

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2008/012

BETWEEN:

MILLENNIUM FINANCIAL LIMITED

Appellant

and

[1] THOMAS MC NAMARA

[2] BANK OF NEVIS INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Scantlebury for the Appellant

Mr. Anthony Gonsalves for the first Respondent

2009: May 20, 21;

2010: March 15.

Civil Appeal – recognition of order appointing a receiver in foreign court – whether there was a sufficient connection between the company and the foreign court – whether recognition of the order gave effect to a foreign penal law – whether inherent jurisdiction provides authority for recognition of foreign appointed receiver in the absence of statutory basis – fraud – piercing the corporate veil – lex fori – admissibility of hearsay evidence

The appellant, “Millennium Nevis”, is a company incorporated in Nevis. In May 2002, the United States Securities and Exchange Commission (SEC) commenced civil proceedings in New York against “Millennium Uruguay”, a company incorporated in Uruguay, alleging that it was involved in a scheme to defraud investors. Millennium Uruguay, it alleged, routed investor money through intermediary banks to several foreign accounts in order to conceal its unlawful activity. This included an account held in the name of Millennium Nevis at Bank of Nevis International (“the second respondent”).

In December 2002, Thomas Mc Namara (“the US Receiver”) was appointed to act as receiver for Millennium Uruguay and all its divisions, groups, subsidiaries, affiliates etc.

doing business as “Millennium Financial Ltd.” Having reviewed the business records of Millennium Uruguay and Millennium Nevis, the US Receiver concluded that they were both elements of the same integrated international operation. In December 2005, SEC obtained a final judgment of permanent injunction against Millennium Uruguay. In October 2008, the US Receiver filed an application for recognition of the US Receivership Order in proceedings then joined as between Millennium Nevis and the second respondent. By order dated 28th November 2008, the High Court of Saint Christopher and Nevis, Nevis Circuit, ordered that the US Receivership Order be recognized and given full effect to within the Federation of Saint Christopher and Nevis. No reasons were given for the decision.

Millennium Nevis appealed, *inter alia*, on the ground that the learned judge had no jurisdiction to recognise or enforce the US Receivership Order having regard to the fact that there is insufficient connection between Millennium Nevis and the US Court’s jurisdiction; the US Receivership Order gave effect to a foreign penal law; and even if the law were civil and not penal, the statutory provisions for the reciprocal treatment of foreign judgments do not extend to the United States of America. Millennium Nevis also challenged the learned judge’s findings with respect to separate legal personality and the admissibility of hearsay evidence.

Held: allowing the appeal, setting aside the order recognizing and giving effect to the US order appointing the receiver and ordering that the parties make written submissions on costs within 21 days:

1. The court’s jurisdiction to recognise a receiver appointed by a foreign court (the United States District Court) is triggered by the existence of a sufficient connection between the foreign jurisdiction and the company covered by the receivership (Millennium Nevis). Absent reasons for the decision in the court below, the appellate court is free to exercise its own discretion *de novo*, taking into account the material evidence.

Dictum of Goulding J. on the “sufficient connection test” in **Schemmer v Property Resources Limited et al** [1975] 1 Ch 273, applied.

2. There was no sufficient connection between Millennium Nevis and the United States having regard to the fact that Millennium Nevis was incorporated in Nevis, it was not a party to or defendant in the US action; there is no evidence that it conducted business in the United States or that it submitted itself to United States jurisdiction (save for the actions of the US Receiver acting on behalf of Millennium Uruguay). Such finding is made having regard to all the affidavit evidence and exhibits presented and is sufficient to dispose of the appeal in the appellant’s favour.
3. The fact that a provision found within a law contains criminal sanctions, such as penalties or forfeiture, does not mean that the provision itself is penal in nature. The court has to determine the substance of the right sought to be enforced and

whether its enforcement would, directly or indirectly, involve the execution of the penal law of the foreign jurisdiction, in this case, the United States of America.

