imaging process and was established by one of the systems hanging for days during the imaging process.[94]"

Litigation

[200] The Receiver-Managers/Liquidators have deposed that the US Receiver has opposed them at every turn. Yet they went ahead and sought an *ex parte* order from Registrar Flamand only to have it set outside at the same instance of the said US Receiver. The fact of the matter is that Janvey should have informed and joined as a party. At the bottom of all of this is the loss of US $20 million to the Antigua Estate.

Support for retention or removal of the Liquidators

[201] The Court accepts Respondents contention[95] that over 2,200 creditors with a combined claim on the SIB estate totaling in excess of US $624 million support the Liquidators. This contrasts with those creditors who are in favour of the Application to remove the Liquidators claim just over US $69 million[96]

Credibility of the liquidators

[202] This Court had determined that decisions rendered at the Superior Court of Quebec, and by extension that of the Quebec Court of Appeal are not binding.

[203] These decisions are not complimentary to the Liquidators. Rather, they are entirely negative with various conclusions and imputations.

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[94] Core Bundle 11, Tab 21

[95] See: Revised Written Submission of the Liquidators at para. 156

[96] See affidavits of: D. Raul Ribeiro, Gina De Umana, Gina Maria Umana De Morales, Palma Giselle Tar Levay and Arnold B. Lacayo, all filed on November, 2009.

[204] Without more, it is open to any Court or any party to any litigation in which SIB is a party to use these decisions to suit their objectives.

Presence or absence of good faith

[205] The principle of 'good faith' is at large and is used in a number of contexts especially in the context of civil law. In the context, of bankruptcy, it has been held that 'in good faith' means "innocent of the knowledge and of the means of knowledge[97]." In another context, it is said that a thing is done in good faith "where it is done honestly, whether regularly or not.[98]" Also in Black's Law Dictionary 'good faith' is stated to be:

> "… an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. Honesty of intention and freedom from knowledge of the circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even though technicalities of law, together with absence of all information; notice or benefit of facts which render transaction unconscientious."

[206] Also under section 75 (1) of the Registered Land Act of Antigua a charge in exercising his power of sale "shall act in good faith and have regard to the interests of the chargor…"[99]

[207] Therefore, the question becomes whether the Liquidators can be said to be innocent of knowledge or to have acted honestly? And can it be said that the Liquidators were imbued knowledge which would put them upon inquiry.

[208] It has been deposed in a number of instances that certain things were done in good faith. The matter of the legal advice relating to acting as Receiver-Managers in Canada without the necessary legal recognition under the Insolvency and Bankruptcy Act. This legal issue is so basic that it hardly needs discussion. But the fact of the matter is that the Receiver-Managers/Liquidators are not new to

[97] See: Stroud's Judicial Dictionary, vol. 2 (E-L) at page 1240
[98] Ibid
[99] In this regard see: Caribbean Banking Corporation and Alpheus Jacobs, HCVAP 2004/010 per Carrington JA (Ag.)

liquidation which they have made clear. Further, they are licensed insolvency practitioners employed by Vantis Business Recovery Services.

[209] In that foregoing context, can it be said that the Liquidators had no knowledge or acted honestly? When the later *ex parte* application is coupled with the stated opposition by the US Receiver, the motivation becomes clearer. Accordingly, it is the Court's conclusion that there was an absence of good faith.

Conclusion

[210] All that can be said at this point is that given the low threshold of the test of 'due cause' based on the principles enunciated in the cases, the Applicant has shown cause. But whether or not it is sufficient to warrant the removal of the liquidators, must await further consideration of the evidence and the law.

ISSUE NO. 8

Should the Liquidators be removed?

[211] Given the issue to be considered, the Court considers it necessary to re-state or give a summary of the law of removal.

