Neutral Citation Number: [2012] IEHC 81

THE HIGH COURT

COMMERCIAL

[2010 No. 6631 P]

[2010 No. 239 COM]

BETWEEN

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) AND KENNETH KRYS

PLAINTIFFS

AND

CITCO BANK NEDERLAND NV, STICHTING SHELL PENSIOENFONDS AND ATLANTA BUSINESS INC.

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of February, 2012

1. This judgment is given following the full hearing of the plaintiffs' claim against the defendants in these proceedings. I have previously delivered a judgment, on 5th May, 2011, to challenges made by the second and third named defendants to the jurisdiction of this Court. For clarity of this judgment, I propose briefly repeating the background to the present proceedings in Ireland.

Background to Proceedings in Ireland

2. The first named plaintiff, Fairfield Sentry Limited (In Liquidation) ("Fairfield"), is a company incorporated in the British Virgin Islands to operate as an investment fund. Its stated objective was to achieve capital appreciation of assets which it sought to do primarily through investment with Bernard L. Madoff Investment Securities LLC ("BLMIS"). Approximately 95% of the assets of Fairfield were invested in BLMIS. On 21st July, 2009, Fairfield was ordered to be wound up by the High Court of Justice of the Eastern Caribbean Supreme Court pursuant to the insolvency laws of the British Virgin Islands. The second named plaintiff (the liquidator) was one of two joint liquidators appointed by the Court. Ms. Joanna Lau, subsequently replaced the original joint liquidator and had been joined as a third named plaintiff. On the first day of the hearing, the Court was informed that Ms. Lau is no longer acting as liquidator and an order was made removing her as a plaintiff herein.

3. The first named defendant, Citco, is a Dutch bank incorporated under the laws of the Netherlands, domiciled there, and with a branch in Ireland and registered under Part XI of the Companies Act 1963 (as amended).

4. Fairfield has since 2003 maintained a US$ denominated bank account at the Dublin branch of Citco ("the Dublin Account"). As of 8th June, 2010, the balance was US$71,522,957.00 and interest continues to accrue. In the replies to interrogatories, the sum in the account as of December 2011 was stated to be $71,606,330.

5. The second named defendant, Shell, is a pension fund foundation incorporated in and with registered offices in the Netherlands. Over the years, it bad invested significant monies with Fairfield, who in turn invested with BLMIS. Following the Madoff scandal, it sought to redeem its shares with Fairfield, but this was refused by the directors. In December 2008 and March 2010, Shell sought and obtained from the Dutch courts conservatory garnishment orders in relation to the monies deposited by Fairfield with Citco in the Dublin Account.

6. The third named defendant, Atlanta, is a Panamanian company. It also invested in Fairfield's fund and bas been unable to recover those funds from Fairfield. Atlanta applied for and was granted a conservatory garnishment order by the Dutch courts on 8th April, 2009, in respect of a sum ofUS$6,900,000.00 of the funds in the Dublin Account.

7. Following pre-trial correspondence between solicitors for the plaintiffs and Citco in this jurisdiction, to which reference will be made as necessary later, a plenary summons was issued for service on Citco in Ireland and on the same day applications made to the High Court (Peart J.) for leave to issue the same proceedings against Shell and Atlanta and the orders were granted. The proceedings were served on Citco in Ireland and an appearance entered in the ordinary way.

8. Subsequent to service on Shell and Atlanta, they brought applications seeking to challenge the orders of the High Court (Peart J.) of 12th July, 2011, and seeking to challenge the jurisdiction of this Court to hear and determine the proceedings. Those applications were dismissed for the reasons set out in the judgment delivered on 5th May, 2011.

Dispute in Proceedings

9. The central dispute between the plaintiffs and the defendants in the present proceedings is whether or not Citco holds the monies in the Dublin Account to the plaintiffs' order subject to the orders of conservatory garnishment issued by the Dutch courts at the request of Shell and Atlanta.

10. The declarations sought as the substantive relief in the proceedings at the date of the hearing may be summarised as follows:

> (i) Declarations that the decisions and orders of the High Court of Justice of the Eastern Caribbean Supreme Court dated 21st July, 2009, declaring that Fairfield be wound up and Mr. Krys appointed liquidator thereof be recognised and enforced in the State.
>
> (ii) A declaration that Citco holds to the order of Mr. Krys, as liquidator of Fairfield, the monies held in the Dublin Account.

(iii) Declarations that each of the orders of conservatory garnishment made by the Dutch courts at the request of Shell and Atlanta is not entitled to recognition in the State, whether pursuant to the provisions of Part III of Council Regulation No. 44/2001/EC or otherwise.

11. The nature of the reliefs sought at (ii) and (iii) is in part explained by the pre- trial correspondence. In a letter of21st June, 2010, Gallenalliance, solicitors for the plaintiffs in this jurisdiction, sought confirmation from Citco "that you hold the Fairfield monies to our clients' order". It did not receive the confirmation sought. Rather, by letter of 28th June, 2010, Whitney Moore, solicitors on behalf of Citco stated:

> "[Citco] holds the Fairfield Monies to your clients' order, subject to the attachments issued by the Dutch court at the request of [Shell and Atlanta] which remain in effect, as well as restrictions agreed to between your clients and the Madoff Trustee appointed by the United States Bankruptcy Court . . . which Trustee also asserted a claim to the Fairfield Monies."

The claim made by the Madoff Trustee and any arrangements in relation thereto is not relevant to any issue in these proceedings.

12. In their reply of 28th June, 2010, Whitney Moore also sought to put in place arrangements whereby the solicitors for the plaintiffs would agree that following any declaration made by the Irish courts, Citco would have the opportunity of returning to the Dutch courts to seek the lifting of the orders of conservatory garnishment. Whilst that has not been expressly agreed, it has been accepted on behalf of the plaintiffs in these proceedings that the Dutch orders of conservatory garnishment are binding *in personam* on Citco by reason of its domicile in the Netherlands and the fact that the Dublin Account is held at a branch operated by Citco, the Dutch company. They have also indicated an intention to apply to the Dutch courts to lift the orders of conservatory garnishment. The plaintiffs dispute, however, that the conservatory garnishment orders apply to the Fairfield monies on deposit in the Dublin Account, or to put it another way, they dispute that Citco holds the monies in the Dublin Account to the order of the liquidator subject to the orders of conservatory garnishment. They do so primarily on the basis that the Dutch orders are not entitled to recognition in this jurisdiction.

13. Shell and Atlanta have made much in their submissions of the fact that the plaintiffs are not seeking, in these proceedings, an order for the payment to them by Citco of the Dublin monies. I will return to this.

14. Citco, from an early stage in the proceedings, has indicated to the Court that its position is essentially that of an interpleader. It delivered a defence on 27th June, 2011, in which, at para. 5, it admits that it considers itself constrained from paying to the joint liquidators of Fairfield the proceeds of the Dublin Account by reason of the Dutch orders of conservatory garnishment. It refers to the dispute between the plaintiffs and Shell and Atlanta as to the recognition and enforceability of the Dutch orders in Ireland and indicates that it wishes to interplead or adopt an analogous position.

15. The plaintiffs and Shell each delivered interrogatories on Citco through Mr. Michael Leers, its managing director, which were replied to by affidavits of Mr. Leers sworn on 25th November, 2011, and 1st December, 2011, respectively. Such affidavits were the only evidence presented on behalf of Citco and, whilst it was represented by counsel at the hearing, no substantive submissions were made on its behalf.

16. Citco, at all materials times, has indicated its willingness to abide by orders of the Irish High Court subject to the prior agreement with the plaintiffs to agree to a stay on any order of the Irish High Court pending the lifting of the Dutch orders unless the parties agree otherwise.

17. Each of Shell and Atlanta delivered defences to the substance of the plaintiffs' claims in relation to the Dublin Account. Each contends that the plaintiff's present entitlement to the monies in the Dublin Account is subject to the Dutch orders of conservatory garnishment. They also each raise other issues which relate to the plaintiffs' entitlement to the declarations sought.

18. Subsequent to the dismissal of the jurisdictional motions brought by Shell and Atlanta, the proceedings were prepared for trial in accordance with the normal Commercial List practice. Witness statements were exchanged and treated as evidence in chief at the hearing subject to limited additional direct evidence and cross-examination in certain instances. Two of the Dutch law experts, Mr. H.A. Stein, retained by the plaintiffs, and Dr. L.P. Broekveldt, retained by Shell, met and prepared a joint memorandum setting out the points of Dutch law on which they agree and disagree in relation to the orders of conservatory garnishment. This has been helpful, given the complexities of the issues in these proceedings.

19. In advance of the hearing, the parties prepared draft lists of issues to be determined. They were not in agreement on the necessary issues.

