

## BRITISH VIRGIN ISLANDS COURT OF APPEAL

### ***Kenneth M. Kryz And Johanna Lau (As Joint Liquidators Of Fairfield Sentry Limited, In Liquidation) -v- Stichting Shell Pension Funds HCVAP 2011/36***

### **INSOLVENCY ACT - BVI APPEALS - SUBMITTING A CLAIM IN LIQUIDATION IS SUBMITTING TO THE JURISDICTION OF THE BVI COURT - INSOLVENCY RECOGNITION**

In an important decision reflecting on the universality principle of one liquidation having effective cross border impact on the gathering of assets, the Court of Appeal allowed an appeal by the Liquidators of Fairfield Sentry (the largest fund investor into Madoff, and a BVI company) granting an anti-suit injunction against the Dutch Respondent restraining it from continuing Dutch proceedings based on pre-judgment garnishee orders obtained in Holland for the purpose of elevating Stichting Pension Funds ("Shell") to a preferred creditor position over the general body of creditors.

This Decision has two particular findings of interest. The first, a point of law, is that by submitting a claim in the BVI liquidation process, Shell had in fact submitted to the jurisdiction of the BVI insolvency process. Such indicated Shell's acceptance of the statutory scheme under the Insolvency laws of the Virgin Islands for the benefit of all unsecured creditors (foreign and local) to be treated equally. Second, in support of the principles of universality and cross border insolvency recognition, the Court held that the ends of justice in the circumstances of this case require that the integrity of the Court's process in the supervision and administration of the statutory scheme under the Insolvency laws be protected:

*"It is important for the liquidation to be a collective proceeding having universal application, such that no advantage should be given to a creditor because he happens to live in (or in Shell's case, happen to have access to the courts of) another jurisdiction".* Chief Justice Periera, Para 22.

Of equal importance was the judicial discussion on the principles of anti-suit injunctive relief. Following well established principles of *Airbus Industrie GIE –v- Patel & Ors* [1998] CLC 702 and applying an analogy to statutory equivalent to Section 183 of the *English Insolvency Act*, the Court of Appeal concluded; *"that on a proper application of the principles and having due regard for comity, the circumstances of this case warrant the exercise of the jurisdiction. This court should not flinch from so doing in achieving the ends of justice"*.

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