[212] It is common ground or settled law that a Liquidator may be removed by the Court as authorized by statute. And the jurisprudence developed established several other principles including the following: removal for due cause (the operation test) is measured by reference to the real substantial, honest interest of the liquidation and the purpose for which the liquidation is appointed;[100] in the context of removal, it is not necessary for the applicant to show that the liquidator had failed to act in an efficient, vigorous and unbiased manner and was likely to continue to do so in the future,[101] it is not necessary to show misconduct or unfitness,[102]it is not necessary to prove everything in sight, it is not necessary to prove misfeasance as such or that there may well be a case of misfeasance,[103] a Liquidator may be removed if in all the circumstances it is desirable to do so,[104] and the Court should not likely remove its own officer and must pay due regard to the impact of such removal of his professional standing and reputation.[105]

[213] In AMP Music Box Enterprises Ltd v Hoffman, Mr. Justice Neuburger (as he then was) gave this succinct summary of the law:

> "The Courts power to remove and replace a liquidator is derived from s. 108 (2) of the *Insolvency* Act 1986which is pleasantly short. 'The Court may, on cause shown, remove a liquidator and appoint another.' As a matter of ordinary principle and statutory representation, that seems to me to suggest as follows: (a) the court has a discretion whether or not to remove and replace the liquidators, (b) it will do so on good grounds, (c) it is up to the person seeking the order to establish those grounds, (d) whether good grounds are established will depend on the particular facts of a particular case, (e) in general it is inappropriate to lay down what facts will and what facts will not constitute sufficient grounds."

[100] See: Re Adam Eyton Limited, supra
[101] See: Re Buildllead (No. 2), supra
[102] See: Re Keypak Homecare Ltd, supra
[103] See: Re Shepheard v Lamey, supra
[104] See: Re Marseilles Extension Railway and Land Co.[1867] LR 4 Eq 692.
[105] Re Edennote Ltd [1996] BCC 718

[214] The Applicant then makes the following submissions to support its case that the Respondent/Liquidators should be removed based on the legal principles.

> "132. Applying the legal principles set out above, it is obvious that the Joint Liquidators can, and should, be removed:
>
> a. the Joint Liquidators' actions in destroying evidence and treating foreign office holders, courts and regulatory bodies with contempt is manifestly contrary to the test of acting in a manner which is "effective, vigorous and unbiased" set out in *SISU* and *Re Keypak*. There is no basis for this court to conclude that their conduct would suddenly improve in the future;
>
> b. the risk that foreign courts will refuse to recognize the liquidators also strongly suggests that they can no longer be "effective";
>
> c. this is an extreme case where the Joint Liquidators have not merely been inefficient, but rather they have offered contradictory evidence under oath and been disbelieved, their motives have been called into question and there has been a finding of bad faith;
>
> d. even allowing for the fact that a court will not remove its officer lightly (as stated in the *Re Edennote Ltd*) if a court is prepared to remove a liquidator where there is no misconduct (*as in Re Keypak*) then it is submitted that it must do so where there is a court judgment confirming, and/or strong evidence of, misconduct;
>
> e. as set out in Re Adam Eyton Ltd., cause is to be measured by reference to the purpose of the liquidation. The primary purpose of any liquidation is to make recoveries for the creditors. The loss of US $20 million out of the estate and substantial risk of the further loss of the $335 million in dispute between the Joint Liquidators and Janvey directly contradictory to this primary purpose of making recoveries. The incurring of further costs by the Joint Liquidators is also contrary to the making of recoveries;
>
> f. the factual findings of the Canadian Court (and indeed the underlying evidence) plainly meet the threshold test (set out in Shepheard) that there "may well" be a case of misfeasance. This threshold is not a high one to surmount;
>
> g. in light of the Joint Liquidators' actions it is reasonable for the creditors to have, and indeed have, lost confidence (as considered relevant in *Re Edennote Ltd). Re A.M.F. International* indicates that this is sufficient by itself for removal;
>
> h. further, the criticisms are numerous, rather than being one or two isolated instances, and go to the very root of the tasks which should be pursued by a liquidator, namely making recoveries, co-operating with foreign agencies, and recovering evidence for potential future criminal or civil claims;
>
> i. the liquidators' actions in Canada are akin to the test set out in re Edennote Ltd, namely of actions "so utterly unreasonable and absurd that no reasonable man would have done it."'
>
> j. a considerable number of creditors support removal, as considered relevant in *Re Keypak* at p563; and,
>
> k. it is very unlikely that removal would involve greater costs. Indeed, it is more likely to save money. As the table of Mr. Wide's fees demonstrates (see the Affidavit of Mr. Blackburn at paragraph 95), Mr. Wide and PWC's rates are lower than those of Vantis. Further, Mr. Wide's access to localised staff,