20. In this judgment, I propose considering the relevant issues in dispute in the following order:

(i) . Recognition and enforcement of the orders for winding up and appointment of liquidator.

(ii) The proper law and contractual terms applicable between Fairfield and Citco in relation to the operation of the Dublin Account.

(iii) Whether as the plaintiffs contend the Dutch orders of conservatory garnishment are not entitled to recognition in this jurisdiction.

(iv) The plaintiffs' entitlement to the declarations sought.

21. Within each of the above, there are sub-issues which require to be addressed.

Recognition of Winding Up Order

22. The plaintiffs submit that the Court has an inherent jurisdiction at common Law to recognise a non-EU liquidation and give assistance to a foreign liquidator. The defendants do not dispute the inherent jurisdiction at common law to recognise a foreign liquidation but submit that there are significant differences to the jurisdiction at common law to give assistance to a foreign liquidator as compared with a foreign trustee in bankruptcy.

23. In my judgment, it is correct that pursuant to common law in Ireland, the Court has an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU courts) for the winding up of companies and the appointment of liquidators. On the issue of

recognition, there does not appear to be any difference between the common law applicable in Ireland and England. Dunne J., in a judgment delivered on 13th December 2010, in the matter of *David K. Drumm, a bankrupt*, cited with approval from the judgment of the Privy Council delivered by Lord Hoffmann in *Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc. and Others* [2006] 3 W.L.R. 689 in which he referred to the "underdeveloped state of the common law" in relation to the recognition of foreign insolvencies. I agree with the view expressed by Dunne J. that such comment also has application in this jurisdiction as the paucity of judicial decisions in the 20th and 21st centuries on the topic demonstrates. Notwithstanding this, I am satisfied that, at common law, the inherent jurisdiction exists, deriving as it does from the underlying principle of universality of insolvency proceedings.

24. l am reinforced in the view which I have formed by the decisions in the High and Supreme Court in *Banco Ambrosiano v. Ansbacher & Co*. [1987] ILRM 669, relied upon by the plaintiffs. In that case, which predated Council Regulation (EC) No. 1346/2000 of29th May 2000 on insolvency proceedings, an application was brought in Ireland by an Italian company which was the subject of an Italian compulsory liquidation order and the three named individuals who had been appointed as "liquidating commissioners". No issue appears to have arisen during the Irish proceedings in the High or Supreme Courts as to the entitlement of the three liquidating commissioners to pursue with the company in liquidation the claim of the company in liquidation to funds in a bank account in Ireland and the implicit recognition given thereby to Italian liquidation and appointment of "liquidity commissioners".

25. I accept as correct the submission made by counsel for Shell that the common law requires a different approach in the exercise of inherent jurisdiction in relation to the giving of assistance to foreign personal insolvencies *i.e*. bankruptcies and corporate insolvencies. As pointed out by Lord Hoffmann in *Cambridge Gas*, "the underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out". There are differences principally arising from the differing effects of an order of adjudication of bankruptcy on the property of an individual and an order for the winding up on the property of the company. I would respectfully agree with the principle as explained by Lord Hoffmaim, when having identified differences between the approach of the English courts to assistance in the case of personal and corporate insolvency he stated at para. 20:

> "20 ... but the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England."

26. On the facts herein, such principle is given effect to by the recognition by the Irish courts of the entitlement of the liquidator to maintain on behalf of Fairfield the proceedings in this jurisdiction seeking declarations in relation to Fairfield's entitlement to the monies in the Dublin Account. In my judgment, the plaintiffs are entitled to declarations of recognition of the orders of the High Court of Justice of the Eastern Caribbean Supreme Court winding up Fairfield and the appointment of Mr. Krys as liquidator.

27. The plaintiffs have not pursued what I consider to be any application for the enforcement of the orders of the High Court of Justice of the Eastern Caribbean Supreme Court, save insofar as they permit the liquidator to maintain the proceedings in the name of Fairfield in this jurisdiction. That appears to me to be a matter of recognition rather than enforcement and therefore I do not propose making a declaration in relation to enforcement.

28. The final' respect in which the order for winding up or the fact of the BVI insolvency proceedings is relied upon relates to submissions made on behalf of the plaintiffs that the distribution of the property of a company in liquidation *pari passu* amongst its creditors forms part of the public policy of this jurisdiction. I will return to this at a later date.

The Dublin Account- Proper Law and Contractual Terms

29. The Dublin Account was opened following a restructuring by Citco of its activities in 2003. By letter of 17th July, 2003, Citco wrote to Fairfield and stated, *inter alia*:

> "Following a restructuring of our activities, we hereby inform you that the trading and custody activities regarding your account will be moved to our branch in Dublin, Ireland, as per September 1, 2003. As a consequence we will open a new bank account with our branch in Dublin, and this will be administered under no. 52.358105.001 (formerly 63.58.93.797); IBAN IE23 CITC 0000 0035 810 501. The General Conditions of Citco Bank Nederland N.Y. Dublin Branch will be applicable to the newly opened account."

Amongst the documents enclosed with the letter was an account opening form and signature card and Fairfield was requested to confirm its acceptance by signing and returning a copy of the letter, the account opening form and signature card. All of this was done. The account opening form in its operative part stated:

"The undersigned (hereinafter called "the customer") requests to open an account with Citco Bank Nederland N.Y., Dublin Branch (herei nafter called "the Bank") according to the General Conditions. A copy of these General Conditions may at all times be obtained from the Bank. The customer hereby declares his agreement to these General Conditions as well as any additions stipulated by the Bank."

30. The General Conditions at Article 1 provides:

> **"Article 1. Scope**
> All relations, including future ones, between Citco Bank Nederland N.Y.'s branch-office in Ireland (the "Bank"), which expression includes its successors and assigns) and the customer shall be subject to these General Conditions.
>
> The provisions of these General Conditions shall apply as far as any special conditions applying to specific services provided by the Bank do not otherwise provide."

31. On 17th July, 2003, Fairfield, Citco Bank Nederland N.Y. Dublin Branch and Citco Global Custody N.Y. also entered into a brokerage and custody agreement expressed to be effective as from 1st September, 2003. That agreement recites that Fairfield "has opened and currently maintains a Current Account No. 52.358105 with the Bank".

32. On 3rd July, 2006, Fairfield, Citco Bank Nederland N.Y. Dublin Branch and Citco Global Custody N.Y. ("the Depositary") entered into a "Custodian Agreement". That agreement is expressly stated to supersede and replace the Brokerage and Custody Agreement dated 17th July, 2003. The Custodian Agreement similarly recites that Fairfield "has opened and currently maintains a Current Account No. 52.358105 and may open and maintain further accounts in the future (the "Account") with [Citco]".

33. The Custodian Agreement provides at Articles 21 and 22:

"21 General Conditions

The General Conditions of the Custodian regulating the relationship between the Fund and the Custodian, as amended from time to time, shall apply correspondingly to the relationship between the Fund and the Custodian and Depositary insofar as they do not differ from the terms of this Agreement. The Fund acknowledges having received a copy of such General Conditions.

> **22 Governing Law and Jurisdiction**
> 22.1 This Agreement shall be governed by and construed in accordance with the laws of the Netherlands.
>
> 22.2 All parties agree that the courts of The Netherlands are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding arising out of or in connection with this Agreement may be brought in such courts. Any proceedings or claims brought by the Fund against the Custodian and/or Depositary and/or its affiliates, arising out of or related to this Agreement shall be brought exclusively in Amsterdam, The Netherlands.

This Agreement supersedes and replaces the Brokerage and Custody Agreement dated July 17, 2003 between parties and which shall hereafter be of no force and effect."

34. The General Conditions at Article 30 provide for a different governing law, namely, that of Ireland. It provides:

> **"Article 30. Laws of Ireland; disputes**
> The relations between the customer and the Bank shall be governed by the laws of Ireland. You are hereby submitted to the non-exclusive jurisdiction of the courts of Ireland. The customer irrevocably agrees that nothing herein shall preclude the right of the Bank to bring proceedings in any other court of competent jurisdiction as the Bank may elect and that legal proceedings in any one or more jurisdiction shall not prejudice legal proceedings in any other jurisdiction."

35. The first issue is whether the laws of Ireland or the laws of the Netherlands apply to the contractual and other terms between Fairfield and Citco in relation to the operation of the Dublin Account. This in turn appears to depend upon whether the General Conditions or the Custodian Agreement applies in relation to the operation by Citco of the Dublin Account.

36. Fairfield submits that the General Conditions apply to the operation of the Dublin Account by Citco and, accordingly, pursuant to Article 30 thereof, the relationship between Fairfield and Citco with regard to the operation of the Dublin Account is governed by the Jaws of Ireland. It submits that the operation of the Dublin Account does not form part of the services agreed to be provided by Citco for Fairfield pursuant to the Custodian Agreement and hence that the terms of the Custodian Agreement, including Article 22 thereof, do not apply to the operation of the Dublin Account. Further, that it follows that the Custodian Agreement does not exclude the application of the General Conditions to the operation of the Dublin Account pursuant to the second paragraph of Article 1 of the General Conditions.

