Trinity Term
[2019] UKPC 37
Privy Council Appeal No 0033 of 2018

JUDGMENT

AWH Fund Ltd (In Compulsory Liquidation) (Respondent) *v* ZCM Asset Holding Company (Bermuda) Ltd (Appellant) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Reed
Lord Carnwath
Lord Briggs
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

29 July 2019

Heard on 4 February 2019

Appellant	*Respondent*
Brian Simms QC Ms Sophia Rolle-Kapousouzoglou (Instructed by Lennox Paton)	Miss Carolyn Walton Miss Travette Pyfrom (Instructed by Pyfrom Farrington Chambers)

LADY ARDEN:

Issues to be determined on this appeal

1. The appeal concerns the question whether there is a jurisdictional gateway available for the service out of the jurisdiction of the claims of the liquidator of the respondent ("AWH") in these proceedings and, if so, whether the claims satisfy the merits threshold for an order by the court for such service. The liquidator seeks orders that payments to the appellant, ZCM Asset Holding Company (Bermuda) Ltd ("ZCM"), be declared void as undue or fraudulent preferences pursuant to section 160 of the International Business Companies Act 2000 ("IBCA") of The Bahamas and that such payments be repaid to him. The Court of Appeal held in the liquidator's favour but ZCM now appeals their decision to the Board. For the reasons set out in this judgment, the Board concludes that it should humbly advise Her Majesty that this appeal should be dismissed.

2. ZCM is incorporated and resident in Bermuda. As part of its business it acts as a sub-custodian under custody agreements between Zurich Bank and various counterparties. One such counterparty was American Express Offshore Alternative Investment Fund ("AMEX"). In January 2002, AMEX transferred to ZCM as a sub-custodian a number of redeemable shares in AWH, an investment vehicle incorporated in The Bahamas on 26 June 1997 to deal in securities listed on the Asian markets.

3. AWH registered those shares in the name of ZCM "for the benefit of AMEX". AWH was entitled under Article 2.06 of its articles of association to recognise the registered holder of its shares as the sole owner and so it is not suggested that the words "for the benefit of AMEX" have any significance. Therefore, if AMEX wished to redeem any of its AWH shares, it had to request ZCM to give notice to AWH to redeem the shares in question. This ZCM did, on AMEX's behalf, in respect of all AMEX's shares in AWH in about April 2002. On 30 July 2002, AWH completed the process of redeeming AMEX's shares by paying the redemption monies, totalling US$13,148,013.01, to ZCM, out of the jurisdiction. The redemption monies were calculated on the basis of the net asset value of the shares as at 30 June 2002.

4. AWH was incorporated as a particular type of corporate vehicle, adopted to promote international business, namely an international business company ("IBC") formed under the IBCA. This has now been amended by the International Business Companies Act 2011 ("the 2011 Act"). The 2011 Act was not, however, in force when these proceedings were started. AWH is now in compulsory liquidation in The

Bahamas, commencing with the presentation of a winding up petition presented by a number of investors on 17 October 2002. The petition alleged that AWH was insolvent. A material averment in the petition was that AWH's corporate investment manager (and its chief executive officer) had been the subject of sanctions imposed by the Takeovers and Mergers Panel of the Securities and Futures Commission in Hong Kong (including a "cold shoulder order" against the chief executive officer restricting transactions by authorised dealers and others on his behalf) and so could no longer trade on the Hong Kong Stock Exchange. This had jeopardised AWH's investment business. Only a small proportion of the petitioners' redemption requests made in July 2002 had been met (by redemptions made in September 2002), which was less than the amounts paid to ZCM (see para 3 above). The sole director of AWH had proposed to investors that the assets of AWH should be liquidated and distributed among investors but the petitioners pressed for an order that AWH be wound up by the court. This order was in due course made.

5. The liquidator of AWH, Mr Alan Bates, has begun these proceedings in The Bahamas against ZCM to set aside the payment of the redemption monies to ZCM as an undue or fraudulent preference of ZCM for the purposes of section 160 of the IBCA by issuing a summons within the liquidation proceedings. (The liquidator had to amend his summons but not in a way material to this judgment.)

6. Section 160 provides:

> "(1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such traders, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and is invalid accordingly.
>
> (2) For the purposes of this section -
>
> (a) the presentation of a petition for winding up a company in the case of a company being wound up by the court or subject to the supervision of the court; and

> (b) a resolution for winding up the company, in the case of a voluntary winding up,
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> shall be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment made by any company formed under this Act of all or any part of its estate and effects to trustees for the benefit of all or any part of its creditors is void."

7. Section 160 by its terms incorporates section 72 of the Bankruptcy Act 1870 of The Bahamas, which provides in essence that transactions which an insolvent person who is made bankrupt within the ensuing three months carries out with a creditor with intent to prefer that creditor are void:

> "72. Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying or suffering the same becomes bankrupt, within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration."

