Neutral Citation Number: [2009] EWHC 1441 (Ch)

Case Nos: 13338 and 13959 Of 2009

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2009

Before:

THE HONOURABLE MR. JUSTICE LEWISON

IN THE MATTER OF STANFORD INTERNATIONAL BANK LIMITED, STANFORD GROUP COMPANY, STANFORD CAPITAL MANAGEMENT LLC, ROBERT ALLEN STANFORD, JAMES M. DAVIS, LAURA PENDERGEST-HOLT, STANFORD FINANCIAL GROUP, AND THE STANFORD FINANCIAL GROUP BUILDING INC (IN RECEIVERSHIP)

AND IN THE MATTER OF THE CROSS BORDER INSOLVENCY REGULATIONS 2006

Mr Antony Zacaroli QC and Mr Daniel Bayfield (instructed by **CMS Cameron McKenna LLP**) for the Liquidators **of Stanford International Bank Limited appointed by the High Court of Antigua and Barbuda.**

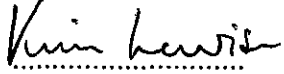
Mr Stuart Isaacs QC and Miss Felicity Toube (instructed by **Baker Botts (UK) LLP**) for the **Receiver appointed by the U.S. Court in respect of Stanford International Bank Limited and other Stanford entities.**

Mr David Joseph QC (instructed by **Addleshaw Goddard LLP**) on behalf of **Robert Allen Stanford.**

Hearing dates: 10, 11, 12 June 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



THE HONOURABLE MR. JUSTICE LEWISON

Mr. Justice Lewison:

Introduction

1. This application is part of the fall-out of the collapse of Sir Allen Stanford's business empire. Underlying the collapse is the allegation that for some considerable time Sir Allen and his associates have been engaged in a giant and fraudulent Ponzi scheme as a result of which many investors, world-wide, have been defrauded. Sir Allen denies these allegations. On 16 February 2009 the United States Securities Exchange Commission (**"SEC"**) filed a complaint against Sir Allen, James M. Davis, Laura Pendergest-Holt, Stanford International Bank Ltd ("SIB"), Stanford Group Company, and Stanford Capital Management, LLC, alleging, among other causes of action, securities fraud and violations of the securities laws. On the same day the United States District Court for the Northern District of Texas made an order appointing Mr Ralph Janvey ("the Receiver") as receiver over the assets worldwide of SIB; Stanford Group Company; Stanford Capital Management, LLC; Sir Allen; James M. Davis and Laura Pendergest Holt; and all entities owned or controlled by any of them, including Stanford Trust Company Ltd (STCL"). SIB is a company incorporated in Antigua and Barbuda and has its registered office there. In parallel with the actions taken in the USA by the SEC the Antiguan regulatory authorities were also taking action against SIB. On 19 February 2009 the Financial Services Regulatory Commission of Antigua and Barbuda (**"FSRC"**) appointed Mr Wastell and Mr Hamilton-Smith as receivers-managers ("Receiver-Managers") of SIB and STCL. A week later, on 26 February 2009 the Antiguan court made an order appointing Mr Wastell and Mr Hamilton-Smith as Antiguan receivers for SIB and STCL. On 24 March 2009 the FSRC presented a petition against SIB under the International Business Corporations Act of Antigua and Barbuda, seeking the winding up of SIB and the appointment of Mr Wastell and Mr Hamilton-Smith as liquidators. On 15 April 2009 the Antiguan court made a winding up order on the FSRC's petition and appointed Mr. Hamilton-Smith and Mr. Wastell as liquidators of SIB ("the Liquidators").

2. Both the Receiver and the Liquidators apply for recognition under the Cross Border Insolvency Regulations 2006. Each of them alleges that the proceedings in which they have been respectively appointed are "main proceedings" for the purposes of the 2006 Regulations. The apparent lack of co-operation between them has resulted in an expensive application at the creditors' expense.

The Cross Border Insolvency Regulations 2006

3. On 30 May 1997, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the text of a model law on cross-border insolvency, which was approved by a resolution of the United Nations General Assembly on 15 December 1997. The Model Law is not binding in any jurisdiction. Individual states are free to adopt all or part of it, with or without modifications; although the UN recommends that in the interests of uniformity as few changes to the text as possible should be made.

4. The 2006 Regulations give effect to the UNCITRAL Model Law within Great Britain in the form set out in Schedule 1 to the 2006 Regulations. The law applies where assistance is sought in Great Britain by a foreign representative in connection with a foreign proceeding: Art 1 1 (a). Both the expressions "foreign proceeding" and "foreign representative" are defined expressions. A "foreign proceeding" may be either a "foreign main proceeding" or a "foreign non-main proceeding". These two expressions are likewise defined. A foreign proceeding is a foreign main proceeding if it takes place in a state where the debtor has the "centre of its main interests" ("COMI"). This expression is not defined, although there is a presumption that a company's registered office is its COMI. Much of the argument in this case has turned on the meanings to be given to these expressions.

5. The relevant provisions of the 2006 Regulations are as follows:

> "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has *the centre of its main interests*" (Art 2 (g))
>
> "foreign proceeding" means a *collective judicial or administrative proceeding* in a foreign State, including an interim proceeding, *pursuant to a law relating to insolvency* in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, *for the purpose of reorganisation or liquidation*" (Art. 2 (i))
>
> "foreign representative means a person or body, including one appointed on an interim basis, *authorised* in a foreign proceeding *to administer the reorganisation or liquidation of the debtor's assets or affairs* or to act as a representative of the foreign proceeding" (Art 2 (j))
>
> "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, *is presumed* to be the centre of the debtor's main interests." (Art 16. 3)

6. The italicised parts represent the phrases in dispute.

7. Under Article 17(1), unless a "foreign proceeding" is contrary to the public policy of the English courts, it must be recognised by the English court if:

   i) the proceedings are "foreign proceedings";

   ii) the representative is a "foreign representative";

   iii) certain formal requirements have been complied with (formal documents provided and statements about other extant foreign proceedings made in supporting documents); and

   iv) the application has been made in the Chancery Division of the High Court.

8. Where these conditions are satisfied, the court must recognise the proceeding either as a foreign main proceeding or as a foreign non-main proceeding. It is not in dispute that the formalities have been complied with and that the applications have been made to the right court.

9. Regulation 2 (2) of the 2006 Regulations lists a number of publications which may be considered in interpreting the Model Law. These include the Model Law itself, any documents of UNCITRAL and its working group relating to the preparation of the model law and the Guide to Enactment published by the UN.

10. I will return to a more detailed discussion of the phrases in dispute, but there is one preliminary matter to deal with. As mentioned, SIB's registered office is in Antigua. Thus Antigua is presumed to be its COMI "in the absence of proof to the contrary". In the present case the applications have been supported by written evidence; but none of that evidence has been tested by cross-examination. How, then, is the court to resolve any disputed question of fact? The answer, I think, is that the court should apply the same test as it applies in deciding questions of jurisdiction under the EC Judgments Regulation 44/2001: viz. that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that the company's COMI is not in the state in which its registered office is located: cf. *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 W.L.R. 12, § 28. No one argued for any different approach. With that in mind I set out the relevant facts of which I am satisfied, or as satisfied as I can be having regard to the procedural limitations of interlocutory proceedings.

SIB's public face

11. SIB was incorporated in Antigua on 7 December 1990. Its registered office is in Antigua. In addition to having its registered office in Antigua, SIB also occupies a building there. The building is a 30,000 square foot Georgian or colonial style building outside the airport in St John's, Antigua. SIB does not own the building, but leases it from another Stanford company. Photographs of this building and its columned portico are included in some of SIB's marketing material. SIB employed 93 members of staff, 88 of whom worked in Antigua. The remaining five worked in Canada. It had its own accounts department, human resources department, IT department, payroll department and operating software, all of which were based in Antigua. It seems likely, however, that they reported to people either in the USA or in St Croix (part of the US Virgin Islands).