37. Shell and Atlanta submit the contrary; that on a proper construction of the Custodian Agreement in accordance with the law of the Netherlands, the operation of the Dublin Account forms part of the services provided by Citco for Fairfield pursuant to that agreement. It follows, they submit, that pursuant to Article 22 thereof, the law of the Netherlands applies and, as this is a contrary provision to Article 30 of the General Conditions, it excludes the application of Article 30 pursuant to the provisions of Article 1 of the General Conditions and Article 21 of the Custodian Agreement.

38. Fairfield relies upon the evidence adduced from Citco through the replies to interrogatories by Mr. Leers to the effect that "the funds in the Dublin Account were/are not being held in custody". In response to different interrogatories, he used the present and past tense. Nothing turns on this. The funds remain in the account. Other responses were relied upon to a limited extent as referred to below.

39. Fairfield and Shell each adduced expert evidence of Dutch law in relation to the principles according to which the Custodian Agreement should be construed in accordance with Dutch law. Professor Wessels gave expert evidence at the request of Fairfield and Mr. Van Baren at the request of Shell. Both are highly qualified and, unsurprisingly, were in substantial agreement about the applicable main rule for contract interpretation. They differed in points of emphasis and in the appropriate resulting construction of the Custodian Agreement.

40. In my judgment, the General Conditions are the contractual terms which apply to the operation of the Dublin Account. Further, the operation of the Dublin Account is not governed by the Custodian Agreement. It follows that the proper law of the contract between Citco and Fairfield in relation to the operation of the Dublin Account is that of Ireland. The following is my reasoning for these conclusions.

41. In accordance with the letter of 17th July, 2003, Citco expressly informed and offered Fairfield that it would open a new bank account at its branch in Dublin and that the General Conditions would be applicable to the newly opened account. Fairfield accepted that offer by signing the letter and also requested the opening of the account by signing a form in which it expressly requested the opening of the account with Citco at the Dublin branch "according to the General Conditions".

42. It therefore appears to me that the starting point of any consideration of the applicable terms of the contract between Citco and Fairfield in relation to the Dublin Account must be the General Conditions according to which the parties expressly agreed to open the Dublin Account. In accordance with Article 1 of the General Conditions, they are to apply to all relations between Citco and Fairfield, including future ones, "as far as any special conditions applying to specific services provided by [Citco] do not otherwise provide".

43. On 17th July, 2003, the only specific services potentially provided by Citco to Fairfield to which the Court's attention has been drawn were those pursuant to the Brokerage and Custody Agreement of that date expressed to be effective as from 1st September, 2003. No reliance has been placed on that agreement in submission by Shell and Atlanta, and it was expressly replaced and superseded by the Custodian Agreement of 3rd July, 2006, upon which reliance is placed.

44. The Custodian Agreement is an agreement between Fairfield and Citco which sets out within the phraseology of Article 1 of the General Conditions "special conditions" which apply to "specific services provided by [Citco]". Accordingly, the resolution of the question as to whether the General Conditions continued to apply to the operation of the Dublin Account by Citco requires the determination of two separate questions:

(i) Does the operation of the Dublin Bank Account by Citco for Fairfield form part of the "specific services" provided by Citco pursuant to the Custodian Agreement; and

(ii) If it does so, do the terms of the Custodian Agreement exclude the continued applicability of one or more of the provisions of the General Conditions to the operation of the Dublin Account.

45. The Custodian Agreement is governed by and is to be construed in accordance with the laws of the Netherlands in accordance with clause 22.1 thereof. In determining each of the above questions of construction of the Custodian Agreement, this Court must do so in accordance with the laws of the Netherlands. Mr. Van Baren, at para. 5 of his witness statement, explained the main rule of contract interpretation under Dutch law. Professor Wessels expressed himself to be in substantive agreement with this explanation, though added certain nuances which it does not appear necessary to consider for present purposes. The explanation given by Mr. Van Baren is as follows:

> "Under Dutch Jaw the main rule for contract interpretation is that contractual provisions should be interpreted according to the meaning that both contracting parties in the given circumstances could reasonably attach to the provisions and to what they reasonably could expect the other party's understanding of those provisions to be (the so called Haviltex criterion).[1]
>
> In determining the reasonable understanding of the parties of a contract clause, the plain meaning, the structure of the contract, the drafting history (in particular the exchange of views in previous drafts and in e-mail exchange), the nature of the contract, the commercial context and purpose of the contract, commercial practices, the status of the contracting parties (commercial parties, expertise), the performance of the contract, and other points of view, may play a role. Consequently, it will be decisive what parties meant to agree and what they could reasonably expect at the time of entering into the agreement and whether such is confirmed by the subsequent performance under the agreement."

46. The Court did not have evidence available to it of all the matters which may play a role in the interpretation in accordance with the above criteria. Nevertheless, it does have the contract itself and some limited evidence of the commercial context. Professor Wessels and Mr. Van Baren were in agreement that a Dutch court would not place much emphasis on the Recitals to the agreement in construction of the agreement, save to regard it as setting out what was termed a "biography" which , I think, was intended to mean a history of the matters leading to the agreement. In the Custodian Agreement, Fairfield is referred to as "the Fund", Citco as "the Custodian" and third party, Citco Global Custody N.V. as "the Depositary

47. The services to be provided by Citco for Fairfield pursuant to the Custodian Agreement are initially set out in clause 2 which provides:

> **"2 Appointment of Custodian**
> 2.1 The Fund hereby appoints the Custodian as custodian of the Fund on the terms and subject to the conditions hereof, which appointment is hereby accepted by the Custodian.
>
> 2.2 The Custodian agrees to provide the services herein set out, subject to the provisions of this Agreement."

Clause 3 provides that the Securities that are to be held for the Fund are to be held by the Depositary.

48. The services to be provided by Citco are expanded upon in clause 6.1 which provides:

> "6.1 The Custodian shall be charged with the duties entailed by the administration of the Securities held by the Depositary for the benefit of the Fund and shall have and perform the following powers and duties and such other powers and duties as the parties shall from time to time agree.
>
> 6.1.1. to register the Securities, other than physically held bearer shares, in the name of the Depositary or any sub-custodian and to keep the Securities in the custody of the Custodian or procure that they are kept in the custody of any sub-custodian, provided however that, if instructed to do so by the Fund, the Custodian may deposit any of the Securities in a depositary or clearing system;
>
> 6.1.2 to deposit in the Account all moneys received from or for the account of the Fund;
>
> 6.1.3 when instructed to do so by the Fund and subject to the provisions of Clause 5.2, to make settlement of transactions undertaken by or for the account of the Fund, delivering or receiving the Securities or other assets of the Fund and making or receiving payments for the account of the Fund. The Custodian is not obliged to deliver securities or assets which cannot be covered by securities or assets which they hold for the Fund or to make any payments other than from the Account;
>
> 6.1.4 to collect and deposit in the Account all income and other payments in connection with the Securities;
>
> 6.1.5 unless instructed to do so, and in which manner, by the Fund, the Custodian and/or any sub-custodian shall not vote on or in respect of the Securities or deliver any executed form of proxy to vote thereon or in respect thereof;
>
> 6.1.6 to employ any legal, financial or other experts which the Custodian deems necessary to comply with their duties and obligations under this Agreement the reasonable costs of which will be reimbursed to the Custodian by the Fund, if reasonable and duly evidenced by appropriate documents;
>
> 6.1.7 when instructed to do so by or on behalf of the Fund, to remit money to banks or others for the account of the Fund and to pay or procure the payment of any invoices or other financial obligations of the Fund;
>
> 6.1.8 to deliver and surrender any bonds or other instruments as and when the same fall due for payment or repayment and to pay all calls and debit the accounts of the Fund accordingly and to effect all necessary or appropriate exchanges of bonds or other instruments;
>
> 6.1.9 to deliver to the Fund all forms of proxy and all notices of meetings and any other notices or announcements in connection with the Securities;

6.1.10 to execute ownership and other certificates and affidavits for all fiscal, tax and other purposes which may be required in connection with the collection of bond and note coupons and payments of dividends and interest and to pay from the Account(s) all required taxes in connection therewith;

6.1.11 to make applications and reports to the competent authorities under any applicable laws, treaties, agreements or conventions in order to secure any tax or other privileges and benefits to which the Fund is or may be entitled with respect to the payments of dividends and interest provided always that the responsibility of the Custodian and/or Depositary to do so will only be on the basis of advice received from experts in jurisdictions designated by or on behalf of the Fund and approved by the Custodian."