8. Section 160 is similar to section 320 of the UK Companies Act 1948, which in like manner incorporated section 44 of the Bankruptcy Act 1914. That section was in force in England and Wales until it was replaced by section 239 of the Insolvency Act 1986 ("the IA86"), referred to below. A payment which is found to be a fraudulent preference is void against the recipient. In principle, it is the person who in law received the payment who has to repay it to the liquidator. The clear intention of the legislature is that the status quo ante the payment in issue should be restored.

9. Under the express words of both section 72 and section 44, the recipient of the payment may be a "creditor or any person in trust for any creditor." A "creditor" is the person who would, if the winding up had supervened immediately before the impugned payment took place, be entitled to prove in the liquidation.

10. In this case, the liquidator filed a short affidavit in support of his application for the court's permission to serve the proceedings out of the jurisdiction, in which he stated:

> "5. Approximately two months before the commencement of its liquidation, the company made a redemption payment ('the ZCM payment') in the amount of US$13,148,013.01 to one of its investors, namely ZCM Asset Holding Company (Bermuda) Ltd ('ZCM').
>
> 6. The Company is advised by its attorneys and verily believes that pursuant to section 160 of the International Business Companies Act 2000 the ZCM payment is deemed to have been an undue and/or fraudulent preference payment and is therefore invalid. As a result, the Company filed the summons in order to seek relief in respect of the ZCM payment."

11. On 27 June 2008, the Supreme Court of The Bahamas gave the liquidator leave to serve his amended summons on ZCM in Bermuda pursuant to Order 11 rule 8(4) of the Rules of the Supreme Court of The Bahamas ("the RSC"). (All subsequent references to Orders are to Orders of the RSC and will be abbreviated to "Ord".) The liquidator duly served this summons on ZCM on 30 September 2008.

12. Order 11 rule 8 confers jurisdiction to order the service of certain documents out of the jurisdiction. It provides:

> "8(1) Subject to paragraph 2 and Order 66, rule 4, service out of the jurisdiction of an originating summons is permissible with the leave of the court.
>
> (2) Where the proceedings begun by an originating summons might have been begun by writ, service out of the jurisdiction of the originating summons is permissible as aforesaid if, but only if, service of the writ, or notice of the writ, out of the jurisdiction would be permissible had the proceedings been begun by writ.
>
> (3) Where any proceedings are authorised by these Rules or (apart from these Rules) by or under any Act to be begun by originating motion or petition, service out of the jurisdiction of the

notice of motion or of the petition is permissible with the leave of the court.

(4) Subject to Order 66, rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the court.

(5) Rule 4(1), (2) and (3) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1 or 2 …"

13. ZCM wished to apply to set aside the order for service of the proceedings on it on the grounds of lack of jurisdiction and lack of a good arguable case on the merits. The Supreme Court of The Bahamas therefore gave ZCM leave to enter a conditional appearance. Its challenge was successful before the Supreme Court of The Bahamas (Bain J), but not in the Court of Appeal of The Bahamas. So, ZCM now appeals to the Board.

Discussion

(1) The jurisdictional gateway

(a) Summary of the available rules and the change of approach before the Board

14. Confusingly, there are three sets of rules in The Bahamas to consider in this case - the Bankruptcy Rules, the Companies (Winding up) Rules 1975 ("WUR") and the RSC - and the complete absence of a "custom-made" set of rules. At the material date, the legislature of The Bahamas had not made any rules specifically to govern the winding up of an IBC.

15. The Bankruptcy Rules are invoked because section 160 of the IBCA vitiates transactions in the winding up of an IBCA by reference to the law of bankruptcy. As the judge rightly pointed out, rule 2 of the Bankruptcy Rules of The Bahamas adopted the rules set out in the First Schedule to the Bankruptcy Act 1914 of England and Wales. Until 1962, there was no power in these rules to order bankruptcy proceedings to be served out of the jurisdiction in England and Wales, and thus the Bankruptcy Rules of The Bahamas did not assist the liquidator. In England and Wales, the position was, however, changed in 1986 following the Report of the Review Committee of the

Insolvency Law and Practice (1982) (Cmnd 8558) (known as "the Cork report"), when Rule 12.12 of the Insolvency Rules 1986 was adopted giving the courts power to order (among other matters) the service of process outside the jurisdiction.

16. The WUR also contain no provision giving the court power to order the service of proceedings out of the jurisdiction. However, the liquidator relied on WUR 101, a "gap filling provision" (see *Bahamas Commonwealth Bank Ltd (in liquidation) v Barclays International Ltd* 1985 BHS No 40, per Van Sertima J). This enables the RSC to be used where the WUR make no provision:

> "101 In all proceedings in or before the court, or any Judge, Registrar or Officer thereof, or over which the court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, be in accordance with the Rules and practice of the Supreme Court."

17. As noted in para 12 above, the RSC provide for the circumstances in which the court may give leave for service out of the jurisdiction of a writ, petition, originating summons, originating motion and a summons.

18. Both the Supreme Court and the Court of Appeal approached the case solely through the prism of the available procedural rules. Before the Board ZCM has emphasised the principle of extraterritoriality, as well as inviting the Board to accept grounds on which it lost below. The parties' arguments on both extraterritoriality and the available rules are next summarised and the Board's conclusions follow.