Dicta of Goulding J. in **Schemmer v Property Resources Limited et al** [1975] 1 Ch 273 and Schofield J. in **Stutts v Premier Benefit Capital Trust** 1992-93 CILR 605 (Grand Court of the Cayman Islands) on foreign penal law considered and not applied. **Roy Madison Terry JR and Durette Bradshaw Plc v Butterfield Bank (Guernsey) Ltd.** Royal Court of Guernsey 24th February 2006, approved. Dictum of Lord Phillips in **Islamic Republic of Iran v The Barakat Galleries Ltd.** [2007] EWCA Civ 1374, followed.

4. Having regard to the terms of the US Receivership Order and the affidavit of the US Receiver, it is pellucid that the substance of the right sought to be enforced was the protection, preservation and collection of the remaining assets of Millennium Uruguay for the benefit of defrauded investors and to compensate them. Accordingly, there is no issue of executing the penal laws of a foreign state, namely, the United States of America. This aspect of the first ground of appeal accordingly fails.
5. There is no treaty ratified or legislation enacted for the reciprocal enforcement of civil judgments between the Federation of Saint Christopher and Nevis and the United States of America. In the absence of a statutory basis, the inherent jurisdiction of the court provides the requisite authority for the recognition of a foreign appointed receiver.

Globe-X Management Limited, Globe-X Canadian Limited, Silicon Isle Limited v Clifford Johnson and Wayne Aranha Anguilla Civil Appeal No. 4 of 2003 which considered **Re African Farms Ltd.** [1906] TS 373, followed in part. **Texan Management Ltd. & Others v Pacific Electric Wire & Cable Company** [2009] UKPC 46, followed.

6. The court may pierce the corporate veil where a company is party to fraud. However, Millennium Nevis, as distinct from Millennium Uruguay, did not play a “pivotal role” in nor was it party to the international investment fraud scheme so as to warrant the piercing of the veil of incorporation. The use of Millennium Nevis account cannot, on its own, establish a sufficient nexus with Millennium Uruguay’s fraudulent operations. Further, it does not appear that Millennium Nevis was incorporated or transacted business merely as a vehicle for Millennium Uruguay’s fraud. The significance of separate corporate personality was not fully appreciated. The appellant accordingly succeeds on the third ground of appeal.

Jones v Lipman [1962] 1 WLR 832, **DHN Food Distributors Ltd. v Tower Hamlets LBC** [1976] 1 WLR 852, **Re A Company Ltd.** [1985] BCLC 333 (CA), **Adams v Cape Industries** [1991] 1 All ER 929, **Truster AB v Smallbone** [2001] 3 All ER 987, applied.

7. The reception or rejection of evidence must be governed by the *lex fori*, that is, the law of the court in which the proceeding is brought. The judgment of a foreign court having jurisdiction over the parties and the subject-matter of the suit therefore cannot be impeached on the ground that it is erroneous on the merits. Millennium Nevis was not however a party to the proceedings before the United States court and had not submitted to United States jurisdiction. The principle of law is accordingly inapplicable.

De Cosse Brissac v Rathbone 158 ER 123, distinguished.

8. Although rather late in the proceedings for the appellant to complain, it would be unsafe to recognise a foreign order which was the fruit of proceedings where inadmissible hearsay evidence was adduced and the right to challenge such was waived by the US Receiver. Ground 4 of the appeal is also allowed.

JUDGMENT

- [1] **BAPTISTE, J.A. [AG.]:** Millennium Financial Limited, the appellant (hereinafter called Millennium Nevis) is incorporated in Nevis and has its registered office in Charlestown, Nevis. On 28th November 2008, the High Court of Saint Christopher and Nevis, Nevis Circuit, made an order recognizing the order of a United States District Court appointing Thomas W. Mc Namara as receiver of Millennium Nevis. This is an appeal against that decision. Millennium Nevis seeks to assail the order on jurisdictional and other grounds. It is necessary, first, to give a brief narrative of the background facts.
- [2] On or about 22nd May 2002, the United States Securities and Exchange Commission (SEC) instituted civil proceedings in New York against Millennium Financial Limited, a company incorporated in Uruguay (hereinafter Millennium Uruguay), for alleged violations of sections 17(a) of the **Securities Act 1933** and 10(b) of the **Securities Exchange Act 1934**. On 6th December 2002, the SEC obtained an order appointing Thomas W. Mc Namara ("The US Receiver") as receiver of Millennium Uruguay. The Receivership Order stated that the US Receiver was to act as receiver for Millennium Uruguay and "all of its divisions, groups, subsidiaries, subdivisions, successors, affiliates, and nominees, including, but not limited to entities doing business as "Millennium Financial Ltd." and