49. As appears, the powers and duties set out in clause 6.1 do not expressly include the operation by Citco of a bank account in the name of Fairfield at its Dublin branch or elsewhere. Mr. Van Baren, in his witness statement identifies that Citco, in its legal relationship with Fairfield, was providing two separate services, namely, custody services and bank account services. His evidence was that in accordance with Dutch law, the Custodian Agreement should be interpreted as providing that the bank account services are "ancillary to the custody services". As such, he considered that they did form part of the services governed by the Custodian Agreement. Professor Wessels disagreed with this interpretation as a matter of Dutch law.

50. In my judgment, Mr. Van Baren is correct in identifying on the facts herein that there are two services being provided by Citco, namely, custody services and bank account services. This view is consistent with the replies to interrogatories of Mr. Leers. Even if this Court, in accordance with Dutch interpretative principles, should have regard to Recital (C) so as to interpret the reference to "the Account" in clauses 6.1.2, 6.1.3 and 6.1.4 as referring to the Dublin Account, it does not appear to me, construing the Custodian Agreement in accordance with the Dutch interpretative principles, having regard to the plain meaning of the words, that the services to be provided by Citco as set out in clauses 2 and 6.1 , in particular, of the Custodian Agreement, include the operation and maintenance of a bank account for Fairfield. Clauses 6.1.2 and 6.1.4 place obligations on Citco to deposit into the Account monies which it may receive from or for the account of Fairfield or in connection with the Securities. This is an obligation imposed as part of the duties flowing from the administration of the Securities. Insofar as the Account is referred to in clause 6.1.3, it is only in a context of limiting any obligation which Citco may have to make payments at the direction of Fairfield. The general obligation to make payments or remit monies when instructed in clause 6.1.7 is, in my judgment, a matter distinct from and different to the operation by a bank of an account for a customer.

51. Seeking to apply the Dutch interpretative principles in accordance with the expert evidence adduced and to give to the Custodian Agreement the meaning that both contracting parties could reasonably attach and understand, my initial conclusion from the plain meaning of the words used is that the operation of a bank account by Citco at its Dublin branch for Fairfield does not form part of the services to be provided pursuant to the Custodian Agreement. Insofar as the Dutch interpretative principles would permit or require the Court to consider the subsequent performance by the parties under the agreement (as appears from the final sentence of para. 5 of Mr. Van Baren's witness statement set out above), it appears to me that the replies given by Mr. Leers to the interrogatories delivered by Shell and Atlanta confirm that Citco, in operating the Dublin Bank Account, does not consider it to be operated pursuant to the Custodian Agreement.

52. It follows from this conclusion that the operation of the Dublin Account by Citco for Fairfield does not form part of "specific services" provided by Citco pursuant to the Custodian Agreement within the meaning of Article 1 of the General Conditions and accordingly the terms of the Custodian Agreement do not apply. Hence, there is no need to consider the second issue identified above. All the provisions of the General Conditions continue to apply to the operation by Citco of the Dublin Account for Fairfield. Irish law applies to all their relations in relation to the Dublin Account (Article 30).

Place of Performance of Payment Obligation

53. Fairfield submits that the place at which Citco is obliged to pay the monies in the Dublin Account to Fairfield in accordance with Irish law is the place where the branch at which the account is held is located as decided in *Clare & Co. v. Dresdner Bank* [1915] 2 K.B. 576, and applied more recently in *Libyan Arab Foreign Bank v. Bankers Trust Company* [1989] 1 Q.B. 728. Related to that principle is the common law principle that the proper law of a banking contract which relates to an account is governed in the absence of agreement between the parties by the place at which the account is held. The decisions relied upon by Fairfield were considered in the context of a proper law issue by McKechnie J. in the High Court in *Walsh v. National Irish Bank* [2007] IEHC 325. At para. 26, he stated:

> "As a general rule the proper law of a banking contract, which relates to an account, is governed, in the absence of agreement between the parties, by the place where that account is held. See *X-A.G. v. A Bank* [1983] 2 All E.R. 464. This rule has its foundation on the bank's promise to repay and to do so at the branch where the account is kept. See *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110 and in particular the judgment of Atkin L.J. at p. 127 of the report ..."

54. On the facts herein, for the reasons already set out, Citco and Fairfield expressly agreed that the relationship between them in relation to the Dublin Account would be governed by Irish law. The express agreement is consistent with the above general common law rule.

55. In *Clare & Co. v. Dresdner Bank*, the plaintiff had an account at the Berlin branch of Dresdner Bank. That bank had branches in Berlin and London. The plaintiff sought payment from the London branch of the amount standing to the credit of its account at the Berlin branch. It was refused and brought the proceedings. Rowlatt J. in his judgment accepted that the relationship between banker and customer is that of debtor and creditor and distinguished the general rule that a debtor has to seek out his creditor in the case of a bank with several branches. His reasoning undoubtedly related to a banking system which is to some extent outdated with modem technology. Nevertheless, it appears that the conclusion to which he came continues to be applied. That is as stated at p. 578:

> "I come to the conclusion, therefore, that, although the question seems never to have been raised before, probably because such a thing has never been dreamt of, there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country."

56. In *Joachimson v. Swiss Bank Corporation*, referred to by McKechnie J. in *Walsh v. National Irish Bank*, Atkin L.J. analysed the obligation of a bank to a customer in relation to a current account as a matter of contract. Amongst the terms of the contract, he identified amongst the bank's obligations an undertaking to repay monies received and stated at p. 127:

> "The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours."

57. The terms, as stated by Atkin L.J. in *Joachimson v. Swiss Bank Corporation* have been subsequently identified as implied terms, see *Richardson v. Richardson* [1927] 1 P. 228,.Hill J. at pages 232 to 233. As stated therein, they apply "in the absence of special agreement".

58. In my judgment, in accordance with Irish law, it remains the position that a bank is contractually obliged to make payment at the place of the branch at which the account is held when demanded by the customer unless the contract between the bank and the customer provides otherwise. The General Conditions do not contain any term which otherwise provides. On the contrary, Article 8 expressly requires that "[o]rders, statements and communications from the customer to the Bank must be addressed separately to each of the branch-offices of the Bank for which these orders, statements and communications are intended unless the Bank has expressly designated another address". This provision appears to reinforce the relationship between the customer and the individual branch of the bank and consistent with an implied intention that the Bank's obligations to the customer be performed by the branch at its location. As analysed in great detail by Staughton J. in *Libyan Arab Foreign Bank v. Bankers Trust Company*, modern banking practice may mean that payment may be effected in many different ways by a bank. Notwithstanding the many different methods of payment analysed in that decision, Staughton J. decided that it did not detract from the right of the plaintiffs to make demand in London for payment in cash and the obligation on Bankers Trust Company to comply with that demand. Similarly, in relation to the Dublin Account and the General Conditions applicable thereto, if, in accordance with same or any implied terms or practice, Citco has in the past made or is willing to make payments by transfers to designated bank accounts, that does not preclude an implied term whereby Fairfield is entitled to demand payment of the balance on the account in Dublin, *inter alia*, in cash and Citco's obligation to make payment in Dublin, subject, to the General Conditions and in particular Article 13 thereof.

59. Article 13 of the General Conditions provides:

> "The Bank shall be entitled not to execute payment orders if the balance of the account does not allow such execution or if such execution is barred by an attachment of the customer's account or by other comparable circumstances."

As a matter of contract, Citco and Fairfield have agreed that Fairfield's entitlement to be paid the monies in the Dublin Account is subject *inter alia* to any attachment which bars or prevents Citco making payment of the monies to Fairfield. Fairfield submits that to be an attachment envisaged by Article 13, it must be an order which, in accordance with Irish law, prohibits Citco making payment of the monies to Fairfield. This requires, it submits, in the first instance, that it be an order of attachment recognisable in Irish law by the courts in Ireland.

60. In my judgment, applying Article 13 in accordance with Article 30 to the operation of the Dublin Account, it appears to follow that the orders of attachment envisaged by Article 13 must be ones which, in accordance with Irish law, bar or prevent the payment by Citco to Fairfield in Dublin of the monies in the Dublin Account. If, as already concluded, the relations between the parties are governed by Irish law, and Dublin is the place at which Citco is obliged to make payment of the monies then insofar as any order of attachment is not one made by an Irish court it must be an order recognisable in Ireland and operate to prevent payment by Citco to Fairfield in Dublin. Irish law, for this purpose, includes relevant EU Regulations which form part of national law. The plaintiffs contend that the Dutch orders of conservatory garnishment are not orders of attachment envisaged by Article 13 as they are not recognisable in Ireland.

