Neutral Citation Number: [2006] IEHC 193

THE HIGH COURT

[2006 No. 62 COS]

IN THE MATTER OF FLIGHTLEASE (IRELAND) LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2005
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 280 OF THE COMPANIES ACT 1963
PAUL McCANN AND STEPHEN AKRES, JOINT LIQUIDATORS

APPLICANTS

Judgment of Mr. Justice Clarke delivered 15th June, 2006.

1. Introduction

1.1 The applicants ("the joint liquidators of Flightlease") have sought a number of orders under s. 280 of the Companies Act 1963 which would have the effect of permitting them to distribute the assets of Flightlease (Ireland) Limited ("Flightlease") without reference to a claim submitted by Swissair Schweizerifche Luftverkehr-Aktiengesellschast in Nachlassliquidation ("Swissair") or alternatively an order which would have the effect of expediting any challenge to, or appeal from, the rejection by the joint liquidators of Flightlease of proof in respect of a claim of Swissair which rejection occurred on the 18th October, 2005.

1.2 The background to that application stems from the fact that most of the creditors of Flightlease (being all creditors to whom Flightlease acknowledges indebtedness through the joint liquidators) have entered into a wind-down agreement on 22nd December, 2003 for the purposes of providing for the orderly winding down of Flightlease and the distribution of the realised assets in accordance with the terms of that agreement. In the events that have happened the only outstanding potential claim in respect of Flightlease, not covered by the agreement, comes from Swissair, all other issues having being disposed off. Therefore all that remains standing in the way of the distribution of the assets of Flightlease in accordance with the terms of the wind-down agreement is the Swissair claim. It is in that context that the joint liquidators of Flightlease have sought the substantive orders to which I have referred.

1.3 Both Flightlease and Swissair are ultimately subsidiaries of SAirGroup. Swissair itself is in a form of debt restructuring liquidation in Switzerland. The liquidator of SAirGroup is also the liquidator of Swissair and an intermediary company in the chain of ownership of Flightlease viz Flightlease AG.

1.4 In the context of the liquidation of Swissair, an application is currently before the Swiss courts seeking the return of certain moneys paid by Swissair to Flightlease. Questions have arisen between the respective liquidators of Flightlease and of Swissair as to the recognition that would be afforded by the courts in this jurisdiction (including having regard to the fact that Flightlease is in liquidation) to any judgment that might be obtained by Swissair against Flightlease in the Swiss courts. An early resolution of that recognition question appeared to be in the interests of all parties. From the perspective of the joint liquidators of Flightlease an early decision has to be taken as to whether to participate in the proceedings currently before the Swiss courts. If it were to be clear that the courts in Ireland would not recognise the judgment of the Swiss court as being binding upon the joint liquidators of Flightlease, then it might well be appropriate for the joint liquidators to take the view that they should not participate in the Swiss proceedings. Furthermore, for reasons which will become clear in the course of the judgment, the very participation by the joint liquidators of Flightlease in the Swiss proceedings has the potential (on one view of the law) to confer a jurisdiction on the Swiss court which would be recognised by the courts in this jurisdiction and which would not otherwise arise.

1.5 Similarly from the perspective of the liquidator of Swissair, the pursuit of the claim in the Swiss courts as against Flightlease may well be perceived to be of little value unless it is clear that a successful resolution of those proceedings in favour of Swissair would be recognised in this jurisdiction so as to bind the joint liquidators of Flightlease to take account of the judgment and order of the Swiss court in the distribution of the assets of Flightlease.

1.6 Given that there was perceived to be a significant urgency (having regard to the stage which the relevant proceedings had reached in Switzerland) to the parties being in a position to deal with this matter on an informed basis, I accepted an application on behalf of the joint liquidators of Flightlease to the trial of a preliminary issue in the following terms:-

> "Whether, in the event that the order sought by Swissair Schweizerifche Luftverkehr-Aktiengesellschast in Nachlassliquidation (in debt restructuring liquidation) the "claimant" against Flightlease (Ireland) Limited (in voluntary liquidation) (the "company") in the Swiss proceedings was granted, that order would be enforceable in the State".

1.7 The parties agreed to a highly accelerated exchange of pleadings by way of points of claim and points of defence, so that the issues arising on those pleadings could be heard within a short number of days of the direction that a preliminary issue be tried. Both parties and their advisors are to be commended on the manner in which this matter has been dealt with.