particularly in the Caribbean, through PWC's global offices, will save money due to lower localized staff rates (than the U.K.) and reduced travel costs."

[215] The Respondents in their submissions accept that the Court has the authority to remove a Liquidator; but do not accept that in all the circumstances it should exercise its power to do so. It is further contended that in the exercise of its powers, the Court should be guided by certain propositions enunciated by Mr. Justice Neuburger in AMP Music Box Enterprises Ltd v Hoffman.[106]

i) "The Court has a discretion whether or not to remove and replace the liquidator;
ii) It will do so on good grounds;
iii) It is up to the person seeking the order to establish those grounds;
iv) Whether good grounds are established will depend on the particular facts of a particular case in and;
v) In general it is inappropriate to lay down what facts will and what facts will not constitute sufficient grounds."

[216] Reference is also made to the case of Re Buildlead (No.2) [107] and certain dicta of Mr. Justice Ehterton as to the focus of the law of removal.

[217] The submissions continue thus:

> 154. Once a liquidation has been conducted for some time, no doubt there can almost always be criticism of the conduct of the liquidator but it is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It is plainly undesirable to encourage an application to remove a liquidator on such grounds.
>
> 155. In almost any case where the court orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences:
> i) in terms of costs; and
> ii) in terms of delay. [AMP at 10001H-1002A]]
>
> 156. The Court will take into account the views of creditors, including the loss in confidence of creditors in the liquidator, to the extent that the loss of confidence is reasonable. [Re Edennote Ltd [1996] BCC 718 ("Edennote") at 725G-H] The Liquidators are supported in opposing the Fundora application for their removal by over 2,200 creditors with a combined claim in the estate of SIB totaling in excess of US $ 624 million. This support was given in knowledge of the Canadian judgment (see affidavits of Mr. Snyder and Gomar).
>
> 157. The Court does not lightly remove its own officer and will, amongst other considerations, pay and due regard to the impact of his professional standing and reputation. [Edennote at 725H; Nam Tai Electronics Inc v David Hague and Tele Art Inc Suit no 21 of 2000].

[106] [2002] BCC 996 at 1000G-H
[107] Loc cit

158. Where the liquidator makes a serious mistake, but he does so acting under advice and honestly such that his integrity and good faith are accepted, it would be wrong to remove him. As Etherton J concluded, in Buildlead (at paragraph 166, with reference to AMP):

> "Neuberger J himself emphasized (at para [21]) that it is in appropriate to lay down what facts will and what facts will not constitute sufficient grounds for removal under s.108(2). In that case, he made helpful and practical comments that it should not be seen to be easy to remove a liquidator merely because it can be shown that in one or more respects his conduct has fallen short of the ideal, and it is necessary to bear in mind the expense and disruption of a substitute appointment. Similarly, as I have already said, Nourse LJ in Edennote (at p.398) observed that the creditors' lack of confidence in the liquidator must be reasonable, and the court will pay due regard to the impact of removal on the liquidator's professional standing and reputation. Factors such as those might, taking into account all the circumstances, warrant a refusal to remove a liquidator even where there are reasonable criticisms that can be made of the liquidator's conduct of the liquidation. (Emphasis added.)