(b) Extraterritoriality:

(i) ZCM's main point: presumption against extraterritoriality applies

19. ZCM's most fundamental argument is that the well-established presumption against the extraterritorial effect of legislation applies to section 160 of the IBCA (set out in para 6 above). The presumption is so well known that it is unnecessary to cite authority in support of it. Mr Brian Simms QC, for ZCM, relies on the fact that the Bankruptcy Rules confer no power to serve out of the jurisdiction. He observes that Dillon LJ held in *In re Tucker* [1990] Ch 148, 157 that "eyebrows might be raised" at the assertion that the Bankruptcy Act had extraterritorial effect. Moreover section 72 of the Bankruptcy Act 1870 of The Bahamas (para 7 above) says nothing to indicate any

extraterritorial application. The position was originally the same in relation to the winding up of companies (*In re Anglo-African Steamship Co* (1886) 32 Ch D 348).

20. In insolvencies governed by the law of England and Wales, Rule 12.12 of the Insolvency Rules 1986 (since replaced) gave the court power to order service to be effected "at such place" as the court determined, and envisaged that service might be out of the jurisdiction. Even so, Sir Donald Nicholls V-C in *In re Paramount Airways Ltd* (in administration) [1993] Ch 223, 235-236 held that it would be extraordinary if section 238 of the IA86 applying in England and Wales (and conferring power for the court to adjust a pre-insolvency transaction at an undervalue) applied to any person in the world, and that it was, therefore, a matter for the court ordering service to consider whether there was sufficient connection with England and Wales to justify service out. In any event, insofar as an order for repayment of the redemption monies is sought, there would, on Mr Simms' submission, have to be some separate basis for jurisdiction to serve out, which does not exist in Ord 11 (see the provisional view of Sir Nicholas Browne-Wilkinson V-C in *In re Jogia* [1988] 1 WLR 484).

21. Mr Simms further submits that the expression "any creditor" in section 72 of the Bankruptcy Act 1870 means any creditor within the jurisdiction. There are some special cases where notices or process can be served out of the jurisdiction: see, for example, *In re Rathbone* (1887) BR 270 (notice of disclaimer of a lease by a trustee); *In re Jogia* (1962 amendment to the Bankruptcy Rules in the UK held to give jurisdiction to order service out) and *Rousou's Trustee v Rousou* [1955] 1 WLR 545 (leave given to serve a writ out of the jurisdiction to pursue a trustee's claim to repayment of monies wrongly paid out of the bankrupt's estate not on the basis of the Bankruptcy Act but on the basis of a claim in quasi-contract). However, in other cases, the courts have interpreted the Bankruptcy Act as not having extraterritorial effect: see, for example, *Galbraith v Grimshaw* [1910] AC 508 (the relation back principle applies only to property situated in England). So, on Mr Simms' submission, there is no reason why section 160 should have extraterritorial effect.

22. Mr Simms also relies on an absence of an express power to order service out as supporting his argument on the presumption against extraterritoriality. He contends that the deliberate policy of the legislature was that there should be no possibility of service out of the jurisdiction. Section 160 incorporated the Bankruptcy Rules, and they contained no provision for service out. The WUR applied, and they contained no provision for service out.

(ii) AWH: presumption against extraterritoriality displaced by context

23. Miss Carolyn Walton, for the respondent, submits that in the case of an IBC it would make no sense if there was no extraterritorial jurisdiction and the liquidator could not make claims against foreign creditors. The vehicle is intended to attract foreign investors.

24. Miss Walton submits that the foreign creditor who has been fraudulently preferred is clearly within section 160. Further, Ord 11 is the correct route. The creditor cannot reap the benefits of the IBC without being subject to its law. There was, therefore, sufficient connection between ZCM and The Bahamas.

25. Miss Walton submits that it is settled law that insolvency provisions can have extraterritorial effect: see, for example, *Paramount Airways* (section 238 of the IA86).

(c) Available rules empowering the court to give leave for service out of the jurisdiction

(i) ZCM's case: the various procedural rules do not provide a gateway in this case

26. Mr Simms submits that the liquidator cannot have recourse to the RSC because Ord 1 rule 2(2) provides that the RSC shall not have effect in relation to bankruptcy or winding up. Rule 2 provides:

> "2(1) Subject to the following provisions of this rule, these Rules shall have effect in relation to all proceedings in the Supreme Court.
>
> (2) These Rules shall not have effect in relation to proceedings of the kinds specified in the first column of the following Table (being proceedings in respect of which rules may be made under enactments specified in the second column of that Table)

TABLE

Proceedings	Enactments
Bankruptcy proceedings	Bankruptcy Act, section 102
Proceedings relating to the winding up of companies	Companies Act, Part VII"

27. If the liquidator could successfully invoke the RSC, Mr Simms submits that Ord 11 rule 8(4) cannot be used to permit service out of the jurisdiction of a summons unless leave would have been granted in the same circumstances for service of a writ: *In re Aktiebolaget Robertsfors and La Société Anonyme Des Papeteries de L'AA* [1910] 2 KB 727 approved in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90 at [32] per Lord Mance. Mr Simms submits that there is no good reason to serve a winding up petition under the IBCA out of the jurisdiction since an IBC must have a registered office in The Bahamas, and the Court of Appeal erred in holding that it could be served out of the jurisdiction. The secondary claim for payment would need to fall under Ord 11 as well.