incorporated in Uruguay, the Federation of Saint Kitts and Nevis, or in any other country or state.”

[3] The complaint of the SEC alleged that there was a scheme by Millennium Uruguay to defraud investors. The scheme allegedly involved the sale of stock in United States companies. The money to fund those purchases was transferred to Millennium Uruguay’s offshore accounts through intermediary banks in New York. The scheme was summarized in detail in the declaration of Robert Kondrat, a SEC attorney. Based on a review of the business records of Millennium Uruguay and Millennium Nevis, the US Receiver concluded that they were both elements of the same integrated international operation. Investors were directed to make transfers into Millennium Nevis’ account in Nevis.

[4] On 21st December 2005, the SEC obtained a final judgment of permanent injunction against Millennium Uruguay. The US Receiver entered a general appearance and consented to the court’s jurisdiction over Millennium Uruguay and the subject matter of the action. The US Receiver consented to the entry of the final judgment without admitting or denying the allegations of the complainant; waived findings of fact and conclusions of law; and waived any right to appeal the final judgment. On 20th October 2008, the US Receiver, without bringing a separate recognition action, filed a Notice of Application in proceedings then joined as between Millennium Nevis and the second respondent (the Bank) in the High Court in Nevis for recognition of the US Receivership Order. The US Receiver had been added by the Bank as an ancillary defendant. On 28th November 2008, the High Court granted the order in the following terms:

“IT IS ORDERED that the Order Appointing a Receiver of the United States District Court of New York pronounced on 6th December 2002, in the case of Securities and Exchange Commission v Millennium Financial Ltd. And Newport Fiduciaries and Nominees SA case 02 Civ. 3901 (MBM) a copy of which is attached hereto, be and is hereby recognized and given full effect to within the Federation of Saint Christopher and Nevis.”

It does not appear that counsel for Millennium Nevis or the court considered the inappropriateness of the grant of final relief on an interim application in the midst of an action which was yet to go to trial.

- [5] The first ground of appeal is that the learned judge had no jurisdiction to recognise or enforce an order entered by the United States District Court appointing the US Receiver as receiver of Millennium Nevis. The bases of that ground are that: (i) there is insufficient connection between Millennium Nevis and the United States Court's jurisdiction; (ii) recognition of the US Receivership Order gave effect to a foreign penal law; and (iii) even if the law were civil and not penal, the statutory provisions for the reciprocal enforcement of foreign judgments do not extend to the United States of America.

The sufficient connection test

- [6] In advancing the jurisdictional argument Mr. Scantlebury, learned counsel for Millennium Nevis, correctly stated that **Schemmer v Property Resources Limited et al**¹ enunciated the principle that the English courts will only recognise a foreign receiver if the defendant involved in the action has sufficient connection with the jurisdiction in which the receiver was appointed. Learned counsel argued that the "sufficient connection" test was not satisfied. He pointed out that there was no evidence that Millennium Nevis ever submitted to the jurisdiction of the United States; that Millennium Nevis was not the defendant referred to in the SEC action; that the defendant in the SEC action against whom the proceedings were instituted was Millennium Uruguay; that Millennium Nevis was incorporated in Nevis and not in the United States of America and its seat of central management and control was not located in the United States; that Millennium Nevis never conducted business in the United States; that the US Receiver's suggestions to the contrary overlook the significance of separate corporate personality. Finally, he argued, it was doubtful whether the appointment of a receiver would be

¹ [1975] 1 Ch. 273

recognized in Nevis as the **Nevis Business Corporation Ordinance 1984**² under which Millennium Nevis was incorporated does not make provision for the appointment of receivers.