2. The Issues

2.1 On foot of the exchange of those pleadings it became clear that the following individual issues arose:-

> (i) Whether the order sought would be excluded from enforcement under common law as arising from a proceeding in bankruptcy or insolvency. It was contended by the joint liquidators of Flightlease that such an exclusion arose and that, therefore, the order of the Swiss court would not, on that ground alone, be enforced in this jurisdiction.
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> (ii) In the event that the answer to (i) is no, a second question arose on the pleadings as to whether, under Irish rules of conflicts of laws, the order of the Swiss court would be recognised on the basis of a "real and substantial connection" test (as contended for by the liquidator of Swissair) rather than the narrower test summarised in Dicey (to which I will refer in due course).
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> (iii) In the light of the proper test different questions as to whether the test found to be appropriate was met on the facts of the case would also arise.
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> (iv) Arising from a rejoinder to the points of defence, which was filed on behalf of the joint liquidators of Flightlease, a further issue arose as to whether the order sought by Swissair in the Swiss proceedings would be unenforceable in the State having regard to the fact that there had been no appeal against the notice of rejection of the claimant's proof of debt in the liquidation under Irish proof of debt procedure.

2.2 The early trial of the preliminary issue was facilitated by the absence, at least for the purposes of the preliminary issue, of any dispute on the facts. Insofar as material to the issues to which I have to decide the following factual matters (including matters of Swiss law) were accepted by the parties for the purposes of the preliminary issue.

2.3 Under the federal statute on Swiss debt enforcement and bankruptcy a claim of the nature brought by Swissair against Flightlease in the Swiss proceedings can only arise where:-

> (i) the transaction in question was carried out during the period of five years prior to the granting of the debt restructuring moratorium;
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> (ii) the transaction was carried out with the intention of either putting certain creditors at a disadvantage or favouring certain creditors to the disadvantage of others; and
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> (iii) it was apparent to the other party that the transaction was carried out with the intention described at (ii) above.

2.4 For the purposes of assessing whether there was a real and substantial connection between Switzerland and the cause of action the subject matter of the Swiss proceedings (being the test contended for by Swissair) the following particularised facts were accepted:-

> A significant part of Flightlease's commercial decisions were made in Switzerland by Swiss members of the board of Flightlease, such as Lukas Kencht and Frank Schwabe. The offices at Balsberg (in Switzerland) thus constituted a fixed place of business of Flightlease and/or constituted a place from which the representatives of Flightlease carried on the business of Flightlease on a regular and ongoing basis.

2.5 In relation to an alleged presence on the part of Flightlease in Switzerland at the time of the commencement and service of the Swiss proceedings (which, as will be seen, is the relevant time for the purposes of the rule identified in Dicey to which I have referred above) the following facts were agreed:-

> In February 2002, shortly after a debt restructuring moratorium had been granted to several companies of the former Swissair Group, SAirlines (a wholly owned subsidiary of SAirGroup) sold its participation in the Volare Group. In the context of this sale the following two settlement agreements were concluded to settle debts which certain Companies of the Volare Group owed against several companies of the former Swissair Group:
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> > settlement agreement of 1 February 2002 between (1) SAirGroup, Flightlease, Mindpearl A.G., Swissair Swiss Air Transport Company Limited and (2) Air Europe S.p.A., Volare Airlines S.p.A. and Volare Group S.p.A.;
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> > settlement agreement of 1 February 2002 between (1) Atraxis Switzerland A.G. (now Atrib Switzerland in bankruptcy), SR Technics Switzerland, Swissport International A.G. and (2) Air Europe S.p.A., Volare Airlines S.p.A. and Volare Group S.p.A.

These settlement agreements were amended by an amendment agreement dated 15 November 2002 and further amended on 1 August 2003.