28. Further, submits Mr Simms, the question whether service out of the jurisdiction should be set aside had to be judged on the basis of the material before the court when the order for service out was made. It is not open to the liquidator to come back and choose another basis (*Parker v Schuller* (1901) 17 TLR 299).

29. Moreover, the liquidator should have used some form of originating process to bring these proceedings which will inevitably involve persons who are strangers to the liquidation of AWH. Third party proceedings are not available if proceedings are begun by summons in a liquidation.

30. In addition, a further reason why Ord 11 rule 8(4) is not applicable in this case is that, for the liquidator to bring these proceedings within the liquidation proceedings, under the WUR 4 to 6 (set out in summary in para 58 below) he would have to have started his proceedings by notice of motion and not a summons. He should not therefore have the benefit of Ord 11 rule 8(4) which only applied to a summons within proceedings.

31. These proceedings were in any event irregular as they were commenced by summons and not by notice of motion in this case (WUR 6(2)). WUR 100 should not

be applied. WUR 100 provided that proceedings should not be invalidated by a procedural defect:

> **"**100(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

32. However, Mr Simms submits that WUR 100 should not be interpreted as authorising that use of the RSC for this purpose because service out of the jurisdiction was an important matter which could not be brought in by a provision such as WUR 100. The fact that the company was set up to carry on business outside The Bahamas did not mean that those who deal with it should not have safeguards.

33. Finally, Mr Simms submits that where a liquidator has a fraudulent preference claim against a person, that person has a contingent claim in the liquidation of AWH and would be a contingent creditor within section 154 of the IBCA. ZCM further submits that section 154 operates to subject the claim against ZCM to the Bankruptcy Rules so that no service out is possible. The Court of Appeal, when they rejected this argument, applied too narrow a reading of section 154, which provides:

> "154 In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they are entitled to by virtue of this section."

(ii) AWH: the RSC provide the necessary jurisdiction

34. Miss Walton submits that section 15 of the Supreme Court Act of The Bahamas (set out in para 65 below) gives the necessary power.

35. As to the use of a summons, Miss Walton submits that, where an insolvency procedure has been initiated before the court with respect to a person, then, as a matter of well-established practice, where the insolvency officeholder in that procedure wishes to make an application to the court he does so by summons within the insolvency proceeding. This is, she submits, the practice in England and Wales and she submits that it is also the practice in The Bahamas.

36. Miss Walton took the Board through the various procedural routes in issue and submitted that Ord 11 rule 8(4) was available. The relevant insolvency process had been commenced by the petition to wind up AWH and the summons in issue was a summons issued in those proceedings.

(d) The Board's conclusions on the jurisdictional gateway

(i) How the presumption against extraterritoriality applies in this case

37. In the judgment of the Board, the wording of section 160 of the IBCA tends to indicate that it is capable of having extraterritorial effect. In particular it uses the words "any" in relation to "conveyance" and the word "creditor" without qualification. The same linguistic points can be made about section 72 of the Bankruptcy Act. It would make no sense to restrict section 160 to Bahamian dispositions, particularly in the case of an IBC.

38. To determine whether section 160 is extraterritorial in its effect, it is necessary to consider that section in its wider context. That wider context includes not only the historical perspective that the Bankruptcy Act 1870 and the Bankruptcy Rules, which did not provide for service out, provide. In the opinion of the Board, it also includes the scheme of the IBCA and the companies legislation which it mirrors.

39. As to the scheme of the IBCA, the Board finds that Miss Walton's submissions are particularly helpful. Times have moved on since the nineteenth century when the relevant provisions in bankruptcy were enacted, and it would not be surprising to find provision now being made for service out. "Trade takes place increasingly on an international basis. So does fraud." (per Sir Donald Nicholls in *In re Paramount Airways* [1993] Ch 223, 239). Moreover, the IBC was established to create a vehicle for international investors.

40. The Board also agrees with Miss Walton that it is now settled law that insolvency provisions can have extraterritorial effect: see *Paramount Airways* (section 238 of the IA86), *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (section 213 of the IA86) (in which

the Supreme Court also approved *Paramount Airways*) per Lord Sumption at paras 107-110, and per Lord Toulson and Lord Hodge at paras 213-214 and *Orexim Trading Ltd v Mahavir Port and Terminal Pvt Ltd* [2018] 2 BCLC 441 (where the Court of Appeal of England and Wales held that section 423 of the IA86 (transaction with intent to defraud creditors) has extraterritorial reach). The Board recalls that, in a winding up, a liquidator may serve notices on creditors and contributories outside the jurisdiction under the powers given by the Companies Acts and without express mention. Such powers are consistent with the fact that winding up legislation (at least) has extraterritorial effect. "The service of [a notice placing a foreign shareholder on the list of contributories] is no infringement of the jurisdiction of the Courts of a foreign country. *If notices of this kind could not be served abroad, it might in many cases be impossible to wind up a company at all.*" (*In re Nathan Newman & Co*) (1887) 35 Ch D 1, 3, a decision of the Court of Appeal of England and Wales distinguishing *In re Anglo-African Steamship Co*, on which Mr Simms relies.