12. In its Disclosure Statement, provided for prospective US depositors, SIB says:

    i) It is "a private financial institution chartered under the laws of Antigua and Barbuda";

    ii) It is presided over by a Board of Directors consisting of seven individuals, a Chief Executive Officer, a President, a Chief Financial Officer and other officers and employees. The management are named later in the document. They include Sir Allen and his father, as well as Mr James Davis. But they also include Mr KC Allen QC who is said to practice law in the UK and the Eastern Carribbean, Sir Courtney Blackman, a Barbadian diplomat and former governor of the Central Bank of Barbados; Mr Rodriguez-Tolentino, the

President; Ms Beverly Jacobs, the Operations Manager and others. Of the 12 named individuals five worked in Antigua;

iii) Its "primary offices" are in St John's, Antigua;

iv) Its "primary business" is the investment of funds deposited with it by depositors;

v) It is regulated by the FSRC, and is not regulated elsewhere than in Antigua;

vi) Stanford Group (a Texas corporation) acts as an independent contractor for a fee payable by SIB in offering certificates of deposit to depositors on SIB's behalf. Another Stanford entity, Stanford Financial Group Company has a marketing and service contract, in force since 1995, under which it provides marketing and management services in return for a fee;

vii) Further information should be sought from Ms Jacobs at the address of the building in St John's Antigua or by telephone to an Antiguan telephone number.

13. The evidence also includes marketing material put out by SIB. It begins with a photograph of "SIB Headquarters" in Antigua. It includes the following statements:

> "… SIB's top management sets goals every quarter linked to profit, productivity and growth."
>
> "As a member of the Stanford Financial Group, the Bank has benefited greatly from the services and support of wholly owned Stanford affiliates located throughout the world. SIB has received this benefit without the capital expenditures required for opening and maintaining multiple global offices."
>
> "Our investment strategy is determined by the Bank's Board of Directors annually and reviewed quarterly. Weekly investment committee meetings are conducted with each portfolio management team to ensure that the stated risk and reward parameters fall within the Bank's guidelines.
>
> These teams are comprised of seasoned investment managers throughout the world, most of whom have worked with the Bank for the past 10 to 15 years and many have been with us since the Bank's inception in 1985."
>
> "We are domiciled in a low tax jurisdiction, allowing us to reinvest more of our profit into the Bank's retained earnings, which has provided us a strong capital base from which to grow."

14. Another brochure states that SIB "conducts business with the world from its headquarters in Antigua."

15. SIB accepted deposits from investors worldwide (some 27,000 in all); in particular from all over North, Central and South America. Because of the legislation under which SIB was incorporated as an offshore bank it was prohibited from accepting deposits from Antiguan citizens. In conducting its business SIB entered into "referral agreements" with financial advisors (most of which were other Stanford group companies) in the numerous jurisdictions in which SIB sought investors. A typical referral agreement appoints a financial adviser to refer to SIB clients who have an interest in the types of financial products that are available through SIB and who are willing to establish a relationship with SIB. Once referred to SIB, SIB retains discretion to accept or decline the prospective client. In return for referrals SIB pays commission of 2 per cent per annum on the amount deposited by clients. A typical referral agreement gives SIB's address as its St John's headquarters and states that it will be governed by the laws of Antigua and that disputes will be resolved by arbitration under the relevant Antiguan legislation. Many of the financial advisers were located in the USA, but there were also financial advisers elsewhere in the world, notably in Latin America. As far as the depositors were concerned their financial adviser, rather than SIB, was the person with whom they had the relationship and with whom they were accustomed to deal. Although the largest contingent of depositors (in terms of value) were located in the USA, they were not a majority either by number or by value. Venezuelan depositors ran a close second in terms of value but were first in terms of number, with other South American countries not far behind. In all, depositors came from 113 different countries. Just under half the financial advisers through whom investors bought certificates of deposit were located in the USA.

16. The terms on which depositors bought certificates of deposit were recorded in writing. The written agreements provided that the agreement was to be governed by Antiguan law, and contained a submission to the jurisdiction of the Antiguan courts. However, in cases in which SIB entered into contracts with financial service providers other than the financial advisers, the contracts often contained addresses for service of notices on SIB in the USA (for the attention of Mr Davis) and submission to the jurisdiction of American courts. It seems reasonable to suppose, based in part on SIB's published accounts, that SIB consumed and paid for utilities (e.g. electricity, postage and telephones) in Antigua at least to the extent required to run its office.

17. Potential investors looking to invest very substantial sums in SIB were flown to Antigua for personal meetings at SIB's headquarters, where they were entertained by Mr Rodriguez-Tolentino. Most investors, however, bought their certificates of deposit by making written applications through financial advisers who completed the paperwork and forwarded it to SIB in Antigua for SIB to carry out checks (e.g. for money laundering) and to decide whether or not to accept their applications. The processing of applications was largely administrative. Transfers of funds by wire from depositors to SIB were made to SIB's bank accounts at Toronto Dominion Bank in Canada or to HSBC Bank plc in England, whereas cheques were sent to SIB in Antigua. Approximately 73% of transfers were wire transfers and approximately 27% were made by cheque. When certificates of deposit were issued they bore the legend "Executed at St John's, Antigua, West Indies". Where certificates of deposit were redeemed, the redemption monies also came from the bank account in Canada. Depositors received monthly or quarterly account statements, sent by SIB from St John's.

18. SIB's principal operating bank account was maintained at the Bank of Houston, in Houston Texas; and it was from that account that its employees were paid. Mr Rodriguez-Tolentino, however, was paid not by SIB but by Stanford Financial Group. Antiguan salaries amounted to about $3 million per annum.

19. The portfolio management teams referred to in SIB's marketing material were not employees of SIB. SIB entered into agreements with others to manage the investment portfolios. One such agreement (dated 1 January 1996) was made with Stanford Group Company, a Texas corporation. Under the terms of the agreement Stanford Group Company agreed to provide services including "portfolio management of securities held by [SIB] or its clients", in return for a fee of 1.5% of the value of funds under management. Notices under the agreement were to be given to SIB in St John's, for the attention of Mr Davis. The agreement was to be governed by the laws of the State of Texas.

20. Funds invested on behalf of SIB or depositors were invested around the world. Assets that have been located to date include:

    i) cash balances in Canada ($19 million), Antigua ($10 million) and the US ($9 million) ("Tier 1 assets"). The amount of cash on deposit in Antigua was, however, a recent development and cash balances in Antigua before 2008 were very small;

    ii) funds under investment with international financial institutions in Switzerland ($117 million), the UK ($105 million) and the US ($12 million) ("Tier 2 assets"); and

    iii) other assets including equity investments, receivables, real estate in Antigua and claims against Sir Allen Stanford personally and other Stanford entities, including potential tracing claims against assets purchased by them; for example, investments made by Sir Allen using the $1.6 billion "loaned" to him by SIB ("Tier 3 assets").

21. Thus the bulk of SIB's actual investments are outside the USA. Each of the institutions in which SIB's funds were invested sent periodic statements to SIB in Antigua and to the US.

22. In addition to its investment business SIB did provide other banking services to customers, although these services were, by comparison, provided on a small scale. It had several hundred "private banking" clients for whom it provided services such as discharging bills and other liabilities. It issued credit cards to 3,500 customers. It also made some loans to customers, based on a proportion of the amounts they held on deposit. The loans amounted in aggregate to somewhere between $97 million and £100 million. The amount owed by US citizens was between £6.9 million and $23 million. Requests for loans were sent to and approved in Antigua. As mentioned, SIB's marketing material included an Antiguan telephone number. Although SIB did not accept instructions by telephone, it did handle some 30 telephone calls per day from investors.