- [7] Mr. Gonsalves, learned counsel for the US Receiver, posited that the existence of factors constituting a sufficient connection is a matter of fact and was for the sole determination of the presiding judge. This is clearly borne out by **Schemmer**. He stated that as a matter of fact the court in Nevis found on the evidence before it sufficient connections to conclude that it was appropriate to recognise the US Receivership Order and give effect to it in this jurisdiction.
- [8] Mr. Gonsalves, referred to the factors cited to the learned judge to show sufficient connection. Before referring to the factors a general observation can be made about the approach taken. No attempt was made to distinguish between Millennium Uruguay and Millennium Nevis. They were both treated as one Millennium. Upon examination, the factors referred to by Mr. Gonsalves almost exclusively concerned Millennium Uruguay. I shall therefore approach this matter in that light.
- [9] United States institutions and persons played a pivotal role in an international investment fraud scheme carried out by Millennium Uruguay. United States intermediary banks were utilized in receiving and distributing funds received in the fraudulent scheme. To conceal its unlawful activities, Millennium Uruguay routed investor money through intermediary banks, including banks in New York City and ultimately to accounts in several foreign locations. One overseas account into which funds were deposited was an account held in the name of Millennium Nevis at Bank of Nevis International. By utilizing United States banks in the investor fraud scheme, Millennium Uruguay fell squarely within the jurisdiction of the United States courts. Rodney Shehyn, an American citizen, was the Chief Executive Officer and owner of Millennium Uruguay and exercised dominion and control over that company. Mr. Shehyn entered a guilty plea in another matter and executed a

² No. 3 of 1984

declaration that acknowledged the creation of the Millennium account at the Bank of Nevis International. Millennium Uruguay submitted to the United States court's jurisdiction. Millennium Nevis, on the other hand, was formed under the **Nevis Business Corporation Ordinance 1984**, and is precluded from carrying on business in Nevis. As it must carry on its business elsewhere, it becomes axiomatic that it will be subject to the laws of the jurisdictions where it purports to carry on its business.

- [10] It is not disputed that the court's jurisdiction to recognise a receiver appointed by a foreign court is triggered by the existence of a sufficient connection between the foreign jurisdiction and the company covered by the receivership. The court does not have before it any reason advanced by the learned judge showing what factors influenced her in arriving at her decision. This is unfortunate. This court is thus free to exercise its own discretion *de novo*, taking into account the material evidence. To my mind the factors pointed to by Mr. Gonsalves do not provide adequate material from which it could be concluded that a sufficient connection existed between Millennium Nevis and the United States. Millennium Nevis is incorporated in Nevis. Nothing was put forward showing that it conducted business in the United States. It was not the defendant or a defendant in the United States SEC action. It was not a party to the United States action. It did not submit itself to United States jurisdiction. I will also add that there is no evidence that Millennium Uruguay submitted itself to United States jurisdiction save for the actions of the US Receiver acting on behalf of Millennium Uruguay and referred to in paragraph 3 above. In the circumstances the sufficient connection test was not satisfied. This is enough to dispose of the appeal but I will consider the other grounds raised.

Giving effect to a foreign penal law

- [11] The second reason advanced in support of the jurisdictional ground is that the recognition of the US Receivership Order gave effect to a foreign penal law. Mr. Scantlebury submitted that the application by the US Receiver was concerned with proceedings which were instituted at the instance of the State as opposed to a

private individual or a private entity. The SEC is an agency of the State. Mr. Scantlebury relied on the cases of **Schemmer**, and **Stutts v Premier Benefit Capital Trust**.³

[12] In **Schemmer** it was held that the **United States Securities Exchange Act 1934**, was a penal statute, and in the absence of legislation founded on treaty, unenforceable in the United Kingdom. Goulding J held⁴ that the act was passed for public ends and that its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful.