> Additionally SAirLines, Flightlease, Atrib Switzerland in bankruptcy, SR Technics Switzerland and Swissport International A.G. provided a specific mandate to SAirGroup by separate agreement of 12 November 2002 to act as their agent in the collection of monies from the Volare Companies and in the distribution of those monies to the parties concerned as further explained in the next paragraph. The mandate agreement of 12 November 2002 is governed by Swiss law. SAirgroup, being the parties' agent, has a presence in Switzerland.
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> The settlement agreements and amendments provide for periodic instalment payments in favour of Flightlease, Atraxis Switzerland in bankruptcy, SR Technics Switzerland, Swissport International A.G., Deutsche Bank AG, SAirLines and SAirGroup. These agreements further provide that all monies received from the Volare companies shall be paid to SAirGroup in a special bank account in Switzerland. The parties further authorised SAirGroup, as their agent and representative to undertake all necessary steps to collect the monies from the Volare Companies and distribute them to the parties in accordance with an agreed distribution schedule.
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> Regular (although often delayed) payments have been made to SAirGroup, as the parties' agent, in pursuance of the said agreements. The monies collected by SAirGroup have in turn been distributed by SAirGroup to the beneficiaries concerned, including Flightlease.
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> Some payments are still outstanding from the Volare Companies. SAirGroup, as the parties' agent and representative, is acting on behalf of the beneficiaries (including Flightlease) in the collection of these outstanding monies. The activities of SAirGroup in this regard include the enforcement of a bank guarantee and the submission of a proof of debt in the insolvency proceedings of the Volare Companies.

2.6 On the basis of those facts I now turn to the issues.

3. The First Issue

3.1 The joint liquidators of Flightlease place reliance on a passage from the 1927 edition of Dicey's Conflicts of Laws where the author states:-

> "An action *in personam* may be defined positively … as an action against a person with a view to enforce the doing by him of some particular thing e.g. the payment of damages for a breach of contract or for a tort; under this head comes (inter alia) every common-law action, whether on contract or tort, also every equitable proceeding, the objective of which is to compel the doing or not doing of a particular thing, as e.g. the specific performance of a contract …
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> It may be well, though hardly necessary, to add that an action *in personam* does not include any proceedings which are not in strictness and "action" at all, such as a proceeding for divorce, judicial separation, restitution of conjugal rights, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy …"

Paragraph 11-002 of the current (13th) Edition of Dicey and Morris contains a similar statement.

3.2 I have no doubt that the passage quoted represents the law in this jurisdiction. It is clear that a proceeding in bankruptcy is not, in itself, an action against an individual. Indeed the bankruptcy itself (whether individual or corporate) involves the collecting in of the assets of the insolvent individual or entity and their distribution in accordance with the appropriate rules. It is, of course, the case

that for the purposes of the orderly conclusion of any insolvency it may be necessary to determine the liabilities and entitlements of the insolvent person or entity as against third parties. In a corporate insolvency a liquidator may claim that the company is owed money by a third party. The third party may dispute such a liability. The question of the existence or otherwise of the liability may be determined, as a matter of procedure, within the insolvency or, in accordance with a permitted procedure in this jurisdiction, a court having authority over the insolvency may authorise separate proceedings to be commenced and, if appropriate, defended to resolve such issues. Similar disputes may arise between an insolvent individual and a third party as to the ownership of assets which, if owned by the individual, might be properly taken into account for the purposes of determining the entitlements of all creditors.

3.3 There can be little doubt that even if such claims by or against the insolvent person or entity are determined, as a matter of procedure, within the insolvency process, orders made as a result of such claims could not, by that fact alone, lose their status as judgments *in personam*. The fact that, in accordance with the procedural law of the relevant jurisdiction, a claim of an insolvent company to (for example) moneys owing, is determined within the insolvency proceedings rather than independent proceedings would not, in my view, affect the proper characterisation of any award made as being one *in personam* against the party from whom the moneys were claimed. It is the insolvency process itself, involving the gathering in of assets and their distribution in accordance with the appropriate insolvency law, that is the process which is not properly regarded as *in personam*. Determinations made, whether within or outside that process, concerning the entitlements or liabilities of the insolvent person or entity are not, in my view, properly characterised as being a proceeding in bankruptcy or insolvency in the sense in which that term is used in the above passage therefore Dicey.

3.4 It is in that context that the decision of this Court in *Dyer v. Dulan* (Unreported, High Court, Keane J., 10 June, 1993) must be considered. The order of a Massachusetts Court sought to be enforced, arose out of a personal insolvency and involved a determination, made under the provisions of s. 523 of the United States Federal Bankruptcy Code, and which followed from a finding of fraud or the like, to the effect that a pre-bankruptcy debt remained due notwithstanding the normal extinguishment of all liabilities on bankruptcy.