23. Meetings of the board of directors were sometimes held in Antigua, although most were conducted by telephone. There is no evidence about the place from where the

participants were actually speaking when holding meetings by telephone. The investment committee referred to in the marketing material made an annual visit to Antigua.

24. SIB's accounts were audited in Antigua by Antiguan accountants. The 2007 accounts disclose general and administrative expenses of some $154 million, of which $142 million were attributed to management fees. The remainder were attributed to rent, telecommunications, mail, advertising, travel, insurance, IT, and professional fees. Note 21 to the accounts stated that SIB was "a member of Stanford Financial Group"; and revealed the existence of the referral fee agreements between SIB and other Stanford entities. That note also disclosed an agreement between SIB and Stanford Financial Group Global Management LLC for the provision of treasury related functions, establishing and implementing trading policy, client communication, research, marketing and branding, government and public relations, technology and other related administrative services.

25. Since the appointment of the Liquidators, they have used SIB's records held in Antigua to keep SIB's customers informed of developments. They also hold meetings twice daily with customers who arrive in person at SIB's building in St John's. When they first visited SIB's building on 20 February 2009 (shortly before their appointment as Receiver-Managers) they found about 100 investors in the lobby of the building, many of whom had travelled to Antigua from overseas.

The Stanford Financial Group

26. SIB was one of a number of companies owned either directly or indirectly by Sir Allen. It was not a group of companies in the sense in which that expression is used in our own domestic companies legislation. The companies owned directly or indirectly by Sir Allen amounted to more than 100. 40 of them were US entities, 38 were Antiguan entities, 28 were other Caribbean entities and 25 were Latin American entities.

27. The Stanford Financial Group included Stanford Development Corporation (which owned SIB's office building in St John's); Stanford Group Company (which provided portfolio management services to SIB); Stanford Financial Group Global Management LLC (which provided the treasury and other services I have described), and many brokerages.

28. The Stanford Financial Group was marketed as a whole. However, within the marketing the Antiguan status of SIB was always referred to expressly. In a promotional video made in 2006 Sir Allen says (among other things):

> "Stanford Financial Group is a family of financial services companies with a global reach. We serve over 40,000 clients who reside in 79 countries on six continents. Our world headquarters are located in Houston Texas, and we have a continual growing number of offices around the world to serve our clients."
>
> "We offer innovative international private and institutional banking services. Stanford International Bank, domiciled in

> Antigua, was founded for the specific purpose of private-client wealth management…"

Behind the scenes

29. Both the Receiver and the Liquidators agree that the evidence thus far uncovered indicates that Sir Allen was at the centre of a massive and fraudulent Ponzi scheme. The Receiver says, and the Liquidators do not deny, that he was aided and abetted by Mr Davis (who was a director of SIB) and by Ms Laura Pendergest-Holt. The scale and extent of the fraud is not agreed, nor is the length of time over which it has been going on. Sir Allen, as I have said, denies that there was any fraud at all. I proceed on the footing that Sir Allen, Mr Davis and Ms Pendergest-Holt have been involved in a fraudulent Ponzi scheme. I am not in a position to make any findings about the extent of the fraud, who else was an accomplice or how long it has been going on. There is, however, no suggestion that SIB's employees in Antigua were participants in the fraud.

30. The Liquidators accept that many decisions at a strategic level (for example the nature of the products to be offered by SIB) were taken by Sir Allen and Mr Davis. But they say that the decisions, once taken, were implemented in Antigua. The Receiver says that *all* decisions at a strategic level were taken by Sir Allen and Mr Davis. The Receiver points out that the Liquidators have given no examples of decisions implemented in Antigua and says that to the extent that there was any such implementation it appears to have been principally aimed at giving SIB the appearance of a legitimate bank. It is difficult to know what to make of this evidence, since it is pitched at a level of general assertion on both sides. Given that it is accepted on both sides that there were meetings of the board of SIB (although precisely what the board discussed is not in evidence) I do not think that I can safely conclude that the Receiver's sweeping allegation is correct.

31. One of the factors on which the Receiver relied was the whereabouts (to use a neutral term) of Sir Allen, Mr Davis and Ms Pendergest-Holt. So far as the evidence goes, the latter two were domiciled and resident in the USA and carried out their work there. So far as Sir Allen is concerned, he is a citizen of both the USA and Antigua (where he was knighted). He has a high profile in Antigua where he has been a major investor and benefactor. He is also a frequent visitor. Amongst other things he has built the Stanford Cricket Ground and two restaurants in close proximity to SIB's building; he owns the Antigua Sun (Antigua's largest newspaper) and was the sponsor of Antiguan Sail Week. He has homes in the USA. But for tax reasons he spends much of his time (at least half the year) in St Croix in the US Virgin Islands. There is also evidence that at the relevant time he lived in part on his yacht.

The UNCITRAL Model Law

32. The adoption by the UN of the UNCITRAL Model Law and the publication of the Guide to Enactment were preceded by a number of meetings and reports. Some of these publications shed light on the meaning of the disputed phrases.

Purpose of the Model Law

33. The Guide to Enactment says that the purpose of the Model Law is to assist States "to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency" (§ 1). It reflects practices in cross-border insolvency matters that are characteristic of "modern, efficient insolvency systems" (§ 2).

34. It recognises that since the Model Law is only a recommendation rather than a convention, the degree of harmonisation is likely to be lower than in the case of a convention (§ 12).

35. It acknowledges that fraud by insolvent debtors is an increasing problem and says that the cross-border co-operation mechanisms established by the Model Law are "designed to confront such international fraud" (§ 14).

36. The Model Law takes into account (among other things) the EC Regulation on Insolvency and states that it "offers to States members of the European Union a complementary regime of considerable practical value that addresses the many cases of cross-border cooperation not covered by the EC Regulation" (§ 19).

Nature of the proceeding

37. The Guide to Enactment says (§ 23):

> "To fall within the scope of the foreign law, a foreign proceeding needs to posses certain attributes. These include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as part of the purpose of the proceeding."

38. It points out that this definition is inclusive, and would include proceedings in which the debtor retains some measure of control over its assets (e.g. as a debtor in possession) (§ 24).

39. I was not referred to any English authority on the nature of collective proceedings, but I was shown the decision of Judge Markell in the US Bankruptcy Court for Nevada in *Re Betcorp Ltd* 400 BR 266. He said (p. 281):

> "A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast to a receivership remedy instigated at the request and for the benefit of a single secured creditor."

40. He also considered the nature of a "proceeding" (p. 278). He said:

> "This excerpt identifies the essence of a "proceeding": acts and formalities set down in law so that courts, merchants and creditors can know them in advance, and apply them evenly in practice. In the context of corporate insolvencies, the hallmark

> of a "proceeding" is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets."

A law relating to insolvency

41. In order to qualify as a foreign proceeding, the proceeding must be "pursuant to a law relating to insolvency". UNCITRAL's report to the UN on the work of its 29th session in which the Working Group considered the draft of the Model Law. Among the points discussed was the phrase "a law relating to insolvency". The view of the Working Group was that that phrase was:

> "sufficiently broad so as to encompass insolvency rules irrespective of the type of statute in which they might be contained…"

42. The French text, which I was also shown translates the phrase as "une loi relative à l'insolvabilité" and says that it was wide enough to include "toutes les dispositions concernant l'insolvabilité, quel que soit le type de texte où elles étaient énoncées". Both the English and the French versions seem to me to envisage a written piece of legislation (whether primary or secondary) in which the rules can be found. The French phrase used to describe a formal written law is a "texte de loi". That is reflected in the French text, just as the English text uses the word "statute". The quoted observations of Judge Markell in *Re Betcorp Ltd* support this conclusion. On the other hand the Guide to Enactment (§ 71) says that the definition "is intended … to refer broadly to proceedings involving companies in severe financial distress".