[13] In **Stutts** it was held that the court's jurisdiction was bound by the principles that it would not execute the laws of a foreign country and would not give effect to foreign penal laws. In **Stutts**, the Grand Court of the Cayman Islands considered whether the recognition of a United States appointed receiver would be enforcement of a foreign penal law. The court dismissed the application of the receiver to be recognized in the Cayman Islands as the receiver of a trust on the basis that recognition of the receiver would give effect to the foreign penal laws of the foreign jurisdiction. The Grand Court examined the nature of the **Securities Act 1933**, and the **Securities Exchange Act 1934**, to determine whether the acts were penal in nature. The Grand Court held that the disgorgement proceedings pursuant to the provisions of the acts were in favour of the State and formed part of the public law and therefore the receiver could not be recognised by the Cayman Islands. Schofield J stated at page 611:

"The disgorgement proceedings which have been taken pursuant to the provisions of the two US Acts under consideration are in the nature of a suit in favour of the state whose law has been infringed. Notwithstanding the compensatory aspects of disgorgement proceeding, it cannot be gainsaid that vindication of violations of the two Acts rests with a body, the SEC, which represents the state itself."

[14] The Grand Court therefore did not recognise the receiver in the Cayman Islands. Learned counsel, Mr. Scantlebury stated that the above reasoning is on all fours

³ 1992-93 CILR 605

⁴ At p. 288

with this present appeal. Mr. Scantlebury argued that although the disgorgement proceedings might be regarded as compensatory in nature, the US Receivership Order flowed from an action instituted by the United States Securities Exchange Commission for breaches of the Securities Exchange legislation.

[15] Learned counsel, Mr. Gonsalves, stated quite correctly that it was entirely within the province of the court whose jurisdiction was being invoked to determine whether the action was penal in such a sense as to oust its jurisdiction.⁵ Mr. Gonsalves argued that the particular decision in **Schemmer** should no longer be followed as good law, based on subsequent cases and in particular **Government of the Islamic Republic of Iran v The Barakat Galleries Limited**⁶. Mr. Gonsalves also submitted that the case of **Stutts** does not represent the contemporary view and should not be followed.

[16] In **Schemmer**, Goulding J held, as an alternative ground of the decision, that the English court would not recognise the title of the receiver appointed by the United States court on the ground that the receiver had been appointed pursuant to the **US Securities Exchange Act 1934**, a penal law of the United States. The court in **Islamic Republic of Iran** clearly doubted the rationale of that decision. It expressly stated that **Schemmer** seems to have overlooked the point that the fact that a provision found within a law contains criminal sanctions, such as penalties or forfeiture, does not mean that the provision itself is penal in nature. The judge pointed out that the receiver had not been appointed to enforce the penal provisions of the act, but to preserve and recover the property of the company. Lord Phillips stated at paragraph 106:

“106. Whether a foreign law, or a claim based on foreign law, is to be characterized as penal depends on English law. It does not depend on the label given to the law by the foreign system of law, nor on whether the claim is in form a private law claim. The English court has to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the

⁵ Quoting Lord Watson in **Huntington v Attrill** [1893] AC 150 at 155.

⁶ [2007] EWCA Civ 1374, [2009] QB 22

penal law of another state: *Huntington v Attrill* [1893] AC 150, at 155; *Att-General of New Zealand v Ortiz* [1984] AC 1, at 32 per Ackner LJ."