41. The Board further accepts that, as Sir Donald Nicholls held in *Paramount Airways* there needs to be some connection between the jurisdiction of the court giving leave for service out, in this case the courts of The Bahamas, and the respondent on whom service is ordered. In this case, the redemptions took place outside The Bahamas but they related to shares of a Bahamian company. The natural place for any winding up proceeding would therefore be The Bahamas and, there being no suggestion that ZCM did not appreciate that it was dealing with a Bahamian company, the Board considers that a sufficient connection with the jurisdiction is shown to warrant the presence of a jurisdiction in the courts of The Bahamas to order service of these proceedings on the respondent out of the jurisdiction.

42. Moreover, in circumstances such as these, the absence of a power in custom-made rules applying to winding up of an IBC cannot be taken as an indication that the courts could not find an appropriate power elsewhere. On the contrary, where an IBC is in liquidation in The Bahamas, it is proper for its courts to rely on other sources of jurisdiction to entertain in appropriate cases proceedings to enforce a claim vested in the liquidator under section 160 to have a transaction declared void. It is desirable that such claims should be heard by them in the interests of ensuring that the purposes of the winding up are fully achieved.

(ii) Effect of the various sets of rules

43. The next question is whether any provision in the various sets of procedural rules is sufficient to confer jurisdiction for this purpose. While the presumption against extraterritorial effect is important, it cannot override any sufficient express provision, as the case of *Paramount Airways* demonstrates. The Board accepts Miss Walton's further submission that, while there is no parallel decision in Bahamian law, given the

wide ambit of section 160, one "would a priori expect procedural rules to exist to enable the court to exercise those powers" even if the respondent was not in the jurisdiction, as Lewison LJ held in *Orexim* at para 32 in relation to a claim under section 423 of the IA86. The Board considers that the RSC provide the necessary jurisdiction.

44. The Board will now consider the various sets of rules in turn.

(a) Bankruptcy Rules

45. As to the Bankruptcy Rules, the Board considers that rules as to service are not within those Bankruptcy Rules which were adopted for companies: see section 154 of the IBCA (set out in para 33 above). Mr Simms seeks to establish that they do apply by characterising ZCM's position in consequence of the present claim as that of a contingent creditor: on that basis, he submits, all the Bankruptcy Rules are made applicable. However, in the judgment of the Board, the statutory purpose of section 154 is to incorporate only the specified Bankruptcy Rules. Here the issue is about the service of the proceedings and it is not directly concerned with ZCM's status as a contingent creditor. Section 154, therefore, does not apply.

(b) WUR

46. The WUR did not apply to an IBC at the relevant time. According to the title to the rules, they were rules made under the Companies Act, 1866. The "Act" is defined as "the Companies Act". The rule-making power contained in the Companies Act 1992 (the current consolidation statute) restricts the minister to making rules to apply to companies to which that Act applies: see section 302 of the Companies Act 1992, which provides that:

> "The Minister may make rules and regulations generally in order to give effect to this Act."

(c) RSC

47. The WUR and RSC are intended to have separate operation. Ord 1 rule 2(2) (set out in para 26 above) is a self-denying ordinance by which the RSC "shall not have effect in relation to … proceedings relating to the winding up of companies [under the] Companies Act, Part VII."

48. But the Companies Act does not apply to an IBC and so Ord 1 rule 2(2) does not disapply the RSC in relation to these proceedings. That means that Ord 11 rule 8 (set out in para 12 above) is engaged and that there is no need to consider WUR 101 ("the gap filling provision" set out in para 16 above).

49. The next question is this: must the summons, for which leave to serve out is sought, be issued for some specific purpose? Ord 11 rule 8(4) does not itself specify any limit on the type of summons that may be issued out of the jurisdiction. It simply says that the summons must be "issued, given or made in any proceedings". The fact that Ord 11 rule 8(4) is not qualified in its operation is relevant to the Board's response to the submission next considered.

50. ZCM contends that there is an internal limit to be read into Ord 11 rule 8(4) from Ord 11 rule 8(3). Mr Simms submits that AWH has to show that the winding up petition could have been served out of the jurisdiction before the court can give permission for the present summons to be served out of the jurisdiction. This submission was founded on the *Robertsfors* case (see para 27 above) and the decision of the House of Lords in *Masri* where the House held that, where there was no express rule permitting service out of the jurisdiction of a summons issued in the course of proceedings for the examination of an officer of a corporate judgment debtor, a party could only serve such a summons out of the jurisdiction if it could have obtained leave to serve a writ to obtain the same relief out of the jurisdiction.