COMI

43. UNCITRAL reported to the UN on the work of the 30th session of UNCITRAL. One of the points raised in the report was that meaning of COMI was not clear. The report stated (§ 153):

> "In response, it was stated that the term was used in the European Union Convention on Insolvency Proceedings and that the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions."

44. The Convention has since been superseded by the EC Regulation on Insolvency Proceedings. In the Guide to Enactment it is said (§ 31):

> "A foreign proceeding is deemed to be the 'main' proceedings if it has been commenced in the State where 'the debtor has the centre of its main interests'. This corresponds to the formulation in article 3 of the EC Regulation, thus building on the emerging harmonization as regards the notion of a 'main' proceeding."

45. In my judgment it is a reasonable inference that the intention of the framers of the Model Law was that COMI in the Model Law would bear the same meaning as in the

EC Regulation, since it "corresponds" to the formulation in the EC Regulation; and one of the purposes of the Model Law is to provide EU member states with a "complementary regime" to the EC Regulation. It is true that in the EC Regulation some help can be derived from recital (13) which says:

> "The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

46. However, the absence of that recital from the Model Law does not in my judgment alter the position, because in my judgment the framers of the Model Law envisaged that the interpretation of COMI in the EC Regulation (which would necessarily take into account recital (13)) would be equally applicable to COMI in the Model Law.

47. In the content of the EC Regulation COMI has been the subject of some consideration. In the context of the EC Regulation the Virgos-Schmidt Report on the Convention on Insolvency Proceedings (which in fact never came into force) is generally considered to be a good guide to interpretation. That report says (§ 75):

> "The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."

48. The first sentence is the origin of the recital. The remaining sentences explain the rationale. The EC Regulation also provides in Article 3 1 that:

> "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

49. The same paragraph of the Virgos-Schmidt report comments:

> "Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

50. On one reading of this the reference to the debtor's "head office" might be thought to be a reference to a physical, visible location. However, the early cases considering the effect of this took the view that the decisive question was where the company's head office *functions* were carried out: e.g. *Re Collins & Aikman Corp Group* [2006] BCC 606. The presumption in favour of the place of the company's registered office was not a particularly strong one; but was "just one of the factors to be taken into

account with the whole of the evidence in reaching a conclusion as to the location of the COMI": *Re Ci4net.com Inc* [2005] BCC 277.

51. The question of COMI was considered by the ECJ in *Re Eurofood IFSC Ltd* [2006] Ch 508. Eurofood was an Irish company which was a subsidiary of Parmalat, an Italian company. Eurofood's registered office was in Dublin. Its principal objective was the provision of financing facilities for companies in the Parmalat group. Its day to day administration was managed by Bank of America under the terms of an agreement. It engaged in at least three large financial transactions. Insolvency proceedings were opened in both Italy and Ireland, and the courts of each Member State decided that they had jurisdiction. The Italian administrator appealed to the Irish Supreme Court which referred a number of questions to the ECJ. The relevant one, for present purposes is the fourth question:

> "Where (a) the registered offices of a parent company and its subsidiary are in two different member states, (b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated, and (c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary-in determining the 'centre of main interests', are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?"

52. That question was first considered by Jacobs A-G. The Italian administrator submitted (§ 111) that:

> "if it is to be demonstrated that the centre of main interests is somewhere other than the state where a company's registered office is located, it consequently needs to be shown that the "head office" type of functions are performed elsewhere. The focus must be on the head office functions rather than simply on the location of the head office because a "head office" can be just as nominal as a registered office if head office functions are not carried out there. In transnational business the registered office is often chosen for tax or regulatory reasons and has no real connection with the place where head office functions are actually carried out. That is particularly so in the case of groups of companies, where the head office functions for the subsidiary are often carried out at the place where the head office functions of the parent of the group are carried out."

53. Jacobs A-G said that he found that submission "sensible and convincing" (§ 112). It is, however, important to see exactly what the thrust of the submission was. The submission was that a head office could be just as nominal as a registered office. Thus in applying the "head office" test, it was necessary to look for real functions rather than formalities. I do not think that the submission went further than that.

54. The Italian administrator then submitted (§ 113) that:

> "the "ascertainability by third parties" of the centre of main interests is not central to the concept of the "centre of main interests". That can be seen from recital 13 in the Preamble itself, which states that the "centre of main interests" "should correspond to the place where the debtor conducts the administration of his interests on a regular basis", in other words, in the case of a corporation, where its head office functions are exercised. Recital 13 continues "and [which] is therefore ascertainable by third parties"; in other words, it is *because* the corporation's head office functions are exercised in a particular member state that the centre of main interests is ascertainable there."

55. Jacobs A-G said that he agreed with that analysis (§114). If I may say so, recital (13) is really an assumption of fact; and on some facts the assumption may not be true. However, Jacobs A-G also emphasised the importance of the attributes of transparency and objective ascertainability; saying (§ 118):

> "Those concepts seem to me to be wholly appropriate elements for determining jurisdiction in the context of insolvency, where it is clearly essential that potential creditors should be able to ascertain in advance the legal system which would resolve any insolvency affecting their interests. It is particularly important, it seems to me, in cross-border debt transactions (such as those involved in the main proceedings) that the relevant jurisdiction for determining the rights and remedies of creditors is clear to investors at the time they make their investment."

56. One reason why he rejected the proposition that control of a subsidiary by a parent was not the test was that such control would not be ascertainable, and even if the facts giving rise to control were published in the company's annual accounts, publication would be retrospective (§ 121). He added (§ 122):

> "Any party seeking to rebut the presumption that insolvency jurisdiction follows the registered office must however demonstrate that the elements relied on satisfy the requirements of transparency and ascertainability. Insolvency being a foreseeable risk, it is important that international jurisdiction (which entails the application of the insolvency laws of a given state) be based on a place known to the debtor's potential creditors, thus enabling the legal risks which would have to be assumed in the case of insolvency to be calculated."

57. Finally he said (§ 124):

> "If therefore it were shown that the debtor's parent company so controlled its policies and that that situation was transparent and ascertainable at the relevant time (and not therefore merely retrospectively), the normal test might be displaced."

58. These later paragraphs in Jacobs A-G's opinion take a rather different approach from his earlier acceptance of the submission that ascertainability by third parties is not central to the concept of COMI.

59. When the case was considered by the court itself, the court agreed with the answer to the question that Jacobs A-G had proposed. The court first said that in the case of a group of companies the EC Regulation had to be applied to each company individually (§ 3). It then considered the question of COMI. It is necessary for me to set out their reasoning:

> "33 That definition [i.e. recital (13)] shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
>
> 34 It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.
>
> 35 That could be so in particular in the case of a "letterbox" company not carrying out any business in the territory of the member state in which its registered office is situated.
>
> 36 By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the Regulation."

60. Mr Zacaroli QC said that I was bound to follow *Eurofood* in interpreting the Cross-Border Regulations. Mr Isaacs QC said that although I was not bound to follow *Eurofood*, I should follow it. I need not decide whether I am strictly bound to follow *Eurofood*, since it is agreed that I should do so. I must therefore consider what *Eurofood* decided. This is not the first time I have done so, although it is the first time that I have done so with the aid of adversarial argument. In *Re Lennox Holdings Ltd* [2009] BCC 155 I had to decide whether this court had jurisdiction to open insolvency proceedings in relation to two companies whose registered offices were in Spain. I decided that it did. Having set out extracts from the opinion of Jacobs A-G and the ECJ in *Eurofood* I said (§ 9):

> "The two particular examples which were given by the court are, if I may respectfully say so, at two opposite and extreme ends of the spectrum. The facts of the present case, as I rather suspect the facts of most cases, lie somewhere between those two extremes. It is for that reason that the approach of the Advocate General is a particularly helpful one. What I should concentrate on is the head office functions of the two Spanish companies. It is, I should say, clear that the two Spanish companies do carry on business in the Member State where their registered offices is situated and consequently the "mere fact" that its economic choices are or can be controlled by a parent company is not enough to rebut the presumption. That is not what is relied on in the present case. It is not control by a parent company that is relied on in the present case. It is control of the companies themselves by their boards of directors."