Keane J. found the relevant order enforceable on the basis of residence on the part of the debtor within Massachusetts at the time of the bankruptcy proceedings.

While the point raised in these proceedings does not appear to have been argued in Dyer, nonetheless is a case where an order against an individual made in the course of bankruptcy proceedings has been enforced in this jurisdiction under common law rules.

3.5 However while accepting that, in principle, some orders made in insolvency proceedings may be enforced counsel on behalf of the joint liquidators of Flightlease argued that the nature of the claim brought in the Swiss proceedings in this case is much more closely connected to the insolvency proceedings such as to bring it within the exclusion identified in Dicey. In that context it is said that the substance of the order enforced in Dyer was simply an order made to recover a debt. It is clear from the facts referred to above (para 2.3) that in order for Swissair to succeed it will be necessary for the Swiss court to be satisfied that the transaction in favour of Flightlease was carried out for the purposes of effecting what, in the analogous jurisdiction of the courts in Ireland in respect of liquidations, might be seen as similar to a fraudulent preference. The transaction must have occurred during the period of five years prior to the commencement of the insolvency proceedings. Thus it is said, correctly, that proceedings of the type contemplated can only arise where there is an insolvency and an insolvency process before the courts.

3.6 While that much is true it does not, it seems to me, at the end of the day, take away from the substance of the order which will be made, which is to the effect that on foot of the application of the relevant Swiss law, Flightlease will, if it is unsuccessful, be ordered to pay a liquidated sum of money back to Swissair. While some weight must be attached to the fact that the relevant proceedings could only have arisen in the event of an insolvency it seems to me that greater weight must be attached to the nature of the order to be made.

3.7 Similar orders could be made in this jurisdiction even in circumstances where there was no insolvency. For example moneys can be paid out by a solvent company which are paid *ultra vires* to a third party. Where that third party was aware that the company did not have the power to pay the moneys, same can be ordered to be repaid. Such an order would, in my view, be clearly an *in personam* order against the recipient. Therefore orders requiring persons to repay monies to a company can be *in personam*. It is the character of such an order that seems to me to be the principle factor in determining whether it can properly be described as *in personam*. Notwithstanding, therefore, the fact that the particular circumstances giving rise to the making of the order in the Swiss proceedings could only occur in the event of the company concerned being the subject of insolvency proceedings, I am nonetheless satisfied that any order which might be made should properly be characterised as an *in personam* order and its enforceability should, therefore, depend on the application of the appropriate rules for the recognition of *in personam* orders at common law.

4. Recognition in Common Law

4.1 As noted earlier there are two competing contentions as to the appropriate basis upon which the common law in this jurisdiction should recognise an *in personam* order of a foreign court. Flightlease argues that the traditional test as set out in Dicey (and in particular Rule 36) represents the current law in this jurisdiction. Swissair contends that the courts in this jurisdiction shall follow the lead of the Canadian courts and adopt a "real and substantial connection" test. There can be little doubt that, heretofore, it is likely that any person considering the matter would have had regard to Dicey. Many of the judgments of the courts in this jurisdiction in various areas connected with private international law have, over the years, placed reliance on Dicey and adopted its rules as representing the common law in this jurisdiction. It would, therefore, be a fair characterisation of the argument put forward on behalf of Swissair, to suggest that it amounts to a contention that there should be a relatively significant alteration to what have heretofore been regarded as the appropriate principles applicable to the recognition of foreign judgments *in personam*. For that reason it seems to me that it is appropriate to consider whether such an important question actually arises on the facts of this case before considering the merits or otherwise of the competing arguments as to the proper test.

4.2 So far as compliance with a "real and substantial connection" test is concerned I am satisfied that if same were to be found to be the correct test it would be met on the facts of this case.

4.3 The agreed facts referred to above (paragraph 2.4) make clear that Flightlease had, at the time of the transaction which gives rise to the claim before the Swiss courts, a fixed place of business in Switzerland from which representatives of Flightlease carried on its business on a regular and ongoing basis. The transaction involved a payment by another company within the same group which was also based in Switzerland. The issues in the case centre around the knowledge and intention of both the paying company and Flightlease as to the effects of the payments on the creditors of Swissair. In those circumstances there clearly is a real and substantial connection between the claim and Switzerland. If, therefore, the "real and substantial connection" test is found to be the proper test applicable it seems to me that I would necessarily have to find that an order of the Swiss court would be recognised in this jurisdiction under the common law *in personam* rules.