51. The Board considers that *Masri* is distinguishable from this case. In *Masri*, judgment was given in proceedings brought in England and Wales against a foreign company which had submitted to the jurisdiction. The defendant failed to satisfy the judgment. The claimant obtained an order under Civil Procedure Rule 71 against a director of the defendant, who was resident in Greece, to attend before the court in England to give evidence as to the assets of the company outside the jurisdiction to assist the claimant in enforcing its judgment against those assets. The question was whether there was jurisdiction to make this order. The House of Lords held that there was no such jurisdiction. It emphasised that service out of the jurisdiction requires express authorisation by or under statute. In reaching its conclusion in the case, the House considered a number of cases in which jurisdiction was conferred by statute, including *In re Tucker* (para 19 above). The House held that in that case it was clear that under the particular provisions of the Bankruptcy Act 1914 there was no jurisdiction to serve out (see para 19). In *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, however, where the liquidator of a company, which was being wound up in England and Wales, sought leave to serve out of the jurisdiction an order for the public examination of a director made under section 133 of the IA 86, the Court of Appeal of England and Wales, whose decision was cited with approval by the House, held that, the relevant section not being territorial only in its application, the order could be served out of the jurisdiction. *Masri* itself was considered to fall between these two situations

for a number of reasons but particularly because the officer of a company was separate from the company and because there was no element of public interest as in *Seagull*: the litigation was private (paras 20 to 23).

52. In summary, in *Masri*, although the English court had jurisdiction to give judgment against the company (which conferred ancillary jurisdiction to make other orders in those proceedings both before and after judgment), it had no jurisdiction to make an ancillary order against a non-party out of the jurisdiction. The House observed, in a passage on which Mr Simms relies, that the power to make ancillary orders under the Rules of the Supreme Court could only have been exercised if service out of a writ was permissible. However, this was in the context of a further argument on service out which was held to confirm the conclusion already reached on considering *In re Tucker*, *Seagull* and other cases (*Masri*, paras 27 and 32).

53. In the Board's judgment, the present case is close to *Seagull* because, as the Board has already held, section 160 is not territorially limited in its application (above, paras 37 to 42). As in *Seagull*, it would be odd, therefore, if proceedings under that section could not be served out of the jurisdiction in an appropriate case. Further, a person who voluntarily enters into a transaction as a result of which he becomes a creditor of a company must anticipate that, if the company is wound up, the liquidation may be conducted in the place of its incorporation.

54. For these reasons, the Board rejects Mr Simms' submission based on *Masri* and summarised in para 50 above. It is not relevant to inquire whether the petition for winding up AWH could have been served out of the jurisdiction and the Board is not therefore required to express its opinion on that question.

55. The real protection for the foreign respondent is that there has to be a sufficient connection between the respondent and the jurisdiction of the Supreme Court of The Bahamas before the court has jurisdiction to entertain the claim for avoidance of the payment of the redemption proceeds under section 160 if the respondent is outside its jurisdiction (see *Paramount Airways* above).

56. It follows that it is unnecessary to identify a jurisdictional gateway under Ord 11 rule 1 as in *Masri* and *Robertsfor* for the liquidator's claim that the payment of redemption proceeds to ZCM was a fraudulent preference. It is also unnecessary to show, for instance, a jurisdictional gateway for the consequential claim for repayment of monies, as was required in *Rousou's Trustee v Rousou* (above). Unlike the WUR, the Bankruptcy Rules 1914 in force in England and Wales at the time of the action in *Rousou* did not contain a "gap filling" provision (ie the Rules of the Supreme Court applied only if incorporated into the Rules, and rules as to service out of the jurisdiction

were not so incorporated). Accordingly the trustee in bankruptcy could not use the equivalent of Ord 11 rule 8(4). He had to commence his proceedings for repayment against the foreign respondent in an action begun by writ. (By the time *In re Jogia* (para 21 above) was decided, the Bankruptcy Rules had been amended to permit service out of the jurisdiction where permitted by Rules of the Supreme Court 1965, Ord 11.)

57. There remain a number of issues which the Board answers shortly below.

(iii) Did the liquidator use the wrong procedure?

58. On the question whether the liquidator used the wrong procedure. Mr Simms relies on WUR 4 to 6, which provide:

> "Courts and Chambers
>
> 4(1) The following matters and applications in the Supreme Court shall be heard in open court -
>
> (a) petitions;
>
> (b) applications for the committal of any person to prison for contempt;
>
> (c) such matters and applications as the judge may from time to time by any general or special order direct to be heard in open court.
>
> …
>
> (3) Every other matter or application in the Supreme court under the Act to which the Rules apply may be heard and determined in Chambers …
>
> 6(1) Every application in Court other than a petition shall be made by motion … (2) Every application in Chambers shall be made by summons …"

59. Therefore, if WUR 4 to 6 had applied, the liquidator would have had to issue a notice of motion. But, the position is, as explained above, that the WUR do not apply.

60. Moreover, the Board agrees with Miss Walton that, on the basis that there were no applicable procedural rules, a summons was a legitimate procedure to adopt. The Board rejects Mr Simms' submission that the proceedings in a liquidation are not ongoing and that the process to initiate proceedings such as these proceedings for fraudulent preference must therefore be an originating one. The Board considers that the practice followed by the liquidator of issuing a summons within the liquidation is correct.