Dutch Orders of Conservatory Attachment

61. The Court has had the benefit of evidence from two further Dutch lawyers, Mr.H.A. Stein, retained by the plaintiffs, and Dr. L.P. Broekveldt, retained by Shell in relation to the Dutch law relevant to the orders of conservatory garnishment at issue in these proceedings. They are, unsurprisingly, in agreement in relation to most matters. Insofar as they disagreed in their evidence, it primarily related to what each considered to be probable decisions by the Dutch courts on any future application to lift the existing orders of conservatory garnishment. The explanations given in evidence to the Court were much wider than those recorded in this judgment and have been helpful in the Court's understanding of the Dutch courts' jurisdiction to make the orders, the procedures followed and the nature of the orders. Similar orders are not available in this jurisdiction.

62. Under Dutch law, an application for conservatory garnishment is made *ex parte*. A party such as Shell may apply for an order of conservatory garnishment against a third party (Citco) which is resident in the Netherlands and owes a debt to the party against whom the applicant has a claim on the merits (Fairfield). Under the Dutch Civil Code, the jurisdiction of the Dutch courts to grant such an order exists where the third party, Citco, is resident within the jurisdiction of the relevant court. It is irrelevant for the purposes of the initial application that the debt due by the resident third party to the intended defendant of the claim on the merits (Fairfield) is located outside of the Netherlands, or that the Dutch courts do not otherwise have jurisdiction over the intended claim on the merits.

63. The initial order made by the Dutch courts appears to be an order granting leave to levy conservatory garnishment. The levying is then done by bailiffs who give notice of the order made by the court to the third party, Citco. Thereafter, Citco is obliged to furnish a statement in which it sets out the property held and debts due by it to the intended defendant. Citco included in each of its statements, in response to the three orders made on the applications of Shell and Atlanta, the monies standing to the credit of Fairfield in the Dublin Account. The orders of conservatory garnishment, (presumably once notified), prevent Citco from paying the debts due by it to Fairfield pending the determination of the claims on the merit by Shell and Atlanta against Fairfield.

64. There is no requirement that the proceedings on the merit be commenced prior to the application for the order of conservatory garnishment. The order granting leave to levy the conservatory garnishment requires that the claim on the merits to be commenced within a specified period of time. There was no evidence of a requirement under the Dutch Civil Code that Fairfield is given notice of the application or orders made for conservatory garnishment prior to same becoming legally effective to prevent Citco paying the monies in the Dublin Account to Fairfield.

65. As Fairfield is resident outside of the EU, pursuant to the Dutch Civil Code, the making of the orders of conservatory garnishment also gives to the Dutch courts jurisdiction to hear and determine Shell and Atlanta's claims on the merits against Fairfield. Absent the orders of conservatory garnishment, there is no evidence that the Dutch courts would have jurisdiction to entertain the claims now being pursued in the Netherlands against Fairfield.

66. In addition to the preventative nature of the orders of conservatory garnishment, they also have what has been described a "pre-booking" effect. If the claims on the merits brought by Shell and Atlanta against Fairfield result in either or both obtaining judgments against Fairfield, then it appears to follow that the successful party or parties are entitled to execute the judgments obtained against the Dublin Account and other funds, if any, which have been subject to conservatory garnishment. All persons who obtain orders of conservatory garnishment and who succeed in obtaining judgments in the proceedings relating to the claim on the merits are entitled to share in the property or funds which have been subject to the conservatory garnishment. The post-judgment execution against

the funds subject to the orders of conservatory garnishment is again done through bailiffs in the Netherlands.

67. The Dutch experts are in agreement that Fairfield does not at any time participate in the proceedings before the Dutch courts in which the order of conservatory garnishment was made. The application was made by Shell or Atlanta without notice to any party.

68. Notwithstanding that Fairfield does not participate in the court proceedings in which the orders for conservatory garnishment are made, it is entitled in accordance with the Dutch Civil Code to institute separate summary proceedings seeking to have the order of conservatory garnishment lifted. Such an application may be made by Fairfield without submitting to the jurisdiction of the Dutch courts for the purposes of the claim on the merits. It also appears that such applications may be repeated more than once and that there is an appeal against a refusal of such an application. Fairfield, prior to the order for winding up, made one such application in respect of the December 2008 order. The primary basis of that application was the absence of any real claim by Shell against Fairfield. The application was rejected. No appeal was taken. It is agreed that Fairfield may make further applications to lift the orders of conservatory garnishment. It has indicated an intention to do so subsequent to the determination of these proceedings.

69. Both experts are in agreement that the existing orders of conservatory garnishment were in accordance with Dutch law effective as they state in their Joint Memorandum *"in principle"*, which they explain as meaning that the assets declared by Citco, including the Dublin Account, were actually seized. However, they are also in agreement that there is a two-stage procedure i.e. the initial conservatory garnishment which, subject to any order lifting same, may last until judgment on the merits claim is obtained and then a second execution phase after judgment has been obtained. In the Joint Memorandum prepared for the jurisdictional challenge and referred to at the full hearing, they point out that the fact that, as a matter of Dutch law, the monies in the Dublin Account are now actually seized by the conservatory garnishments "does not mean automatically that these assets will also have to be surrendered to Shell by [Citco] in the Netherlands based on the garnishments once these have moved to the enforcement phase (Art. 704, s. 1 in conjunction with Art. 722 Rv.)". This reservation is by reason of the fact that the debt due by Citco to Fairfield, which is the subject of the conservatory garnishment, is in respect of monies in the Dublin Account which is located outside of the Netherlands and the decision of the Dutch Supreme Court in *Lindeteves* H.R. 26th November, 1954, N.J. [1955] 698. That decision, as explained by the experts, related to a judgment which had been obtained by a wife against a husband in the Netherlands. Garnishment was therefore at the execution phase post-judgment. The husband was employed by Lindeteves N.V., which had its registered office in the Netherlands at its branch in Indonesia. As explained, the Supreme Court developed, in that decision, the doctrine of the risk of "paying twice" and its willingness to protect a garnishee against such risk.

70. Mr. Stein and Dr. Broekveldt, in their oral evidence, were in agreement that either Fairfield or Citco may apply to the Dutch courts to lift the orders of conservatory garnishment in reliance upon the principles established by the *Lindeteves* decision. In their Joint Memorandum, they set out three different scenarios which may apply on the facts herein. It is not necessary to refer to these in relation to the issues to be determined in this judgment. .

71. The *Lindeteves* decision of the Dutch Supreme Court related to execution post-judgment. Mr. Stein and Dr. Broekveldt have identified a clear distinction between the two phases, pre and post-judgment. In these proceedings, the justiciable dispute between the plaintiffs and Citco relates to Fairfield and its liquidator's current entitlement to the monies in the Dublin Account or to put another way Citco's current obligations to Fairfield and the liquidator. It is therefore only this Court's recognition at the present time of the orders of conservatory garnishment which is at issue. This Court is not now determining the recognition or non-recognition of orders of garnishment in the post judgment execution phase.

Regulation (EC) 44/2001

72. All parties are in agreement that the applications in the Netherlands for orders of conservatory garnishment and related proceedings are civil and commercial matters within the scope of Council Regulation (EC) 44/2001 of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Regulation"). The submissions made on behalf of Fairfield appear to raise an issue as to the Article of the Regulation under which the Dutch courts were exercising jurisdiction when making the orders of conservatory garnishment. Reference was made in part of the submissions to Article 31. It therefore appears necessary to set out my conclusion on the applicable jurisdictional provisions.

73. Insofar as the proceedings in which the order of conservatory garnishment were made may be considered as a proceeding in which Citco is being sued, then the Dutch courts were exercising jurisdiction pursuant to Article 2 of the Regulation as Citco is domiciled in the Netherlands. Insofar as the proceeding may also be considered as a proceeding against Fairfield, as the orders are contended to affect funds to which Fairfield would otherwise be entitled, then the Dutch courts are exercising jurisdiction pursuant to Article 4 of the Regulation. This provides:

> "1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State."

Articles 22 and 23 are not applicable.

74. In my judgment, the Dutch courts were not exercising jurisdiction pursuant to Article 31 of the Regulation in making the orders of conservatory garnishment. This provides:

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

Article 31 is in identical terms to Article 24 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters ("the Convention"). The ECJ determined that it is not necessary for a court hearing an application for provisional or protective measures to have recourse to Article 24 of the Convention where it has, in any event, jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention: Case C-99/96 *Mietz* [1999] ECR I-02277 (paragraph 40) and Case C-391 /95 *Van Uden Maritime B.V.* [1998] ECR 1-07091, paragraph 19. It is not in dispute that the same principle applies to Article 31 of the Regulation where a court is exercising jurisdiction pursuant to the analogous Articles of the Regulation. The Dutch courts were doing so in the proceedings in which the orders for conservatory garnishment were made for the reasons set out above. It is therefore not relevant in these proceedings to determine whether or not the orders for conservatory garnishment are provisional measures within the meaning of Article 31.