4.4 However if Dicey Rule 36 is applicable then it is clear that the relevant time for considering jurisdictional questions is the time of the commencement of the proceedings. By that time Flightlease was in liquidation. Its affairs were, therefore, in accordance with Irish law, conducted by the joint liquidators. The fact as set out above (paragraph 2.5) as occurring at or around the time when the proceedings were commenced seem all to relate simply to the making of payments in favour of various companies including Flightlease through a bank account in Switzerland. It seems to me clear that what was involved, so far as Flightlease was concerned, was simply a mechanical action on the part of an agent who had no decision making powers and who simply collected money already owing and paid it on in accordance with the relevant agreements referred to in that paragraph.

4.5 It seems clear on the authorities that such a state of affairs does not give rise to a presence in the jurisdiction of Switzerland at the relevant time sufficient for the purposes of conferring a jurisdiction on the Swiss courts in accordance with Dicey Rule 36. *Okira & Co. Ltd. v. Forsbarka Jernverks AIB* (1914) 1 K.B. 715 is authority for the proposition that to be present by an agent, the agent must do business for the principal and that in order to do so the agent concerned must make business decisions. From the lengthy list of criteria specified in *Adams v. Cape Industries Plc.* [1990] Ch. 433 it seems clear that the actual conduct of business by the agent at the relevant time is highly material. In this case no business was actually conducted at the relevant time other than by the joint liquidators who were not present in Switzerland.

4.6 Therefore it is clear that in the event that Dicey Rule 36 represents the common law in this jurisdiction, it would not be appropriate to afford recognition to any judgment in the Swiss proceedings against Flightlease.

4.7 It is therefore clear that the question of whether the common law rules in this jurisdiction for the enforcement of a judgment of the type sought by Swissair in the Swiss proceedings against Flightlease would afford recognition to such judgment depends upon the test to be applied. If it is the real and substantial connection test then recognition should be afforded. If the test remains that as set out in Dicey Rule 36 then recognition should not be afforded. It is, therefore, necessary to determine which is the appropriate test and I now turn to that issue.

5. The Test

5.1 In *Rainford v. Newell-Roberts* [1962] I.R. 95 Davitt P. adopted the views expressed in *Cheshire - Private International Law* (1945 edition) to the effect that jurisdiction to render a judgment actionable in Ireland exists only where either the defendant was present in Ireland at the time of the action or where the defendant has submitted to the jurisdiction. The passage from Chesire quoted with approval, corresponds to the grounds set out in Dicey's Rule 36. Sub-rules (ii) to (iv) of Rule 36 concern questions of when a party may be said to have submitted to the jurisdiction of the foreign court by bringing a claim or counterclaim, entering a voluntary appearance or contracted to submit to jurisdiction. No such issues arise in this case. Therefore insofar as relevant to the issue which I have to decide, Dicey Rule 36 boils down to a contention that an action *in personam* can, in the absence of submission to jurisdiction of the type to which I have referred, only be enforced as a foreign judgment where the judgment debtor was, at the time the proceedings were instituted, present in the country concerned.

5.2 Swissair draws attention to recent developments in the jurisprudence of the Canadian courts and in particular the decisions of the Supreme Court of Canada in *De Savoye v. Morguard Investments Limited* (1990) 3 SCR 1077 and *Salndahna v. Beals* (2003) 3 SCR 416.

5.3 In *De Savoye* the Supreme Court of Canada considered whether a judgment obtained by the respondents in Alberta could be enforced against the appellant in British Columbia. The case therefore, strictly speaking, concerned the analogous issue of the recognition by the courts of one province within a federal country of judgments obtained in another province. The Supreme Court of Canada placed some reliance on the decision of the House of Lords in *Indyka v. Indyka* (1969) 1 AC 33 where it was established that the English courts would recognise a divorce decree granted in a foreign country where there was a real and substantial connection between the petitioner for the divorce and the country exercising the jurisdiction. The jurisprudence in respect of the recognition of foreign divorces in the United Kingdom by means of a real and substantial connection test did not develop significantly by virtue of the fact that the issue was overtaken by statutory intervention.