- [17] In **Roy Madison Terry JR and Durette Bradshaw Plc v Butterfield Bank (Guernsey) Limited**,⁷ a United States District Court appointed the plaintiff as receivers of Vavasseur for the benefit of its investors, to Marshal, conserve, protect, hold funds, operate and with the approval of the court dispose of any wasting assets, wherever they may be found. The proceedings were brought by the Securities and Exchange Commission. The SEC sought the appointment of the receivers pursuant to the general equity powers granted to Federal District Courts with respect to violations of the **Securities Exchange Act 1934**. The court reviewed the law respecting the court's ability to recognise foreign appointed receivers and concluded that the main purpose of the receivership order was to compensate defrauded investors and that it could find no policy reason to deprive defrauded investors of the opportunity to recover, via the hands of the plaintiff, the benefit of monies held by the bank of Guernsey in the name of Vavasseur.
- [18] Applying the principles expressed in **Islamic Republic of Iran**, the court has to determine the substance of the right sought to be enforced and whether its enforcement would, directly or indirectly, involve the execution of the penal law of the United States. The US Receivership Order empowered the receiver to, among other things; take all necessary steps to secure and protect the assets, property, and the books and records of Millennium; commence, maintain, defend or participate in legal proceedings; sue or, collect, receive and take into possession all goods, monies, credits, et cetera; make expenditure on behalf of Millennium with a view to preventing loss, damage and injury to investors and preserving assets and records of Millennium. In his affidavit the US Receiver stated that as receiver he is an independent civil party appointed in the SEC action, which is a civil action in the District Court in New York, but he does not represent, work for nor report to the SEC or any other government agency. By virtue of the US Receivership Order, he represents only the interests of the Millennium investors

⁷ Royal Court of Guernsey 24th February 2006

and reports only to the District Court that appointed him. His primary duty is to collect and protect any remaining assets of Millennium. Any such assets will be returned on a pro rata basis to the Millennium investors through the claims procedure monitored and approved by the District Court in New York. None of the funds will be paid to the SEC or any other United States government agency. The most significant remaining asset is the account at the Bank of Nevis held by Millennium Nevis. Since this is an asset of Millennium, it is his duty as receiver of Millennium to take all steps to collect this money and add it to the pool of assets to be made available to the investors.

- [19] Looking at the terms of the US Receivership Order and the affidavit of the US Receiver it is pellucid that the substance of the right sought to be enforced was the protection, preservation and collection of the remaining assets of Millennium Uruguay for the benefit of defrauded investors and to compensate them. Accordingly, there is no issue of executing the penal laws of a foreign state, namely, the United States of America.

Reciprocal enforcement legislation

- [20] The third aspect of the jurisdictional ground is whether the court had jurisdiction to recognize the foreign order appointing the US Receiver as receiver of Millennium Nevis. Mr. Scantlebury for the appellant contended that there is no legislation enacted or treaty ratified for the reciprocal enforcement of civil judgments between the Federation of Saint Christopher and Nevis and the United States of America. That being so, the judge had no jurisdiction to make an order recognizing an order made by a United States court. Mr. Scantlebury further submitted that the question whether there is by law a reciprocal relationship between the United States of America and the Federation of Saint Christopher and Nevis for the enforcement of civil judgments is a question of law and cannot be determined by affidavit evidence. Accordingly, the learned judge erred in finding that the absence of an affidavit in opposition to the US Receiver's affidavit militated against the appellant's case below.

[21] Learned counsel, Mr. Gonsalves, argued that the court has an inherent jurisdiction to recognise orders made by foreign courts affecting companies in this jurisdiction. Mr. Gonsalves pointed out that the **Reciprocal Enforcement of Judgments Act**⁸ does not speak specifically to this matter and submitted that it falls within the inherent jurisdiction of the court. In support of his argument Mr. Gonsalves referred to the case of **Globe-X Management Limited, Globe-X Canadian Limited, Silicon Isle Limited v Clifford Johnson and Wayne Aranha**.⁹ The appeal in **Globe-X Management** arose out of a judgment of the High Court on an application made by the respondents. The respondents contended that the winding up and their appointment as joint liquidators of “the Globe-X companies”, together with a number of other orders ancillary to the principal request, should be recognized and given full effect in Anguilla. The liquidators were armed with a letter of request from the Bahamian court seeking the Anguillan court’s assistance in the interest of justice and good international relations. The grounds of appeal relevant to this matter were that:

1. the learned trial judge erred in law in holding that the Bahamian Court had jurisdiction to make the winding-up orders; and
2. the trial judge was wrong in law in holding that the foreign liquidation in the Bahamas fell within the established bases of recognition at common law and that equity, convenience and comity demand that a foreign liquidation should be recognized by this Court.