Recognition of Dutch Orders

75. Fairfield contends that the existing Dutch orders of conservatory garnishment are not entitled to recognition in Ireland pursuant to the Regulation for two distinct reasons:

(i) The orders are not a "judgment" within the meaning of Article 32 of the Regulation as they were granted *ex parte*; and

(ii) Even if they are to be considered a judgment within the meaning of Article 32, recognition of the orders would be "manifestly contrary to public policy" in Ireland within the meaning of Article 34(1) of the Regulation.

76. Prior to considering each of those objections, it is necessary to consider a preliminary submission made by Shell and Atlanta that the procedure provided for in the Regulation for recognition and enforcement constitutes "an autonomous and complete system, independent of the legal systems of the Contracting States" and that as it does not provide for applications for declarations of non-recognition, this Court has no jurisdiction to determine that issue in these proceedings. The submission to the effect that the procedures set out in Chapter III of the Regulation constitutes "an autonomous and complete system, independent of the legal systems of the Contracting States" is in accordance with the case Jaw of the Court of Justice on the Regulation: Case C-167/08 *Draka NK Cables Ltd*. [2009] ECR I-03477, paragraph 27, and Case C-148/84 *Deutsche Genossenschaftsbank* [1985] ECR-01981, paragraphs 16 and 17 and is correct. However, as part of that complete system, Article 33 provides:

> "1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
>
> 2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.
>
> 3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question."

77. In my judgment, the present proceedings fall within Article 33(3). I have had regard to the submission that Article 33(3) is intended to apply to a court of a Member State other than the Member State in which recognition is being sought. Such submission was made in reliance upon para. 43 of the Jenard Report in relation to the similar provision in Article 26 of the Convention. In my judgment, it is not so limited. If Fairfield had made a demand for payment on Citco which was refused and then brought proceedings in this jurisdiction seeking payments of the monies in the Dublin Account or judgment in that amount and Citco, in defending the proceedings, sought to rely upon Article 13 of the General Conditions and the Dutch orders of conservatory garnishment as preventing payment, there can be no doubt that the Irish High Court, for the purposes of determining whether or not Fairfield was entitled to judgment against Citco for the amount of the payment sought, would be entitled pursuant to Article 33(3) to determine the incidental question as to whether or not the Dutch orders for conservatory garnishment are entitled to recognition pursuant to Chapter III of the Regulation in this jurisdiction.

78. Whilst the plaintiffs have not sought payment, they have sought a declaration that Citco presently hold s the monies in the Dublin Account to the order of the liquidator. They dispute Citco's position that it holds the monies to the order of the liquidator subject to the Dutch orders of conservatory garnishment upon the grounds that such orders are not entitled to recognition in Ireland. The resolution of the dispute as to whether or not the plaintiffs are entitled on the grounds advanced to the declaration that Citco holds the monies in the Dublin Account to the order of the liquidator of Fairfield in the sense sought i.e. as meaning not subject to the orders of conservatory garnishment necessitates a determination of the issue as to whether or not those orders are currently entitled to recognition in this jurisdiction. This necessity is reinforced by my conclusion on the applicability of the General Conditions to the operation of the Dublin Account; the place of payment of monies if demanded, and the proper construction of Article 13 of the General Conditions. In such circumstances, it appears to be an incidental question of recognition within the meaning of Article 33(3) of the Regulation. Hence, this Court has jurisdiction to determine same.

Article 32 of the Regulation

79. Fairfield submits that in accordance with the decision of the ECJ in Case 125/79 *Denilauler* [1980] ECR-01553, the Dutch orders of conservatory garnishment being orders granted *ex parte* by the Dutch courts are not judgments within the meaning of Article 32 of the Regulation, and as such, are not entitled to recognition pursuant to Chapter III of the Regulation. Article 32 provides:

> "For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution as well as the determination of costs or expenses by an officer of the court."

Article 25 of the Brussels Convention was in identical terms to Article 32 of the Regulation and was the subject matter of the ECJ's consideration in *Denilauler.* Recital (19) of the Regulation requires continuity of interpretation of the Convention and similar provisions of the Regulation. The Court of Justice has endorsed this approach: Case C-167/08 *Draka N.K. Cables,* paragraph 20.

80. The facts giving rise to the reference for a preliminary ruling in *Denilauler* were the following. Couchet Freres brought proceedings in France claiming a sum of FF120,000 due from Mr. Denilauler. In the course of those proceedings and prior to judgment, the President of the Court made an order on 7th February, 1979, pursuant to the French Code of Civil Procedure authorising Couchet to have Denilauler's bank assets at a named bank in Frankfurt frozen as security for the sum of FF120,000 plus FF10,000 for interest and expenses. That order was made *ex parte* and expressed to be enforceable.

81. Couchet applied to the Landgericht Wiesbaden for a declaration that the French order was enforceable in Germany and for an order enabling it to attach the bank assets. The application was granted, a writ of execution issued and the attachment was effected. Denilauler appealed, and on appeal, the Oberlandesgericht made a reference for a preliminary ruling to the Court of Justice. Questions 1 and 2 related to the applicability of Articles 27(2), 46(2) and 47(1) of the Brussels Convention to the order of the French court made *ex parte* and characterised in the reference as a provisional and protective measure. The ECJ concluded that Articles 27(2), 46(2) and 47(1) of the Convention did not apply and then stated at para 10:

> "However, it cannot be inferred from the fact that Articles 27(2), 46(2) and 47(1) cannot apply to decisions of the type in question, save by distorting their substance and scope, that such decisions must nevertheless be recognized and enforced in the State addressed. It is necessary to consider whether judicial decisions of this type, having regard to the scheme and objects of the Convention, may be dealt with under the simplified procedure for recognition and enforcement provided by the Convention."

82. The principal argument in favour of inclusion appears to have been that Article 25 of the Convention (now Article 32) covers all decisions given by the courts of Contracting States without distinguishing between those involving adversary proceedings and those given *ex parte.* Other submissions were made in reliance upon Article 24 (now Article 31) and Article 24 (now Article 41).

83. The ECJ rejected those submissions, stating that, "these arguments cannot prevail over the scheme of the Convention and the principles underlying it". At para. 13, the court gave its reasoning on the primary submission:

> "All the provisions of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to recognition and enforcement. In the light of these considerations it is clear that the Convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject. in that State of origin and under various procedures, of an inquiry in adversary proceedings. It cannot therefore be deduced from the general scheme of the Convention that a formal expression of intention was needed in order to exclude judgments of the type in question from recognition and enforcement."

84. In further support of its conclusion, the ECJ analysed the function attributed under the general scheme of the Convention to Article 24 (now Article 31 of the Regulation). Article 24 provides:

> "Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the Jaw of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

That analysis was subsequently summarised by the ECJ at para. 33 of its judgment in Case C-261/90 *Reichert* [1992] ECR I-02149.

> "The Court also pointed out in the judgment in Case 125/79 *Denilauler v. Couchet Freres* [1980] ECR 1553, at paragraphs 15 and 16, that an analysis of the function attributed under the general scheme of the Convention to Article 24 leads to the conclusion that, where such types of measures are concerned, special rules were contemplated so as to take account of the particular care and detailed knowledge of the actual circumstances required by the granting of this type of measure as well as the determination of procedures and conditions intended to guarantee the provisional and protective character of such measures."

85. I am referring to the above as it forms part of the interpretative approach of the ECJ to the judgments which come within Article 32 of the Regulation. For the reasons set out, the Dutch courts were not exercising jurisdiction pursuant to Article 31 of the Regulation when making the orders for conservatory garnishment at issue herein.

86. The principles stated by the ECJ at para. 13 of its judgment in *Denilauler* have been repeated and applied again in two further decisions . In Case C-474/93 *Hengst Import B.V.* [1995] ECR I-02113, giving its decision on a reference on the interpretation of Article 27(2) of the Convention, the ECJ stated at paragraph 14:

> "It should be noted that the order at issue is undoubtedly a judgment capable of recognition and enforcement under Title III of the Convention since there could have been an *inter partes* hearing in the State where it was made before recognition and enforcement were sought in the Netherlands (see Case 125179 Denilaulerv Couchet Freres [1980] ECR 1553, paragraph 13)."

87. In that case, *Hengst* had obtained, ex parte, an order for payment against the defendant, Mrs. Campese, in Italy. In accordance with the Italian Civil Code, on service of the initial order, the defendant had a right to oppose the order within a prescribed period and if she did this, the ordinary *inter partes* civil procedure followed, in accordance with Article 645 of the Italian Civil Code, and converted the matter into ordinary contentious proceedings. It is in the context of those facts that the ECJ reached the above conclusion.