5.4 The Supreme Court of Canada came to the conclusion that the traditional English common law test (which is the test set out at Dicey Rule 36) should no longer represent the common law of Canada.

5.5 The following passages from the judgment of La Forest J. seem to embody the rationale in taking that approach:-

> "the common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century. This principle reflects the fact, one of the basic tenets of intentional law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside jurisdiction. Great Britain, and specifically its courts, applied that doctrine more rigorously than other states; see *Libman v. The Queen,* which deals with the question in its criminal aspect. The English approach, we saw, was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces.
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> Modern states, however cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of this jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.
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> But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, may necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind."

Later La Forest J. continued:-

> "As Dickson J. in *Zingre v. The Queen*, citing Marshall C.J. in *The Schooner Exchange v. M'Faddon*, stated, 'common interest impels sovereigns to mutual intercourse' between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in 'Recognition of Foreign Adjudications: A Survey and A Suggested Approach' (1968), 81 Harvard Law Review 1601, at p. 1603: The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.'
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> Yntema (though speaking more specifically there about choice of law) caught the spirit in which private international law, or conflict of laws, should be approached when he stated: 'In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws'. As is evident from throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.
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> This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the word in the then state of travel and communications. The Symon case, supra, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. As well, there was an exaggerated concern about the quality of justice that might be mated out to British residents abroad; see Lord Reid in The Atlantic Star.
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> The world has changed since the above rules were developed in 19th century England. Modern means of travel and communication have made many of these 19th century concerns appear parochial. That business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
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> However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of injustice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice."

Finally, in relation to the case before the court La Forest J. said the following:-

> "I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a 'power theory' or a single situs for torts or contracts for the proper exercise of jurisdiction."

5.6 In substance the judgment in *Salndahna* simply made what was implicit in the judgment in *De Savoye* explicit, that is to say that the logic of the views of the court expressed in *De Savoye* necessarily require that the principle be extended to the recognition of foreign judgments and not merely to the recognition of the judgments of one province in the courts of another.

5.7 It is clear, therefore, that the courts in Canada have taken the view, for the reasons set out above, that the principles which evolved in the English courts, and are encapsulated in Dicey Rule 36, are outdated and require to be changed. On that basis the court adopted the test of "real and substantial connection", which the House of Lords had indicated as applicable in the case of matrimonial proceedings, as appropriate to the recognition of foreign judgments.

5.8 The real question which I have to decide is as to whether this court should follow suit.

5.9 Before addressing that question two points need to be noted. Firstly counsel were not able to refer to judgments from any other common law jurisdictions which suggested that common law courts generally have followed the Canadian lead. Indeed there has been some academic commentary which cautions against adopting that course. It would, therefore, not be correct to describe the area under consideration as one where there has been a broad acceptance in the common law world of a new direction. For the time being Canada appears to be an exception.

5.10 Secondly it is of some relevance to note that limited consideration was given to the real and substantial connection test by the Irish courts in *K.D. v. M.C.* [1985] I.R. 697. In that case an appellant in divorce recognition proceedings sought to urge upon the court the adoption of the "real and substantial connection" test (placing reliance on *Indyka*). However, as appears from the judgment, the point had not been raised in this court and the substantive decision of the Supreme Court was to the effect that it would not be appropriate, in all the circumstances, to embark upon a consideration of the applicability of the test – the matter not having been raised at first instance. It is fair to say, therefore, that no concluded view was expressed on the test. As in the Untied Kingdom, issues were overtaken by statutory intervention and the Irish courts do not appear to have ever reached a final view as to the appropriateness of adopting the real and substantial connection test as a matter of the common law recognition of foreign divorces.

5.11 However I find some assistance from the judgment of McCarthy J. at p. 705 where he says the following:-

> "The ground of appeal propounded, amended so as to substitute the name of the respondent in the decree of divorce granted in England for the petitioner, would involve, essentially, not a re-hearing of the petition, but a fresh and totally different hearing, seeking to establish facts showing a real and substantial connection between the parties to that divorce and the United Kingdom (the so called *Indyka* principle) and, as a preliminary to such further inquiry, persuade this court to declare, upon a theoretical set of facts, that decisions of both this court and the former Supreme Court were fundamentally wrong, notwithstanding that the law of this country and the actions of citizens of this country, based upon that law, have assumed it to be as so stated at least since 1957. In that context, public policy is not confined to the status of a child as here, but extends to the affairs of the community as a whole over the last decade (since *Gaffney v. Gaffney* [1975] I.R. 133 or over 28 years since *Mayo Perrott v. Mayo Perrott* [1958] I.R. 336). In my judgment, it would be utterly wrong to embark upon such an inquiry".