159. It is against the backdrop of those authorities and guidance which this Application is to be determined."

[218] The following are further submissions on behalf of the Respondents:

"160. It is submitted that a consideration of the evidence does not yield any indication of wrongdoing by the Liquidators as alleged. To the contrary the evidence establishes that

i) The Liquidators acted lawfully and/or reasonably in imaging and deleting data on the computers at the SIB Montreal office;

ii) The Respondents did not act outside their remit as Receiver-Managers and, acting in the best interests of the liquidation, had acted in contemplation of the sale of assets in the eventual liquidation; and

iii) The Respondents did not disregard the Canadian jurisdiction and in fact at all times acted in consultation with legal advisors.

161. When considering the factors to be taken into account, it is clear that:

i) The Liquidators have been efficient, vigorous and unbiased in their conduct of the liquidation of SIB, as evidenced by the affidavits of Mr. Nigel Hamilton-Smith's and their reports filed in court;

ii) The Court can be confident that the Liquidators will live up to the standards expected of them in the future (paragraph 67 of Mr. Hamilton-Smith's affidavit);

iii) The Liquidators have been effective and honest (see the affidavits of Mr. Hamilton-Smith); and

iv) Even if the Court were to find that the Liquidators' conduct had fallen short of the ideal, it is not sufficient to justify their removal and such a finding would be disproportionate.

The balancing exercise

[219] Mr. Justice Neuburger has made the very learned proposition that in the end in the context of the application to remove a liquidator, the Court must perform 'a difficult balancing exercise.'[108] That exercise must now begin.

[220] The Court has no difficulty with the Respondents' contention as to the manner in which a Liquidator is expected to act. This is in abstract terms. But in concrete terms to say[109] that the Liquidators acted lawfully in imaging data, did not outside of their remit as Receiver-Managers and did not disregard the Canadian jurisdiction and in fact acted on advice at all times, creates an imbalance.

[221] In reality, the Court found as a fact that they did exactly the opposite with respect to the matters mentioned above and more. And there is acknowledgement that for example, they acted unlawfully in the Canadian jurisdiction. It is also accepted by the Respondents that they acted improperly (at least) in sending the discs containing the SIB data outside of Canada. Their consolation is that it was later returned in a sealed packet.

[222] On the other hand, the authorities generally, including those cited by the Applicant, show a clear preference, as they must, for honesty, acting good faith and actions that are in the interest of creditors. Indeed, the case of Ince Hall Rolling Mills Co. Ltd. v Douglas Fonge Co., [110]from ancient times established quite clearly that the distribution of assets to creditors was "the primary purpose of the liquidation."

[223] In this context, three cases in particular stand in contrast. They are: AMP Music Box Enterprises Ltd v Hoffman, Re Keypak Home Care Ltd and Re Buildlead (No. 2). In the former, the liquidator was not removed, but in the latter two

[108] See: AMP Enterprises v Hoffman, loc cit at para. 23
[109] See: Revised written Submissions of the Liquidators at para. 160.
[110] [1882] 8 QBD 179,184

removals were ordered. The reasoning of the Court in all instances has some positive benefits in the balancing exercise.

[224] In AMP Music Box, Mr. Justice Neuburger reasoned his non-removal in this way:

> "In my view there are three complaints against the respondents – two specific and one more general – which merit consideration. The first relates to Rolled Gold, the second to Cavern, and the third to the vigor in pursuing matters more generally.
>
> As to Rolled Gold there are two points. The first is that, although there have been attempts to chase up Rolled Gold as recorded by Mr. Lawler, what is not clear is when they were made, how strongly they were pursued, what steps have been taken to shake them into giving an answer. There is a real possibility that there has been a rather more casual, less vigorous, attitude than one would expect.
>
> Secondly, there is Mr. Hoffman's extraordinary statement, describing the complaint as 'bizarre', because Rolled Gold would be a bigger claimant in the liquidation if it had not received a preference. Either that is frivolous or it shows a worrying lack of understanding of the pari passu principle. The general body of creditors would clearly be better off with the money available for distribution among all of them, including Rolled Gold, pari passu, rather than being paid exclusively to Rolled Gold, where the money lies at the moment.
>
> So far as Cavern is concerned, there have been some investigations, as evidenced by Mr. Howell and by Mr. Lawler. At the moment, at least, however, I have some concern about the assignment to Cavern by Fast Forward. It seems to me that the fact that it is undated, its unexplained origin, and the normal consideration do raise questions which are worthy of investigation. It is an agreement which I would have thought should have been looked into more fully. It is fair to say, however, that the existence of the alleged debt to Fast Forward is pretty reasonably substantiated on the evidence.
>
> The third point is general lack of vigour, in the sense that there are a number of references in Mr. Hoffman's affidavit, and in Mr. Lawler's report, to going to the creditors to obtain funds for further research and investigations, but nothing in that connection appears to have been done.
>
> Those, then, to my mind are the three concerns which should exist after the respondents' conduct of the liquidation.
>
> Conclusion
>
> The question which has to be considered is whether those three concerns in the context of this case justify the removal of the respondents as liquidators and their replacement by Mr. Swaden, who nobody has criticized an inappropriate liquidator if there is to be a replacement.
>
> I have come to the conclusion that I should not order the removal and replacement of the respondents on the facts of this case. First, this is not a case where the liquidators have done nothing, or virtually nothing. In the light of the evidence of Mr. Hoffman and the report to Mr. Lawler, it is clear they have done quite a lot. Secondly, this is not a case where it can be fairly suggested that the liquidators have been biased or lacking in independence, or where there could be a reasonable perception to that effect. Thirdly, I accept that there are criticisms that can be made of the liquidators. They should have pushed rolled Gold harder, they should have investigated Cavern's claim in the light of

the rather extraordinary assignment which appears to me to call for further questions, and they should have been more active in seeking funding from the creditors to investigate and pursue the aspects mentioned by Mr. Lawler. However, they have not had a great deal of time to deal with matters. They were appointed on 12 April and this application was made on 21 June. It is perfectly true that they have continued to be the liquidators for the five weeks since 21 June, and that their duties have continued, notwithstanding the risk of their replacement. However, they have had to concentrate on dealing with this application. Further, they may have been concerned as to whether they would have been able to recover all their costs, expenses and charges in relation to their work since 21 June. However that should not have been a major concern, in my view.

I think the application has been reasonably made, in the sense that there are legitimate concerns, but, at least on the on the facts and allegations in this case, I am ultimately concerned, not with the past, but with the future. If the liquidators were or even might be reasonably perceived to be biased, unprofessional, or criticisable to the extent established in Keypak, it would be different. However, while there have been failings by the liquidators which might be said to render the applicants' concern not unreasonable, it would be unfair on the liquidators, and much more importantly, unnecessary for the creditors' and company's interests, as well as, unnecessarily expensive and disruptive, if I were to remove the respondents. They have not helped themselves with Mr. Hoffman's (to my mind) silly remark about the Rolled Gold preference, but it would be harsh and disproportionate if I let that factor tip the balance in favour of replacing the liquidators, if I otherwise thought it right not to do so."

[225] In Re Keypak Homecare Ltd Mr. Justice Millett in granting the application to replace the liquidator said this:[111]

"In the present case I approach the matter in this way. There is nothing that can be said against Mr. Edgar so far as his personal integrity concerned. There is no evidence of any misconduct or wrong doing on his part, or of his intimacy or friendship with the directors of the company at all. He is a professional independent and experienced liquidator. But I am not impressed by his performance in the conduct of this liquidation. I take the view that his experience, gained in times when liquidators were accustomed to directors simply removing the stock before liquidation and then paying for them afterwards at forced sale values, has stood him in ill stead. As a result, he has adopted a relaxed and complacent attitude to such conduct, and in my judgment the creditors, who were outraged by what they believed had happened, were perfectly reasonable in the view that Mr. Edgar was not likely to pursue the directors with anything like sufficient vigour. If that was the view they adopted at the meeting, then it has been amply confirmed by all that has taken place since. I, too, take the view that Mr. Edgar is unlikely to pursue the directors with anything like sufficient vigour.