61. Mr Zacaroli submitted that I was wrong to apply the simple test of "head office functions" propounded by Jacobs A-G. He said that Jacobs A-G had expressly accepted the submission of the Italian administrator that ascertainability by third parties of the centre of main interests is *not* central to the concept of COMI (§ 114). That was inconsistent with the Advocate-General's own subsequent stress on the need for elements relied on to rebut the presumption in favour of the registered office to satisfy the twin requirements of transparency and ascertainability. More to the point, it was not consistent with the decision of the ECJ itself which emphasised that COMI *must* be identified by reference to criteria that are both objective and ascertainable by third parties (§ 33); and said in terms that the presumption in favour of COMI coinciding with the company's registered office could *only* be rebutted by factors which are *both* objective *and* ascertainable by third parties. Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in *Lennox Holdings* on the basis accepted by Jacobs A-G in § 114, I now consider that I was wrong to do so. Pre-*Eurofood* decisions by English courts should no longer be followed in this respect. I accept Mr Zacaroli's submission that COMI must be identified by reference to factors that are both objective and ascertainable by third parties. This, I think, coincides with the view expressed by Chadwick LJ (before the decision in *Eurofood*) in *Shierson v Vlieland-Boddy* [2005] 1 W.L.R. 3966 (§ 55):

> "In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be *perceived* to be doing by an objective observer." (Emphasis added)

62. This leads on to the next question: what is meant by "ascertainable"? Mr Isaacs submitted that information would count as being ascertainable even if it was not in the

public domain if it would have been disclosed as an honest answer to a question asked by a third party. Provided that a third party asked the right questions, and was given honest answers, the result of the inquiry would be ascertainable. Mr Zacaroli submitted that this formulation was far too wide and blurred the distinction between what was ascertainable and what was not. On the basis of Mr Isaacs' submission the requirement of ascertainability was diminished almost to vanishing point. Rather, what was ascertainable by a third party was what was in the public domain, and what a typical third party would learn as a result of dealing with the company. I agree with Mr Zacaroli. As Chadwick LJ says, one of the important features is the *perception* of the objective observer. One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. It would impose a quite unrealistic burden on them if every transaction had to be preceded by a set of inquiries before contract to establish where the underlying reality differed from the apparent facts.

63. In *Eurofood* the ECJ emphasised the importance of the presumption in favour of COMI coinciding with a company's registered office. In my judgment this means that the decision in *Re Ci4net.com Inc*, to the effect that the location of the registered office is no more than a factor to be considered, should also no longer be followed. In my judgment it follows from *Eurofood* that the location of a company's registered office is a true presumption, and the burden lies on the party seeking to rebut it.

64. I have already quoted Article 16 3 of the Model Law which enacts the same presumption. Commenting on this article the Guide to Enactment says (§ 122):

> "Article 16 establishes presumptions that allow the court to expedite the evidentiary process: at the same time they do not prevent, in accordance with the applicable legal procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party."

65. I do not consider that this commentary, which explicitly refers to presumptions, detracts from the force of the decision of the ECJ in *Eurofood*. At this point I should refer to some of the decisions of courts of the USA. The USA gave effect to the Model Law as Chapter 15 of the Federal Bankruptcy Code. However, in enacting the equivalent of Article 16 3 Congress changed the wording. Instead of providing for the presumption in the absence of "proof" to the contrary, the equivalent provision in Chapter 15 provides for the presumption in the absence of "evidence" to the contrary. The American jurisprudence thus holds that the burden of proof lies on the person who is asserting that particular proceedings are "main proceedings" and that the burden of proof is never on the party opposing that contention: *Re Tri-Continental Exchange Ltd* 349 BR 629, 635, per Judge Klein. In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122 Judge Lifland said that except where there is no contrary evidence the registered office does not have any special evidentiary value. This change in language of the enactment, as it seems to me, may well explain why the jurisprudence of the American courts has diverged from that of the ECJ.

66. Professor Westbrook, the Receiver's expert on US law, explains in his first affidavit (§ 21) that:

> "The United States jurisprudence has made it clear that the COMI lies in the jurisdiction [where] the most material "contacts" are to be found, especially management direction and control of assets."

67. According to *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* these contacts can include the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors or of a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. However, none of these factors in the American jurisprudence is qualified by any requirement of ascertainability. In my judgment this is not the position taken by the ECJ in *Eurofood*.

68. Mr Isaacs also submitted that in a case where it is alleged that the company in question was used as a vehicle for fraud, the court should not investigate the COMI of the company itself. Rather it should investigate the COMI of the fraudsters pulling the strings. In this case the fraudsters are alleged to be Sir Allen, Mr Davis and Ms Laura Pendergest-Holt, so it is their COMI that counts. I reject this submission. First, in *Eurofood* the ECJ confirmed (§ 30):

> "that, in the system established by the Regulation for determining the competence of the courts of the member states, each debtor constituting a distinct legal entity is subject to its own court jurisdiction."

69. Second, by its very nature the existence of a fraud behind the scenes is unlikely to be ascertainable by third parties. The whole point of a fraud is that it is kept secret for as long as possible. Third, the idea of ascertaining the COMI of the fraudsters is all very well if they all happen to have their COMI in the same state; but what if they do not? How then is the court to identify the relevant COMI? I add also that on the facts of the present case it has not been shown (and apart from generalised assertion there is no evidence) that SIB was established for fraudulent purposes which might amount to justification for piercing the corporate veil.

70. I hold therefore that:

i) The relevant COMI is the COMI of SIB;

ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;

iii) The burden of rebutting the presumption lies on the Receiver;

iv) The presumption will only be rebutted by factors that are objective;

v) But objective factors will not count unless they are also ascertainable by third parties;

vi) What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company.

Is the Receivership a foreign proceeding?

71. Mr Joseph QC argued that the receivership was not a foreign proceeding as defined, with the result that the Receiver was not entitled to recognition under the Cross Border Insolvency Regulations. He said this for three reasons:

    i) It was not a collective proceeding;

    ii) The Receiver was not appointed pursuant to a law relating to insolvency; and

    iii) He was not appointed for the purpose of reorganisation or liquidation.

72. Mr Zacaroli adopted Mr Joseph's points, although he concentrated on the second of them: Although presented as discrete points there is, I think, a considerable degree of overlap between them.

73. The first step in evaluating these submissions is to look at the order of the US District Court for the Northern District of Texas appointing the Receiver, and from which he derives his authority. The order was made on the application of the SEC. A number of Stanford companies (including SIB); and Sir Allen, Mr Davis and Ms Pendergest-Holt are all Defendants. The SEC alleged in its complaint that it was seeking emergency relief "to halt a massive ongoing fraud" by Sir Allen and his associates. It alleged that there had been a number of violations of legislation relating to securities. It said that the SEC was bringing the action "in the interest of protecting the public from any further unscrupulous and illegal activity". The complaint goes on to set out at length a number of allegations of fraudulent misrepresentation and then sets out the SEC's causes of action against the Defendants. They are all violations of investor protection legislation. The complaint does not allege that any of the Defendants is insolvent. The relief sought includes:

> "The appointment of a temporary receiver for Defendants, for the benefit of investors, to marshal, conserve, protect, and hold funds and assets obtained by the Defendants and their agents, co-conspirators, and others involved in this scheme, wherever such assets may be found, or with the approval of the Court dispose of any wasting asset in accordance with the application and proposed Order provided herewith."