61. It is helpful to see this point from the perspective of what actually happened after AWH was wound up. All the applications in this matter have been issued with the same court file number as the court gave the petition. Moreover, these proceedings have been intituled "in the matter of AWH Limited (in compulsory liquidation) and in the matter of the [IBCA]." It is reasonable to suppose that the same practice would be adopted in relation to any other application in the winding up.

62. The origin of this practice in England and Wales appears to be historical in that, on issue of the winding up petition, proceedings relating to the petition and (if an order for winding up was made) all proceedings relating to the winding up were (in common with other like proceedings) allocated to a particular Chancery judge (see *Daniell's Chancery Practice* 8th ed (1914) at pp 1343-1344). However, the practice is also consistent with principle. Proceedings in a liquidation to collect assets or enforce claims are some of the various ways in which an order for winding up made by the court is worked out on the ground. So, the proceedings in a winding up are therefore properly proceedings under the original order.

63. So too, in England and Wales, when a company is wound up by the court, the proceedings are given a single number which is used in the title to all further proceedings in a winding up. Moreover, a single court file was maintained. Thus, under the Companies (Winding up) Rules 1948 (SI 1949/330), there was an express obligation to maintain a continuous file for each liquidation. While there was no obligation to maintain a continuous file in the WUR, there are other indications that, once a company enters winding up, there is one set of proceedings. Thus, creditors and officers are given the right to inspect "the file" of the proceedings (WUR 13) and WUR 7 provides that every proceeding shall be instituted in the same way, that is "in the matter of the company to which it relates and in the matter of the Companies Act."

64. Mr Simms also argues that an originating process had to be used because there would be claims by ZCM against third parties which would be outside the liquidation.

However, it is not always a bar to using a summons in the liquidation that the court may have to determine third party claims: see for example *In re Shilena Hosiery Co Ltd* [1980] Ch 219, per Brightman J.

65. Miss Walton submits that section 15(1)(b) and (1)(c) of the Supreme Court Act 1997 reinforces this conclusion. Section 15 provides:

> "15. The jurisdiction vested in the court shall so far as regards procedure and practice, be exercised -
>
> (a) in the manner provided by this Act or by rules of court;
>
> (b) where no such provision has been made, in accordance with former practice as near as may be; or
>
> (c) where there is no former practice, in such manner as seems to the court just and practicable in the circumstances."

66. It is not necessary for the Board to rely on this provision. It is well established that service out of the jurisdiction requires express authorisation by statute or in the RSC.

67. The Court of Appeal also placed reliance on the duty of the liquidator to collect in assets in section 107 of the IBCA, holding that this duty extended to the cause of action against ZCM in these proceedings. This provides in material part:

> "107. The … liquidator … shall take into his custody, or under his control, all the property, effects, and things in action to which the company is or appears to be entitled …"

68. The Board likewise does not consider that it is necessary to consider further the application of this important provision in the present case.

69. Accordingly, the Board concludes that the Court of Appeal was correct to hold that the Supreme Court had power to give leave for the service of these proceedings out of the jurisdiction.

(2) The merits threshold for leave to serve out of the jurisdiction

(a) The parties' submissions

70. Mr Simms submits that ZCM held its AWH shares solely as bare trustee for AMEX and so it could only act as AMEX instructed it and it accounted to AMEX for the redemption monies it received. Moreover, ZCM submits that its position was the same as that of an agent who in good faith hands money received for his principal's account to his principal and is not liable to repay it if it turns out to be a fraudulent preference: see *In re Morant* [1924] 1 Ch 79. ZCM should not therefore be the respondent in these proceedings.

71. ZCM also submits that dominant intention to prefer has to be shown, and that, when there was no direct evidence of intention, an intent to prefer could not be inferred (*Peat v Gresham Trust Ltd* [1934] AC 252).

72. In the light of *Vizcaya Partners Ltd v Picard* [2016] 3 All ER 181 at para 73, the choice of law clause in the subscription agreement could not, on ZCM's submission, apply to the liquidator's present claim.

73. Miss Walton submits that the liquidator had shown a good arguable case on the merits. He had to show the court that its discretion should be exercised in favour of service out: see Ord 11 rule 8(4) and *Paramount Airways* and *Orexim*.

(b) The Board's conclusion on the merits threshold

(i) The test for compliance with the merits threshold

74. Ord 11 rule 4(2), dealing with leave to serve process out of the jurisdiction, provides:

> "(2) No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

75. The Board takes the view that this means that, as was held in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, at para 71 in the context of the rules applying in the Isle of Man, a claimant for leave to serve out of the jurisdiction must satisfy three requirements:

> "First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: eg *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-557, per Waller LJ affirmed [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)* [2007] 1 WLR 12, paras 26-28. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

76. In the recent case of *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 at para 9, the Supreme Court gave further guidance on the meaning of the "good arguable case" in England and Wales:

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant 'had the better of the argument' on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, para 7, this court reformulated the effect of that test as follows: '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably

> do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

77. The Board considers that this jurisprudence also applies in The Bahamas and considers each of the requirements in turn.