5.12 While it is clear from the above passage that McCarthy J. was concerned principally with setting out the reasons why it was not considered appropriate to enter into a consideration of the ground of appeal at all, there is nonetheless assistance to be had from the point made that persons will order their affairs based upon a view as to the law (based, where appropriate, on legal advice). Just as persons would have made decisions concerning marital status based on the then existing view as to the law in Ireland relating to the recognition of foreign divorces, so also would persons sued in foreign jurisdictions have made important decisions as to whether to participate in those proceedings on the basis of a view as to whether such judgments would be recognised in Ireland.

5.13 It seems to me that McCarthy J. was emphasising that a radical change in the common law had the potential, in some cases, to create significant effects (including retrospective effects) on many parties (and not just the parties before the court) and should not, therefore, be lightly engaged in. I fully agree with that view.

5.14 It is inherent in the common law that it will necessarily evolve to meet new circumstances and that, in the course of any such evolution, new principles may, in time, be developed to reflect the changing world in which the law has to operate. To that extent a gradually evolving common law system can, in certain circumstances, have advantages over a more rigid statutory regime where change can only occur after a full statutory process and may be too late to meet the needs of individual cases. The other side of the some coin is, however, that decisions as to the common law declare the law as it was at the time of the events giving rise to the proceedings in which the issue arises. A radical change in the common law has, therefore, the potential to have a retrospective effect which would not, in the ordinary way, arise in the event of a statutory amendment. It was the potential injustice of such an effect that McCarthy J. was referring to in the passage which I have quoted.

5.15 Subject to the overall limitation that the courts in this jurisdiction could not, in any event, engage in an alteration in the common law which amounted to legislation (an issue not raised by the parties in this case), the courts remain free to allow for the orderly evolution of common law principles. However the passage from McCarthy J. which I have quoted seems to me to be a reason for exercising significant caution where an over radical alteration in common law principles is suggested.

5.16 Having regard to that caution and to the fact that there does not, as yet, appear to be any real consensus in the common law world as to a need for a change in the direction identified by the Supreme Court of Canada, I have come to the view that the change that would be effected by accepting the argument of Swissair in this case would have the potential to do more harm than good. It would amount to a departure from the clear acceptance, as long ago as 1962, by the courts in this jurisdiction that the common law of Ireland was, in this area, as identified by the leading United Kingdom commentators.

5.17 In all the circumstances it seems to me that it would be inappropriate to engage in such a radical restructuring of the common law which could have the effect of adversely affecting, in a retrospective way, parties who had ordered their affairs (by for example not participating in foreign proceedings) on the basis of a reasonable understanding of what the law currently was.

5.18 In those circumstances I have come to the view that Dicey Rule 36 represents the common law in this jurisdiction for the recognition of foreign *in personam* judgments and, for the reasons set out above, I am satisfied that, on the basis of the application of that test, recognition would not be afforded to any judgment obtained in the Swiss proceedings. I propose to so hold.

6. Question 4

6.1 In those circumstances it does not seem to me that the fourth question arises. As this, in turn, involves potentially important issues I do not think it appropriate for me to deal with that question in circumstances where it does not appear to me to arise. I fully accept the principle that it is desirable that all issues which have the potential to effect the orderly distribution of the assets of an insolvent person or entity should, where possible, be determined by the courts of one jurisdiction. The reasons in favour of such an approach are obvious.

6.2 However on the facts of this case the issue involves the orderly conduct of two separate liquidations (that is to say those of Swissair and Flightlease) which are properly in the course of being conducted in two separate jurisdictions. Precisely how such a matter should be resolved I would prefer to leave to a case where the resolution of the issue would be decisive on the facts.

6.3 In those circumstances I would propose answering the issue raised in the preliminary issue by indicating that recognition would not be given by the Irish courts to any judgment obtained against Flightlease in the Swiss proceedings.