74. The order itself recites that it is made because:

> "It … is both necessary and appropriate in order to prevent waste and dissipation of the assets of Defendants to the detriment of the investors"

75. Paragraph 1 of the order asserts that the Court itself takes possession of the Defendants' assets, wherever located. Paragraph 2 appoints the Receiver "with the full powers of an equity receiver under common law as well as such powers as are enumerated herein as of the date of this Order". Paragraph 4 directs the Receiver to take control and possession of the Receivership Estate. Paragraph 5 gives him specified duties. These include:

i) Maintain full control of the Receivership Estate;

ii) Collect, marshal and take custody possession and control of assets of the Receivership Estate or traceable to assets of the Receivership Estate, wherever situated;

iii) Institute proceedings to impose a constructive trust obtain possession or recover judgment against persons who received assets traceable to the Receivership Estate;

iv) Obtain documents and testimony (if necessary by compulsion) to identify assets, liabilities and causes of action of the Receivership Estate;

v) Enter and secure any premises in order to take possession custody or control of assets of the Receivership Estate;

vi) Make ordinary and necessary payments distributions and disbursements "for the marshalling, maintenance or preservation" of the Receivership Estate;

vii) Contract and negotiate with any claimant against the Receivership Estate "(including, without limitation, creditors)" for the purpose of compromising or settling any claim;

viii) Perform all acts necessary to hold manage and preserve the value of the Receivership Estate in order to prevent any irreparable loss damage and injury to the Estate;

ix) Enter into agreements in connection with the administration of the Receivership Estate;

x) Institute or take part in proceedings to preserve the value of the Receivership Estate or to carry out the Receiver's mandate under the order;

xi) Preserve the value of the Receivership Estate and minimize expenses "in furtherance of maximum and timely disbursement thereof to claimants".

76. Paragraph 6 of the order gave the Receiver sole and exclusive power to manage the Defendants' business and financial affairs, including the sole power to petition for bankruptcy under the US Bankruptcy Code. However, before doing so, he was required to give two days' notice to the Defendants and to the SEC.

77. Paragraph 9 of the order enjoined creditors and all other persons from the following actions "except in this court":

i) Proceedings arising from "the subject of this civil action";

ii) The enforcement of any judgment obtained before the commencement "of this proceeding".

78. Paragraph 10 enjoined creditors and all other persons, without prior approval of the court, from any act to obtain possession of the Receivership Estate assets, enforcing any lien against the Receivership Estate; any act to collect assess or recover a claim

against the Receiver that would attach to the Receivership Estate; the set off of any debt owed by the Receivership Estate based on any claim against the Receivership Estate and from petitioning for bankruptcy under the US Bankruptcy Code or from applying for recognition of a foreign proceeding.

79. Mr Joseph submitted that, under the terms of the order, the Receiver is not charged with responsibility of advertising, ascertaining and representing the total body of creditors so that the collected assets will be distributed *pari passu* to that body of creditors, let alone exclusively through his offices. Rather the function of the Receiver in this case was to provide ancillary and interim protection *for the investors* pending the determination of their claims for compensation, as brought to court by the SEC. This is made clear by the recited purpose of the order, viz. to prevent waste and dissipation of assets of the defendants "to the detriment of the investors". It is also reflected in the specific duties imposed on the Receiver, the main thrust of which is to identify and preserve the assets of the Receivership Estate. Under paragraph 7(a) of the Order, there is a limited restraint on creditors commencing proceedings against the Defendants. There are two relevant limitations. First, the restraint precludes proceedings being commenced "except in this court". Thus the order expressly permits proceedings to be begun in the District Court for the Northern District of Texas. Second, the restraint is limited to proceedings "arising from the subject matter of the civil action". The civil action seeks compensation for investors; not for any other creditors. This emphasises that the Receiver is not acting in the collective sense for and on behalf of all creditors. Those who are owed money independently by the Defendant companies (such as severed employees or general trade creditors) can and indeed are left to their own devices to establish their claims and rights against the Defendants. A truly collective proceeding would have stayed all claims.

80. Mr Isaacs submitted that the order requires the Receiver to obtain information to identify the liabilities of the Receivership Estate; authorises him to make distributions and also authorises him to contract and negotiate with any claimant (including, without limitation, creditors) for the purpose of settling and compromising claims. The order also authorised the Receiver to preserve the estate in furtherance of "maximum and timely disbursement thereof to creditors". These elements of the order showed that the proceeding was a collective proceeding. The Receiver's appointment was made at the instigation of the SEC, which is not a creditor of any of the Defendants, but which protects the public interest and thus all creditors. Mr Isaacs also relied on the second affidavit of Professor Westbrook who pointed out that the US Bankruptcy court had recognised a Canadian receivership as amounting to a foreign proceeding: *Re Innua Canada Ltd* 2009 WL 1025090. However the reason why the US court recognised the receiver in that case was that the Canadian court that had appointed him had declared that he was the foreign representative of a foreign proceeding and had specifically authorised him to seek recognition in the USA under Chapter 15. The US court was therefore entitled to apply and did apply the presumption in Article 16 1 of the Model Law. The Texas court in the present case did not make any such declaration. In oral argument Mr Isaacs said that although the Receiver was not expressly required or authorised by the order to deal with the proof and ascertainment of all creditors' claims, that is in fact what he was doing. In fact the Receiver's evidence is that he has processed claims by *investors*. He does not mention, for example, employees or trade creditors.

81. Both Mr Joseph and Mr Zacaroli submitted that the Receiver was not appointed pursuant to a law relating to insolvency. He was appointed because the court has a general power to appoint receivers. The trigger for his appointment was not an allegation of insolvency against any of the Defendants. It was triggered by allegations of violations of investor protection legislation. The general body of law governing the appointment of receivers, and the powers and duties of receivers, cannot be described as a law relating to insolvency. Receivers are appointed for a variety of purposes, particularly to safeguard or preserve assets pending the trial of substantive claims, and that is what has happened in this case. The Liquidators' expert on US law, Mr Daniel Glosband, points out that there is no (or very little) statutory regulation of receivers; and that where receivers have been appointed over insolvent corporations as an alternative to bankruptcy (a practice that has been deprecated by some US courts) the appointment relies on "the *ad hoc* application of equitable principles" to those cases. If and when a distribution plan is approved by the court, it will be a plan approved pursuant to *ad hoc* principles of equity rather than under any law relating to insolvency. Professor Westbrook agrees that a common law receivership would not qualify as a foreign proceeding under the Model Law "unless it had a fully developed common law underpinning, but the United States law offers just such support in a number of cases in which distributions, almost always *pro rata*, have been made in such cases." In a later paragraph Professor Westbrook says that receivership cases "often" employ a *pro rata* rule. While Mr Zacaroli was inclined to accept that the common law could, in principle, amount to "a law" relating to insolvency, if for example an authoritative decision of the House of Lords had comprehensively set out the principles of distribution and priorities, Mr Joseph on the other hand submitted that "a law" meant a published code whether contained in primary or secondary legislation.

82. Mr Isaacs submitted that the "law" in question was not required to deal only with insolvency or even to address insolvency directly. As long as it could be applied to insolvency it would qualify. Nor did the law have to be a statutory code, as opposed to common law (or equitable) principles, as long as it set out rules for distribution and priorities. The US common law of receivers satisfied this criterion. He pointed out that in *Terry v Butterfield Bank (Guernsey) Ltd* (24 February 2006) the Royal Court of Guernsey had recognised a receiver appointed by the US courts (although since the court was concerned with recognition at common law rather than under the Model Law, this case was not helpful). He also pointed out that in *SEC v Credit Bancorp Ltd* 290 F 3d 80 the US Second Circuit court held that receiverships were "insolvency proceedings" for the purposes of the Uniform Commercial Code. However, as the judge in the District Court pointed out (*SEC v Credit Bancorp Ltd* 99 Civ 11395) that applies only if the receivership is instituted to liquidate or rehabilitate a person's entire estate, and that if a receiver did not have authority to do that then the receivership would not amount to insolvency proceedings for that purpose.