Mr. Edgar may well have a justified feeling that he is being treated a little like Admiral Byng, and that he is being removed from office 'in order to encourage the others.' I do not shrink from that. In an insolvency the stock is not there to be taken by the outgoing directors and traded with for weeks before the commencement of the liquidation and then simply paid for at an artificially low forced sale valuation; and the sooner that liquidators recognize that the better.

In circumstances such as the present, the creditors are entitled to expect either the suspicious matters to be cleared up very shortly after the creditors' meeting, or

[111] Loc cit at page 416-417

> proceedings to be commenced against the former directors with speed and pursued with vigour. A liquidator who can see from the statement of affairs that there are likely to be insufficient assets to enable him to discharge his duties ought to make the positions clear at the meeting of creditors and insist on being authorized by those present at the meeting of creditors and insist on being authorized by those present at the meeting to take such steps as may be necessary. But simply to stand back and do nothing and then claim that that is justified by the lack of finance is not, in my judgment, good enough.
>
> So for the reasons I have given I propose to remove Mr. Edgar and appoint Mr. Hughes."

[226] In Re Buildlead Ltd (No. 2) in ordering the removal of the Liquidator extracts from the reasoning of Mr. Justice Etherton are as follows:

> "156. The burden is on the applicant to show a good cause for removal of a liquidator, but it is well established that the statutory provision confers a wide discretion on the court which is not dependant on the proof of particular breaches of duty by the liquidator. The court's approach is well illustrated by the following judicial statements from a small selection of the authorities.
>
> 170. The conduct of Buildlead's liquidation by the liquidators has been unsatisfactory and inappropriate in the respects which I describe in the following paragraphs of this section of my judgment. By reason of that conduct, the understandable consequent loss of confidence of Quickson in the professional judgment of the liquidators, and for the other reasons which I mention below, I consider that the best interests of Buildlead's liquidation are served by the removal of the liquidators, and that they should therefore be removed."

[227] In summary, then, in AMP Music Box the Court accepted that the Liquidators did wrong but they were not found to be biased, unprofessional or criticisable to the extent in *Keypak*, which would have made a difference. However, in *Keypak* the problem the Liquidators had was lack of sufficient vigour in pursuing their duties.

[228] The lack of vigour in *Keypak* encompassed the following:

1) No examination of the sales and purchase ledgers.
2) Failure to investigate whether stock was missing.
3) No inquiries made of NB Ltd.
4) No interview of employees of the company to determine exactly what happened in the weeks before the company ceased to trade.

[229] In none of these key cases, did the question of honesty or questionable integrity arise. And the Liquidator in Keypak may be placed under the rubric of failure to

act in the best interest of creditors as he is mandated by law to do. Now, what of the Joint Liquidators in this instance?

The Result

[230] For present purposes, the balancing all must embrace the following: the issues against the Liquidators, the issues in favour of the Liquidators.

[231] It has already been determined that the Liquidators violated the Laws of Canada (which they have acknowledge), they also destroyed computer data thereby creating actual or potential legal problems of investors especially those resident in Canada, removed evidence from to SIB without authorization from a Canadian Court. This Court has also determined that they did not act in good faith in the instances in which they claimed to have done so, gave false or misleading statements about rent and distress by the landlord of SIB's rented premises in Montreal, they were inefficient in some respects, generated litigation unnecessarily and acted outside of their remit as Receiver- Managers.

[232] Against the foregoing, the Liquidators have in their favour the fact that they did do work on the liquidation and the 2200 creditors with US $614 million invested and who opposed the application. Also in their favour, is the finding that to some extent they did co-operate with AMF. The phrase, to some extent, is used because AMF's real desire was to obtain the list of Canadian investors. And although the Liquidators were constrained by the order of the Antigua High Court, it is the view of this Court that they could have used their 'good offices' to assist given the context. AMF's concern seemed to be a point of reference for the Canadian creditors.