88. The final case is Case C-39/02 *Maersk Olie and Gas A/S* [2004] ECR I-09657. That decision was given in a preliminary ruling from the Supreme Court of Denmark arising out of an action for damages brought by Maersk against ship owners for damage caused by a trawler belonging to the ship owners to pipelines laid by Maersk. The action for damages in Denmark was lodged on 20th June, 1987. However, prior to that date, the ship owners made an application in the Netherlands to the District Court of the place at which their vessel was registered for limitation of their liability under Dutch law. The District Court made an order on 27'h May, 1987, provisionally fixing the amount of the limitation and enjoining the ship owners to lodge that sum and a sum for costs. Maersk appealed the Dutch District Court order on the basis it did not have jurisdiction. On 6th January, 1988, the Dutch Appeal Court upheld the order of the District Court. On 1st February, 1988, Maersk was formally notified of the decision of the District Court establishing the liability limitation fund and subsequently, in a letter of 25th April, 1988, the Court requested Maersk to submit its claim. It did not do so and the monies lodged were returned to the ship owners. Subsequently, the Danish court held, *inter alia* , that the rulings of the Dutch courts of 27th May, 1987, and 6th January, 1988, had to be treated as judgments within the meaning of Article 25 of the Brussels Convention.

89. The Danish Supreme Court, on appeal, referred four questions for a preliminary ruling, the second of which was:

> "Is an order to establish a liability limitation fund under the Netherlands procedural rules in force in 1986 a judgment within the meaning of Article 25 of the 1968 Brussels Convention?"

90. Maersk submitted that the order made on 27th May, 1987, cannot be a judgment within the meaning of Article 25 as it was made at the conclusion of non contested proceedings. The ECJ did not accept that objection and stated:

> "50 While it is true that, according to settled case-law, the Convention is concerned essentially with judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin, and under various procedures, of an inquiry in contested proceedings (Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13), it must be stated clearly that, even if it was taken at the conclusion of an initial phase of the proceedings in which both parties were not heard, the order of the Netherlands court could have been the subject of submissions by both parties before the issue of its recognition or its enforcement pursuant to the Convention came to be addressed (see also, along these lines, Case C-474/93 *Hengst Import* [1995] ECR 1-2113, paragraph 14).
>
> 51 It is thus evident from the case-file that such an order does not have any effect in Jaw prior to being notified to claimants, who may then assert their rights before the court which has made the order by challenging both the right of

> the debtor to benefit from a limitation of liability and the amount of that limitation. Claimants may, in addition, lodge an appeal against that order challenging the jurisdiction of the court which adopted it- as indeed happened in the main proceedings in the present case.
>
> 52 In the light of the foregoing, the answer to the second question must be that a decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of the Brussels Convention."

91. It appears to me that there may be two slightly different reasons given in paras. 50 and 51 respectively which may be of relevance to the application of the principles stated to the Dutch orders of conservatory garnishment at issue in these proceedings. Paragraph 50 suggests that the relevant test for an order which has been made initially *ex parte* is that such order could have been in the Netherlands "and under various procedures" the subject of an enquiry in contested proceedings before its recognition and enforcement is sought in a State other than the Netherlands. However, in para. 51, the court appears to also have had regard to the fact that the Dutch order did not have "any effect in law" prior to being notified to the claimants who could then assert their rights and challenge the right of the debtor to benefit from a limitation of liability and the amount of the limitation.

92. I now turn to apply those principles to the evidence in relation to the Dutch orders of conservatory garnishment at issue in these proceedings in the context of the relief sought by the plaintiffs herein.

93. On the evidence of Mr. Stein and Dr. Broekveldt, the Dutch orders of conservatory garnishment were made *ex parte*. There also exists, albeit in a separate proceeding in the Netherlands, a procedure whereby Fairfield, in a contested proceeding, may. apply to have such orders lifted. The third relevant aspect of the Dutch orders is that on the evidence, it appears that they did have legal effect prior to notification to Fairfield. The evidence does not make clear the precise point in time when Fairfield was notified of the making of the orders for conservatory garnishment, or when precisely Citco considered itself prevented as a matter of Dutch law from paying to Fairfield any part of the monies in the Dublin Account.

94. Counsel for Fairfield submitted that this Court, in considering the issue of recognition of the Dutch orders of conservatory garnishment, should consider their position the day after the *ex parte* orders were made. That submission does not appear to me correct in the context of the present proceedings.

95. For the reasons already explained, this Court is considering the issue of recognition or non-recognition of the Dutch orders of conservatory garnishment pursuant to Article 33(3) of the Regulation as a necessary "incidental question" to the determination of the plaintiffs' entitlement to the declaration sought that Citco holds the money in the Dublin Account to the order of the liquidator of Fairfield. The declaration sought relates to the current entitlement of Fairfield and its liquidator in accordance with the general principles relating to declaratory relief. The Court declares the entitlement of the plaintiffs at the date the declaration is granted unless the relief claimed expressly sought a declaration of rights as at some other date. This has not been done as there was no basis for same. It was only by a letter dated 21st June, 2010, that Citco was asked to confirm that it held the monies in the Dublin Account to the order of Fairfield and its liquidator. These proceedings do not relate to a demand for payment or confirmation of terms upon which the monies are held made on the day after the date or dates upon which the Dutch orders of conservatory garnishment were made, and a refusal by Citco to comply with such a demand for payment or give such confirmation. If those were the facts, there might be merit to the submission made on behalf of counsel for the liquidator.

96. Counsel for Shell and Atlanta have drawn attention to further limits of this Court's jurisdiction in accordance with Irish law where a declaratory judgment is the primary relief sought. The declaration sought, as already stated, relates to the present obligation of Citco in relation to the monies in the Dublin Account. These proceedings are not to enforce a demand for payment which has been refused. The courts will not normally determine an issue which is a moot; *TCPV (A Minor) v. The Courts Service* [2009] 4 I.R. 264.

97. Further, the Court will not grant relief by way of declaration in respect of future rights. In *Maguire v. South Eastern Health Board* [2001] 3 I.R. 26, Finnegan J. at p. 29 stated:

> "A considerable body of jurisprudence developed as to the circumstances in which the court would exercise its discretion in deciding whether or not to grant relief by way of declaration. Thus relief will not be given in respect of future rights as the respondent's obligation will vary at different dates and in different circumstances: *Attorney General v. Scott* [1905] 2 K.B. 160. Nor where a declaration will be of no practical value: *Bennett v. Chappell* [1966] Ch. 391."

98. To determine whether the plaintiffs are entitled to the declarations sought that Citco holds the monies in the Dublin Account to the order of the liquidator of Fairfield, this Court must determine on this issue whether the plaintiffs have established on the balance of probabilities that, at this moment in time, the Dutch orders of conservatory garnishment are not entitled to recognition in this jurisdiction as they are not judgments within the meaning of Article 32 of the Regulation. The Court of Justice in *Maersk* and in the earlier cases of *Hengst and Denilauler* considered questions referred to it by national courts in a context where recognition (and possibly enforcement) of the orders of a court of another Member State had been sought. Recognition has not been expressly sought in this jurisdiction. Applying the principles set out by the Court of Justice to the circumstances with which this Court is concerned, it appears to me that in accordance with para. 50 of the judgment in *Maersk*, the issue which this Court has to decide is whether at the date of the hearing herein, the Dutch orders of conservatory garnishment which were granted *ex parte* are judicial decisions which, before that date, "have been or have been capable of being the subject in [the Netherlands] and under various procedures of an enquiry in contested proceedings".

99. The plaintiffs laid some emphasis on the fact that any application to have the Dutch orders lifted must be made in a separate proceeding and does not form part of the proceeding in which the orders of conservatory garnishment were granted. The principles as stated by the ECJ do not appear to require that the adversary contest be in the same proceeding. The reference to "various procedures" and underlying principle of the protection of the right of defence prior to being entitled to seek recognition in accordance with the simplified procedure of the Regulation as explained in *Denilauler* appears to emphasis this. On the facts before me, the answer to above question must be yes. That being so, it appears to me that applying the principles set out in para. 50 of the *Maersk* judgment, the plaintiffs have failed to establish that at the date of the hearing herein, the Dutch orders of conservatory garnishment are not judgments within the meaning of Article 32 of the Regulation.

100. However, I recognise that the additional reasoning of the ECJ at para. 51 of *Maersk*, creates some uncertainty. The Dutch orders herein, as already pointed out, contrary to those at issue in Maersk, do appear to have had legal effect in the Netherlands prior to being notified to Fairfield.

101. The report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on

the Application of Council Regulation (EC) 44/2001 of 21st April, 2009 COM (2009 174 Final) also raised the issue at para. 3.6 where it stated:

> "Provisional measures remain an area where the diversity in the national procedural laws of the Member States makes the free circulation of such measures difficult.
>
> A first difficulty arises with respect to protective measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant. In Case C-125179 *(Denilauler),* the Court of Justice held that such *ex parte* measures fall outside the scope of the recognition and enforcement system of the Regulation. It is not entirely clear, however, whether such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently."