(ii) Application of the good arguable case test to the facts

78. ZCM's contention as to lack of a good arguable case concern is based principally on its submissions that there is a lack of direct evidence as to intent to prefer and that ZCM's status was that of an agent.

(a) Lack of direct evidence showing intent to prefer

79. The Board rejects the argument that there has to be direct evidence of this. Intent to prefer can also be inferred from other evidence: see per Lord Greene MR, with whom Luxmoore and Goddard LJJ agreed, in *In re M Kushler Ltd* [1943] Ch 248, 252-253, where he held, disagreeing with the trial judge's holding on the basis of observations of Lord Tomlin in *Peat v Gresham Trust* above that, if there was no direct evidence from the debtor of intent to prefer, inferences from other evidence could not be drawn:

> "I can see nothing in the language of the section which justifies the view that the problem which the legislature sets the court is to be dealt with on any principles different from those commonly employed in drawing inferences of fact … I do not think Lord Tomlin could have meant that, in every case where there is no direct evidence of intention to prefer, the court is bound to say that the onus of proof is not discharged if any view of the facts not involving an intention to prefer can possibly be taken."

80. Goddard LJ, when agreeing, also added that the law which determined when inferences could be drawn in relation to fraudulent preferences and that determining when inferences could be drawn in relation to other matters of fact were the same (para 254).

81. At this stage, given the allegations in the petition summarised in para 4 above indicating that ZCM's request for redemption was more favourably treated, and the liquidator's evidence as to insolvency, there must be a plausible evidential basis for inferring that, when it redeemed the shares registered in the name of ZCM, AWH knew itself to be insolvent and that it accordingly had the requisite dominant intent to prefer. On the evidence, ZCM submits that other requests were made in June after its clients and that they were redeemed in August. But this evidence would not of itself be sufficient to negate any intent to prefer. There are plainly contested issues of fact but, at this stage, the court cannot be satisfied that the final outcome will be in ZCM's favour.

(b) ZCM's position as an agent and not as a principal

82. As explained above (paras 8 and 9), a "creditor" for section 72 purposes is a person who (but for the transaction said to constitute a fraudulent preference) would have been entitled to prove in the liquidation, and that, if a fraudulent preference claim succeeds, relief in terms of repayment is given against the payee, that is, the person who in law is to be treated as the person who received the payment. There is no doubt that, if AWH had not satisfied the redemption request, ZCM would have been the person entitled to prove for the unpaid proceeds. ZCM was the registered holder of the shares, and when it became a member of AWH it became a party to AWH's articles of association. Article 2.06 of AWH's articles of association provided in the usual way that the company was entitled to recognise the registered holder as the sole owner. Those articles mean that ZCM agreed to stand in the relationship of principal as regards AWH. There was nothing before the Board to suggest that AWH had agreed that any other person should be treated as the registered holder. ZCM held the legal chose in action resulting from the redemption request and it would have been the proper claimant to sue for the unpaid redemption monies.

83. The position of ZCM is thus materially different from that of the agent in *Morant* (above, para 70). The principle applied in that case was that a mere agent is no longer liable to a third party for monies he has received if he has in good faith and without notice of the third party's claim paid them to his principal. The agent was held not to be a trustee for his principal. Moreover, he did not agree to act as principal. The payer's trustees in bankruptcy accordingly had to bring their fraudulent preference proceedings against the principal, and the principal alone. The agent could not have proved in the liquidation of the payer in competition with the principal if the monies had not been paid. There may be a separate question which the Board is not called upon to consider on this appeal whether an agent, who has not agreed to act as principal (as ZCM has done) and still holds the monies paid to him by the company when he receives notice of the liquidator's claim under section 160, could set up a defence on the basis of agency alone without any evidence of good faith payment over to his principal. ZCM did not, however, suggest that such a defence would be available in those circumstances.

84. The Board therefore rejects ZCM's argument that its position as no more than a bare trustee is analogous to that of an agent who has in good faith accounted to his principal for payments made to him by a company prior to the winding up and who is not on the authority of *In re Morant* a "creditor" within the meaning of section 72. In support of its argument, ZCM relied on *In re Thirty-Eight Building Ltd (in liquidation) (No 2), Simms v Saunders* [2000] 1 BCLC 201 where Ms Hazel Williamson QC, sitting as a Judge of the High Court of Justice, Chancery Division, while rejecting the argument that the beneficiaries under a discretionary trust could be regarded as "creditors" for the purposes of a claim to set aside a voidable preference under section 239 of the IA 86 (the successor with modifications to section 320 of the Companies Act 1948), considered (obiter) that bare trustees might be in a different position under that section (p 207). A bare trustee can be in no better position than an agent in this context.

85. Therefore, ZCM is the right respondent to this summons. It is always open to ZCM to pursue any remedy it has against the persons it paid.

(iii) The Board's conclusion on the merits threshold

86. To summarise the Board's conclusion on the merits threshold, the Board considers that in the circumstances of this case the evidence showed a sufficiently arguable case.

Conclusion

87. The Board will humbly advise Her Majesty that this appeal should be dismissed.