[233] Also in the equation, is the final status of the assets recovered or identified so far.

[234] There are also what may be termed the neutral factors, such disruption, and increased expenditure in the event of a removal.

[235] When the factors or the issues in Keypak and Buildlead (No. 2) are matched with those in this instance, there is really no serious comparison. In brief, the Liquidator in Keypak was because he did not pursue his duties with vigour. And in Buildlead (No. 2), the problem was the manner in which the Liquidators conducted their investigation into the issues of inter-company balances and the actions they took in consequence of those inquiries were inappropriate and likely to give rise to a reasonable loss of confidence by the subsidiary company and its directors.

[236] The Respondents have sought to remind the Court of the following:

> "153. The following considerations are to be taken into account as part of the balancing exercise referred to in the authorities:
>
> i) A liquidator is expected to be efficient, vigorous and unbiased in his conduct of the liquidation.
>
> ii) If the liquidator fails to live up to those requirements, the Court will consider whether it can be reasonably confident that he will live up to those requirements in the future.
>
> iii) If a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him.
>
> iv) It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal.
>
> v) The court should not encourage applications to remove liquidators by creditors who have not had their preferred liquidator appointed or who are for some other reason disgruntled."

[237] These submissions are obviously based on the exciting jurisprudence where the turbulence is mild and where there is no disregard of the laws of a country or the destruction of evidence relating to the very liquidation. Indeed, this Court does not consider that the Liquidators are efficient and vigorous, and is not reasonably confident that they will live up to the requirements in the future. Further, there is a manifest proclivity for illegality. Nor can it be said that they have been effective and honest. Their conduct has fallen short in several instances rather than once or twice. Their conduct in Canada is of their own making and as such they must bear the professional consequences if and when they arise. Further still, even though this Court has indicated that it is not bound by the Canadian decisions,

another Court in one of the countries in which SIB may have investments may say otherwise. These decisions are not complementary to the Liquidators.

[238] In the final analysis, the positive issues cannot assist the Liquidators. In other words, the 2200 creditors together with their high level of investments have been considered by the Court.

Analysis and Conclusion

[239] It has been shown above that it is prerequisite that before the Court can exercise any of its wide powers under section 304 of the IBC Act including the replacing of a Liquidator.

[240] The prerequisite is that the Court must be satisfied that the corporation is able to pay or adequately provide for the discharge of all of its obligations. These would include the payments to the creditors, the liquidation fees, fees for legal advice and legal representation and other connected expenses.

[241] Based on the accounting evidence before the Court, it is clear that the liquidation have identified approximately $1 billion dollars in the assets of SIB. Or as they put it, there is a shortfall of $6 billion in the creditors' investment, based on the Liquidators reports and the evidence of Ms. Karyl Van Tassel.

[242] In this regard, the Court takes the view that this liquidation is multijurisdictional involving some 113 countries and the liquidation has been in progress for just over one year. Beyond that, it does not appear that the $1 billion does not include real estate held by SIB.

[243] In all the circumstances and having regard to the evidence available, the Court is satisfied that SIB would be able to adequately provide for the discharge of all of its obligations. In reality, in any liquidation the expenses incurred must come from the creditors investments or the total assets so that adequate must be construed in

that context. Adequate must mean as much as possible in that context. Adequate does not mean fully in this context.

[244] The other prerequisite is the matter of good cause shown by the Applicant. This, as the Court has concluded, has been done. This is constituted by the destruction or erasing of data, misleading statements about rent, the guise of protecting creditors' interest, inefficiency, acting outside of their remit as Receiver-Managers, generating liquidation and other issues.