83. So far as the purpose of the receivership was concerned, both Mr Joseph and Mr Zacaroli submitted that it was to preserve the assets of the Receivership Estate. It was possible that in due course the Receiver might apply to the court to sanction a distribution plan but that would involve a further application to the court; and unless and until a plan is approved it will not be known what that distribution plan will be. If and when a distribution plan is approved it may be that at that stage the receivership can be said to be for the purpose of liquidating the Defendants' estates, but that time

has not yet been reached. One thing is clear and that is that the receivership is not a bankruptcy under the US Bankruptcy Code. Indeed the SEC is opposed to a bankruptcy and has recently defended a motion to allow other creditors to invoke the Bankruptcy Code. This led on to Mr Joseph's subsidiary point. Even if the receivership was a foreign proceeding, the Receiver was not a foreign representative because the order appointing him did not (yet) authorise him to liquidate or reorganise SIB.

84. As I have said, it seems to me that the Receiver's authority derives from the terms of the order. I do not, therefore, consider that it is profitable to discuss the sorts of powers which might be conferred on receivers generally. Thus I agree with Mr Joseph that the question is not whether an equitable receivership could generally or ever give rise to *pari passu* distribution. What matters, to my mind, is what powers and duties have been conferred or imposed on the Receiver by *this* order. I do not consider that the powers and duties conferred or imposed on the Receiver amount to a "foreign proceeding" for the purposes of the Cross Border Insolvency Regulations, largely for the reasons given by Mr Joseph and Mr Zacaroli. In short:

i) The recited purpose of the order was to prevent dissipation and waste, not to liquidate or reorganise the debtors' estates;

ii) The detriment that the court was concerned to prevent was detriment to *investors*;

iii) The underlying cause of action which led to the making of the order had nothing to do with insolvency and no allegation of insolvency featured in the SEC's complaint. Indeed there is no evidence that any of the personal Defendants (i.e. Sir Allen, Mr Davis or Ms Pendergest-Holt) is in fact insolvent, yet the appointment of the Receiver over their assets must have the same foundation as his appointment over the assets of the corporate Defendants;

iv) The powers conferred on and duties imposed on the Receiver were duties to gather in and preserve assets, not to liquidate or distribute them. (The order does not, at least on its face, confer any power on the Receiver to sell any of the Defendants' assets of which he might take possession);

v) In so far as the order mentions creditors who are not investors, they are mentioned only to allow claims to be compromised. The reference to distributions to creditors does not sanction actual distribution; it merely describes the reason why expenses are to be kept to a minimum;

vi) The order does not preclude claims from being made against the Defendants outside the receivership if either they do not relate to the underlying causes of action on which the SEC's application was based, or they are brought in the District Court for Northern Texas;

vii) Under the order the Receiver has no power to distribute assets of the Defendants. It would need a further application to the court to enable him to do so;

viii) The fact that some receiverships may be classified for some purposes as "insolvency proceedings" or be treated as acceptable alternatives to bankruptcy does not mean that this receivership satisfies the definition of foreign proceeding in the Cross-Border Insolvency Regulations 2006;

ix) The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership is not "a law relating to insolvency" since it applies in many different situations many (if not most) of which have nothing to do with insolvency; and many of the principles leave a good deal to discretion.

85. I do not say that any one of these factors is decisive, but cumulatively they lead to only one conclusion. I hold, therefore, that the receivership is not a "foreign proceeding". I would also hold that since the Receiver has not yet been authorised to administer the liquidation or reorganisation of SIB he is not yet a "foreign representative" as defined, even if the receivership is a "foreign proceeding". It follows that the receivership cannot be recognised under the Cross Border Insolvency Regulations 2006.

Is the Antiguan liquidation a foreign proceeding?

86. Mr Isaacs said that if the receivership was not a foreign proceeding, then nor was the Antiguan liquidation. It is common ground that the Antiguan liquidation is a collective proceeding, and that the Liquidators were appointed to liquidate the assets of SIB. But Mr Isaacs said that the Liquidators were not appointed pursuant to a law relating to insolvency. SIB was established under the International Business Corporations Act (Cap 222 of the Laws of Antigua and Barbuda). Part IV of the International Business Corporations Act is, generally speaking, a law relating to insolvency and I did not understand Mr Isaacs to dispute that. His point was that because the petition was founded on section 300 alone, in which insolvency does not feature as a ground, the Liquidators were not appointed pursuant to a law relating to insolvency.

87. The Liquidators were originally appointed as Receiver-Managers. In their report to the court in that capacity they stated that their investigations led them to conclude that SIB was insolvent and that it was not capable of being reorganised via the receivership. They therefore recommended that SIB should be placed into liquidation. A petition was therefore presented by the FSRC. Mr Paul Ashe and Mr Hamilton-Smith swore affidavits in support of the petition. Mr Ashe verified the petition. Paragraph 6 of the petition stated:

> "Information gleaned from the Bank's report to me and its Management accounts for the year ended December 31, 2008 led your Petitioner to conclude that the realisable value of the Bank's assets were or would shortly have become less than the aggregate of its liabilities."

88. The petition also stated (§ 13) that the petitioner was "wholly convinced that the Bank is insolvent". It concluded (§ 17) that:

> "In the premises it is just and equitable that the Bank be liquidated and dissolved."

89. The petition prayed for a winding up pursuant to section 300 of the International Business Corporations Act (Cap 222 of the Laws of Antigua and Barbuda).

90. Mr Hamilton-Smith's affidavit supported the petition. He repeated the Receiver-Managers' belief that SIB was insolvent.

91. Mr Isaacs' point is this. The section under which the FSRC prayed for a winding up order enables such an order to be made where the company in question has failed to comply with regulatory requirements. Insolvency is not a ground for winding up under that section. However, the order of Harris J made on the petition not only recites that the court was satisfied that the conditions set out in section 300 had been met, but also recites that the court had considered the evidence adduced in support of the petition and that the court:

> "... having determined that in the circumstances it is just and equitable that [SIB] be liquidated and dissolved under the supervision of this Court pursuant to the Act."

92. The formal order that the court made was that SIB be liquidated and dissolved under the supervision of the court "pursuant to the provisions of the International Business Corporations Act ...".

93. In his written judgment on the petition Harris J said (§ 61):

> "I am satisfied that the breach under s. 300 is made out and further to this considered the final question: having been satisfied that the grounds for winding up and dissolution have been made out, should the court grant the order sought. ... Both counsel directed the court to the obvious insolvency and international crisis arising from it. Further, Mr Nigel Hamilton-Smith ... testified to the effect that no other arrangement under the act nor would the re-organization of SIB serve a useful purpose."

94. It is, in my judgment, clear from the court's order and the judgment of Harris J that it was not basing the order on section 300 alone. It made the order because, having considered the evidence, it concluded that it was just and equitable that SIB be wound up. An important part of the evidence was that SIB was insolvent and could not be reorganised via the receivership. In my judgment at least one of the reasons why Harris J made the order that he did was that he was satisfied that SIB was insolvent.

95. I hold, therefore, that the Liquidators were appointed pursuant to a law relating to insolvency and that they are entitled to be recognised as foreign representatives of a foreign proceeding.

Main proceeding or non-main proceeding?

96. Whether the Liquidators are recognised as representatives of a main proceeding or a non-main proceeding depends on the COMI of SIB. It is only if the COMI is in Antigua that the Antiguan liquidation will be a main proceeding. I have already set out my understanding of the general principles that apply in determining the COMI of a corporation. I now apply those principles to the facts.

97. SIB's registered office was in Antigua. Thus it is presumed that its COMI was in Antigua. The onus is on the Receiver to rebut the presumption. SIB was not merely a "letterbox company". Its physical headquarters were in Antigua; almost all of its employees were located in Antigua; its contracts both with investors and financial advisers were governed by the laws of Antigua; and its marketing material gave prominence to its presence in Antigua. Cheques from depositors were sent to Antigua and although wire transfers were not, wire transfers were not made to banks in the USA. Private banking facilities were provided from Antigua. It was regulated by Antiguan regulators and its accounts were audited by Antiguan accountants. In short its public face was that of an Antiguan corporation. All these features reinforce rather than rebut the presumption.