The above is, of course, an observation by the Commission and not binding on this Court. Nevertheless, in the light of the above, I have considered whether this Court should make a reference to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union prior to determining the plaintiffs' entitlement to the declarations sought herein. I have decided against exercising this Court's discretion to do so. The High Court, as a court of first instance is, of course, not bound to make the reference. My reasons for so deciding are as follows.

102. It is common case that this judgment will not finally determine all relevant issues between the parties as to their respective entitlements (if any) to the monies in the Dublin Account. It is intended that there be an application to the Dutch courts to lift the orders of conservatory garnishment. Having regard to the length of time required for a reference to the Court of Justice it appears undesirable to make a reference in a proceeding which will not finally determine issues between the parties even at first instance. Also this Court is constrained in this application to determining the present obligations of Citco and rights of Fairfield and its liquidator in relation to the monies in the Dublin Account. The only Dutch orders at issue in these proceedings are the Dutch orders of conservatory garnishment *i.e.* the orders made pre-judgment. From the explanations given by Mr. Stein and Dr. Broekveldt in relation to any future application to the Dutch court to lift the orders of conservatory garnishment and the application of the principles decided by the Dutch Supreme Court in the *Lindeteves* decision, it appears probable that it is not only the recognition in this jurisdiction of the present Dutch orders of conservatory garnishment which may be at issue, but also relevant may be issues concerning the recognition in this jurisdiction pursuant to the Regulation of orders of garnishment in the post judgment or execution phase and their application to the monies in the Dublin Account. Even if I am incorrect in that analysis and understanding, the issue which I now intend determining, without making a reference, is a question of EU law, namely, the proper construction of Article 32 of the Regulation. The Dutch courts are at least equally well placed as this Court to determine that question and possibly better placed by reason of their familiarity with the Dutch procedures at issue. Any party who disagrees with the conclusion reached by this Court on the issue of interpretation of Article 32 can seek to have it reconsidered by the Dutch courts in the anticipated application to lift the orders of conservatory garnishment. If the Dutch court takes the view that there remains an issue of interpretation of EU law which requires a preliminary ruling, then it can make a reference in a proceeding which is more likely to finally determine disputes between the parties than the present proceedings.

103. In my judgment, considering the ECJ case law from *Denilauer* to *Maersk* the primary requirement of the Court of Justice in relation to an order originally granted *ex parte* for inclusion in Article 32 is that prior to the point of time at which its recognition by a court of another Member State falls to be decided, such order must have been or have been capable of being the subject of challenge in contested proceedings in tl1e Member State of origin. The fact that prior to that date it may have had legal effects in the Member State of origin is not, in my judgment, in accordance with the purpose of the Regulation and principles set out by the ECJ in the case law referred to such as to preclude in the scheme of the Regulation such order being a judgment within the meaning of Article 32, provided it has been capable of being challenged in the Member State of origin prior to the point of time at which its recognition falls to be decided by the courts of the second Member State. On the evidence herein the Dutch orders of conservatory garnishment whilst granted *ex-parte* meet such criteria for inclusion in Article 32.

104. Accordingly, I have concluded that on the facts herein, the plaintiffs have failed to establish that the Dutch orders of conservatory garnishment are not entitled to be recognised in this jurisdiction upon the ground that they are not judgments within the meaning of Article 32 of the Regulation.

Article 34(1) - Public Policy

105. Article 34(1) of the Regulation provides that a judgment shall not be recognised "if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought".

106. The parties are in agreement as to the applicable principles. They are as set out by the Court of Justice in Case C-7/98 *Kombach v. Bamberski* [2000] ECR I- 01935 at paragraph 37 in relation to Article 27(1) of the Convention and repeated in Case C-420/07 *Apostolides v. Drams* [2009] ECR 1-03571, in the context of Article 34(1) at paragraph 59:

> "Recourse to the public-policy clause in Article 34(1) of Regulation No. 44/2001 can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (see *Krombach*, paragraph 37, and *Renault*, paragraph 30)."

107. The submission made on behalf of Fairfield and the liquidator is that the Dutch orders of conservatory garnishment operate to "pre-book" the monies in the Dublin Account for the benefit of Shell and Atlanta (and any other persons who bring a similar application in the Netherlands). The monies in the Dublin Account are the single largest asset in the winding up of Fairfield. Mr. William Hare, a member of the Bar of the Eastern Caribbean Supreme Court and a non-practising member of the Bar of England and Wales in his witness statement deposed to the *pari passu* principle being one of the key principles of BVI Insolvency law. He states that such insolvency law follows closely the principles of the law of England and Wales and exhibits s.207 of the BVI Insolvency Act which provides for the distribution of assets in a liquidation in a manner similar to this jurisdiction, *inter alia*, providing priority for costs and expenses, preferential claims and then all other claims admitted in the liquidation.

108. On the evidence, I am satisfied that Fairfield and the liquidator have established, as a matter of probability, that if Shell or Atlanta obtain judgment against Fairfield in their proceedings on the merits in the Netherlands and are able to execute that judgment against the monies in the Dublin Account by reason of the "pre booking" effect of the existing orders of conservatory garnishment that they would obtain for their benefit monies which may have been assets of Fairfield at the date of winding up other than in

accordance with s. 207 of the BVI Insolvency Act to which Mr. Hare has referred. I am ignoring, for the purposes of this part of the judgment, the fact that Shell obtained its first order of conservatory garnishment prior to the date of commencement of the winding up of Fairfield.

109. However, in accordance with the principles stated by the Court of Justice in relation to Article 34(1) of the Regulation, the infringement caused by recognition of the orders of conservatory garnishment in this jurisdiction must be of a fundamental principle of Irish law, or as alternatively put, must be such that it would constitute a manifest breach of a right recognised as being fundamental within the legal order of Ireland.

110. Whilst, Fairfield, in submission, refers to the fundamental principle of *pari passu* distribution amongst unsecured creditors on the insolvency of a company in this jurisdiction, it has adduced no authority for the proposition that such principle is a fundamental principle within the legal order of Ireland. Counsel for Shell and Atlanta submit that to be recognised as such, it must relate to a right which is protected at a constitutional level or by the European Convention on Human Rights as implemented in this jurisdiction. It is unnecessary for me to decide for the purposes of these proceedings whether a rule of law or fundamental principle to come within the public policy exemption in Article 34(1) must be so recognised or relate to a right so protected.

111. On the facts herein, to succeed in this defence, the plaintiffs would have to establish that it would be manifestly contrary to the public policy of Ireland to recognise a judgment which would permit a creditor of an insolvent BVI company being wound up in accordance with the laws of BVI, obtain a right to assets of the company other than *pari passu* with the other unsecured creditors. Earlier in this judgment I agreed with the statement by Lord Hoffman in *Cambridge Gas* that as a matter of common law the" principle of universality [of insolvency proceedings] is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in [Ireland]". As pointed out the common law is undeveloped in relation to any further assistance to be given to foreign liquidators. However, there does not appear to me any basis for the proposition that the protection of a right of unsecured creditors of a BVI company being wound up in accordance with the laws of the BVI to share *pari passu* in the distribution of the assets of the company (after statutory priorities) is a fundamental principle of Irish Law such that it forms part of Irish Public Policy for the purposes of Article 34(1) of the Regulation.

112. Hence, in my judgment, the plaintiffs contention that Article 34(1) precludes recognition of the orders of conservatory garnishment is not made out. It follows that the plaintiffs have failed to establish that the Dutch orders of conservatory garnishment are not now entitled to recognition in this jurisdiction.

113. Similarly, the plaintiffs fail in their contention that Citco holds to the order of Mr. Krys, as liquidator of Fairfield, the monies in the Dublin Account in the sense sought i.e. not being subject to the Dutch orders of conservatory garnishment upon the ground that such orders are not entitled to recognition in Ireland.

Relief
The plaintiffs are entitled to the declarations sought in relation to recognition of the order for the winding up of Fairfield and the appointment of Mr. Krys as liquidator.

The plaintiffs are not entitled to the declarations that each of the orders of conservatory garnishment are not entitled to recognition in the State pursuant to the Regulation.

It also appears that the plaintiffs are not entitled to the declaration sought that Citco holds the monies in the Dublin Account to the order of the liquidator having regard to the underlying dispute with Citco and their failure on the issue of non recognition of the orders of conservatory garnishment.

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1 Supreme Court 13 March 1981, NJ 1981, 635. The burden of proof is generally on the party alleging that the common understanding of the parties with regard to the meaning of the relevant contractual provision differs from its literal (grammatical) meaning.