Conclusion

[245] The Court has taken into account the state of the SIB estate, the issues for and against the Liquidators, the likelihood of disruption and an initial increase in expenditure in the event of a removal, the likely impact of removal on the professional status of the Liquidators and has come to the conclusion that it is appropriate that they should be removed. The Court places reliance especially on this dictum of Mr. Justice Etherton in Re Buildlead Ltd (No.2) when he said: "…It is quite clear from the entire time of authority stretching back to 1867 that, in appropriate circumstances, there may be good cause to remove a liquidator, notwithstanding the failure of the applicant to prove misfeasance as such, even though no reasonable criticism can be made of his conduct." In the final analysis, the Court considers that, notwithstanding the disruption and initial additional expenditure coupled with the rule that the Court should be slow in removing its officers, the liquidators, Mr. Nigel Hamilton-Smith and Mr. Peter Wastell should be removed. Further, in making the order the Court does not consider harsh and disproportionate.

ISSUE NO. 9

Who should replace the present Liquidators?

[246] The Applicant is seeking to have Mr. Marcus Wide of Price Waterhouse Coopers LLP, Canada replace the present Liquidators. In this regard, there is much documents on Mr. Wide's qualification and experience. But it is common ground that Mr. Wide was previously named in an application[112] to be appointed as Liquidator instead of those who now hold the office.

[247] When the two applications are combined, they give the semblance or the reality that Mr. Marcus Wide is the Applicant's preferred Liquidator. For this there is a prohibition.

[248] In the circumstances, the Court must adhere to that rule that says that a creditor should not have his preferred Liquidator appointed.[113] The reality is that this is the second occasion on which Mr. Wide's name is before this Court in these SIB proceedings. This point is fully embraced and ventilated by the Respondents.[114]

[249] In the circumstances, it is the determination of the Court that Mr. Marcus Wide's name should be re-submitted by the Applicant with at least two other qualified and experienced insolvency practitioners in order that a further determination may be made as to the replacement. This must be done within thirty days of the date of this order.

[112] ANUHCV No. 2009/0149
[113] Per Neuberger J in AMP Music Box Enterprises v Hoffman [2002] BCC 996, 1001 H
[114] See Revised Written Submissions of the Liquidators at paras. 7-154

ORDER

It is hereby ordered and declared as follows:

1. This Court is not bound by the findings of fact or otherwise of the Superior Court of Quebec and the Quebec Court of Appeal as they related to these proceedings.

2. The actions of the Liquidators with respect to the erasing of data on the computer hardware was not in accordance with standard forensic practice as such they acted inappropriately.

3. The Receiver-Managers exceeded their remit by making preparation for the sale of the assets of SIB and by deleting data from the computers.

4. The Receiver-Managers/Liquidators disregarded the jurisdiction of the Canadian courts by undertaking actions with respect of SIB otherwise than in accordance with the Bankruptcy and Insolvency Act and removed computer data relating to SIB without the permission of the Courts in Canada.

5. The Court is not bound by UNCITRAL model insolvency laws.

6. The Applicant has standing to make the application for the removal of the Liquidators and the legal test for such removal is due cause.

7. The Applicant has shown due cause based on the legal principles enunciated by the courts.

8. After a consideration of all the circumstances and the law, the Court considers it appropriate that the Liquidators should be removed.

9. Mr. Marcus Wide is or has the semblance of the Applicant's preferred liquidator which is prohibited by law. Accordingly, the Applicant must within thirty days of the date of this order re-submit to the Court the names of Marcus Wide together with at least two other suitably qualified and experienced insolvency practitioners in order that a further determination may be made as to the replacement.

10. The present Liquidators of SIB will continue to conduct the liquidation in the interest of all the creditors until such time as the replacement is appointed by this Court.

11. The Applicant is entitled to his costs to be assessed under Part 65.11 of CPR 2000, if not agreed. Such assessment must take place at the end of these proceedings.

Appreciation

This has been a long and detailed process, or, as one affiant described it, "long, voluminous and repetitive."[115] In all the circumstances, the Court wishes to place on record its deep appreciation for all the assistance provided by Learned Senior Counsel and Junior Counsel on both sides.

Errol L. Thomas
Judge (Ag.)

[115] Affidavit of Geoffrey Paul Rowley In Response To The Application Of Urgency being Exhibit "NJHS1" To The Affidavit Of Nigel John Hamilton-Smith