98. On the basis that, as I have held, the presumption can only be rebutted by factors that are both objective and ascertainable by third parties, Mr Isaacs relied on the following:

i) The location of the principal movers of the fraud (Sir Allen, Mr Davis and Ms Pendergest-Holt) was in the USA. This fact (if it is a fact) is not one that was ascertainable by third parties.

ii) The location of most of the directors was in the USA and none was in Antigua. It is true that the nationality of the directors was set out in marketing material and was thus ascertainable by third parties. But I cannot see that the nationality of the directors has any significant bearing on the COMI of the company. Mr Isaacs said that most of the board meetings were held by telephone. That raises an interesting question: if a meeting takes place by telephone, in what state does it take place? But I do not think that I need to answer that question, because the manner in which board meetings took place would not have been ascertainable by third parties.

iii) The principal place of business of SIB was in the USA. What Mr Isaacs relies on under this head is the marketing of certificates of deposit by financial advisers; and the provision of services to SIB by other Stanford companies. However, I do not consider that an investor would have considered that a financial adviser was conducting SIB's business; and the disclosure statement made it clear to investors that marketing was not carried out by SIB. The paperwork for investments was processed in Antigua. When the certificates of deposit were issued they stated on their face that they had been executed in Antigua.

iv) The purchasers of certificates of deposit were all residents and citizens of countries other than Antigua. This is true. It may also have been ascertainable by third parties because SIB's marketing information said that they did

business with the world. But I do not see that this fact points in favour of any single state other than Antigua. The presumption cannot be rebutted by an attempt to demonstrate that Antigua was not the COMI of SIB unless it is also shown that SIB had a COMI in some other state. It is not possible for a corporation to have a world-wide COMI.

v) The investments were managed outside Antigua, mostly in the USA. This is true. To some extent this was ascertainable by third parties because SIB's marketing material puffed its association with other Stanford companies and revealed the existence of portfolio management teams, and its accounts revealed large payments to other Stanford companies as management fees. But I do not consider that management carried out by other companies under contractual arrangements with SIB changes SIB's COMI. It has chosen to manage its affairs by outsourcing some functions to others.

vi) The real management of SIB was carried out by employees in the USA. In so far as this point relies on what was happening behind the scenes, it relies on facts that would not have been ascertainable to third parties. In so far as it relies on the location of the financial advisers, I have already dealt with that. It was suggested that the marketing of SIB as part of the Sanford Group anchored it to the USA; but marketing material for the Stanford Group was always careful to refer to SIB's location in Antigua.

vii) The location of books and records relating to the primary business of investments was in the USA. Books and records relating to the investors themselves were kept in Antigua. The Liquidators have adequate records in Antigua to enable them to contact investors and deal with their claims. This point relates to records of investments. The primary records about investments were kept in the USA although investment summaries were regularly sent to Antigua. This may be true as far as it goes, but what it shows is that SIB's books and records were split between Antigua and the USA.

viii) SIB's assets were located outside Antigua and mostly in the USA. It is true that SIB's investment assets were located outside Antigua. But it is not true that they were mostly located in the USA. More assets are located in the UK and in Switzerland than in the USA. Since its business was the world-wide investment of funds, the location of the investments themselves is not significant as regards SIB's COMI.

99. In my judgment these features, even when taken together, are not sufficient to rebut the presumption in favour of Antigua as the COMI of SIB, reinforced as it is by other objective facts ascertainable to third parties. I hold, therefore, that Antigua was the COMI of SIB and that, in consequence, the Liquidators are entitled to recognition as foreign representatives of a foreign main proceeding.

Recognition at common law?

100. Mr Joseph submitted that if the Receiver failed in obtaining recognition under the Cross-Border Insolvency Regulations (as I have held he has) that was an end of the matter. The Regulations contain a complete code which leaves no room for the application of the common law. In my judgment this statement goes too far. The

Regulations themselves recognise expressly that they do not apply to a wide variety of corporations. There is a long list of exceptions in Article 1 2, running from water and sewerage undertakings, through building societies and credit institutions, to concessionaires of the Channel Tunnel. If corporations of this kind are expressly excluded from the ambit of the Regulations, it is difficult to see that Parliament intended that there should be no cross-border co-operation at all. In those circumstances the common law must remain in being. If (as I think) the common law remains in being as regards corporations that are expressly excluded from the ambit of the Regulations, it must surely also continue to exist as regards entities that fail to satisfy the definition of "foreign representative". In my judgment the Regulations supplement the common law; they do not extinguish it.

101. There is little authority on the circumstances in which the court will recognise the title of a receiver appointed by a foreign court to assets within this jurisdiction. In *Schemmer v Property Resources Ltd* [1975] Ch. 273 Goulding J refused to recognise a receiver appointed by a US court on the application of the SEC. He said (p. 287):

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

102. On the facts he held that there was no sufficient connection because:

i) The company in question was not made a defendant to the American proceedings, and there was no evidence that it has ever submitted to the federal jurisdiction;

ii) It was not incorporated in the United States of America or any of their states or territories;

iii) There was no evidence that the courts of the place of incorporation would themselves recognise the American decree as affecting English assets;

iv) There was no evidence that the company carried on business in the United States of America or that the seat of its central management and control has been located there.

103. However, Goulding J did not say that he would have recognised the receiver's title if one or more of those features had been established.

104. Mr Zacaroli accepted that the common law continued to exist as regards entities that fail to satisfy the definition of "foreign representative", but said that the common law was there to supplement the Regulations; not to trump them. If it is established (as here) that a liquidator has been properly appointed in the place of incorporation of a corporation, with the power and duty to collect assets on behalf of all creditors, then

barring exceptional circumstances, the liquidator should be left to get on with his job without outside interference from others. That would promote the general policy of universalism; namely that there should be one collective proceeding in which all creditors are entitled to participate, irrespective of where they are located: *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, § 16.

105. I accept this submission. In my judgment the Receiver should not be recognised in so far as his appointment deals with the assets of SIB.

106. So far as the other Stanford entities and the Sir Allen are concerned, the only argument that recognition should be refused was the argument that recognition at common law has not survived the Cross Border Insolvency Regulations. No one has argued that the Receiver should not be recognised at common law if, as I have held, that jurisdiction has survived the Cross Border Insolvency Regulations. I am satisfied that Sir Allen is a US citizen and that the District Court had jurisdiction to appoint a receiver over his assets. His connection with the USA is substantial and the Receiver ought to be recognised in this jurisdiction.

107. STCL has its registered office in Antigua. Unlike SIB, however, the bulk of its employees were located in the USA, and its business was carried on in the USA. Its brokerage accounts were maintained in the USA and in brokerage houses in Latin America. In those circumstances I consider that there was a sufficient connection between STCL and the USA to justify recognition of the Receiver in this jurisdiction. Other Stanford entities are incorporated in states of the USA, and in their case the substantial connection with the USA is plain.

Relief to be granted

108. The main contest under this head is which of the Receiver and the Liquidators should take control of SIB's assets within the jurisdiction and, if the Liquidators, whether they should be permitted to remit those assets (or any realisation of them) to Antigua. In view of the policy in favour of a single liquidation I consider that the Liquidators, who have been properly appointed as liquidators by the courts of SIB's place of incorporation, should take possession of SIB's assets within the jurisdiction and that they should be permitted to remit those assets (or any realisation of them) to Antigua.

109. The precise terms of the relief to be granted to the Liquidators; and the precise terms of the relief to be granted to the Receiver over the assets of the other Stanford entities and the personal Defendants will be a matter for discussion or argument when this judgment is handed down.