[22] In dismissing the appeal, the Court of Appeal referred to the case of **Re African Farm Ltd.**¹⁰ In that case, a company registered in England but carrying on business in the Transvaal and owning property there was placed in liquidation in accordance with English law. The liquidator, appointed by a creditor’s resolution in England sought recognition of his appointment in the Transvaal. Innes CJ said at page 381:

⁸ Cap. 67 of the Revised Edition of Laws 1961

⁹ Anguilla Civil Appeal No 4 of 2003

¹⁰ [1906] TS 373

“The true test appears to me to be not whether we have this power to order a similar liquidation here, but whether our recognizing the foreign liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable.”

[23] The Court of Appeal concluded that the court in Transvaal used its inherent jurisdiction to achieve its end. The court held further that section 19(2) of the **English Supreme Court Act 1981**, is similar in terms to section 5 of the **Eastern Caribbean Supreme Court Act**. This section incorporates “the inherent jurisdiction of the court”. Such jurisdiction has been exercised by the superior courts from the earliest days. The court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rules of court. The Court of Appeal held that the High Court of Anguilla is the repository of all the powers referred to as “the inherent jurisdiction” possessed by the common law courts of England. By parity of reasoning the High Court of the Federation of Saint Christopher and Nevis is the repository of all the powers referred to as the “inherent jurisdiction” possessed by the common law courts of England.

[24] The modern approach to the exercise of the court’s inherent jurisdiction is gleaned from the case of **Texan Management Ltd & Others v Pacific Electric Wire & Cable Company**¹¹. Lord Collins stated at paragraph 57:

“But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: *Raja v Van Hoogstraten* (No. 9) [2008] EWCA Civ 1444, [2009] 1 WLR 1143. That decision concerned the court’s power under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae*. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court’s inherent jurisdiction.”

¹¹ [2009] UKPC 46

In my judgment the inherent jurisdiction of the court provides the requisite authority for the recognition of a foreign appointed receiver in the absence of a statutory basis. Accordingly, this aspect of ground 1 of the appeal also fails, in my view, but I would allow ground 1 on the basis that there is insufficient connection between Millennium Nevis and the United States court's jurisdiction.

[25] The second ground of appeal stated that the learned judge erred in finding that the absence of an affidavit in opposition to the affidavit in support of the 1st respondent's application for recognition was fatal to Millennium Nevis' defence of the said application in that:

- (a) There was evidence from the US Receiver's own bundle of exhibits which showed that there was insufficient connection between Millennium Nevis and the United States jurisdiction;
- (b) The question whether in recognizing the US Receiver the court was giving effect to a foreign penal law is a matter of law and not evidence;
- (c) The question whether there is legislation which creates a reciprocal relationship for the recognition or enforcement of civil judgments made in the United States of America is a matter of law and not evidence.

[26] Mr. Gonsalves agreed that the issues raised in (b) and (c) above are matters of law. I also agree. With respect to (a) however, this involved a finding of fact. Learned counsel pointed out that the learned judge stated that if Millennium Nevis wished to challenge any of the factual assertions contained in the affidavit in support of the application for recognition, then it should have filed an affidavit. No such affidavit was filed. This did not mean that the learned judge did not consider the affidavit evidence to determine whether it satisfied the requirements of proving a sufficient connection. This court does not have the benefit of the reasoning which influenced the decision of the learned judge. Having considered the affidavit evidence and the exhibits, and as stated above, I am of the view that

there is insufficient connection between Millennium Nevis and the United States jurisdiction. For this reason, I would also allow this ground of appeal.

Separate corporate personality and piercing the corporate veil

[27] The third ground of appeal stated:

“The learned judge failed to appreciate the distinction between Millennium Financial Ltd. a company incorporated in Uruguay, which was the party in the US action against whom breaches of US securities exchange legislation and fraud were alleged and the Appellant [Millennium Nevis] being a separate corporate sole incorporated in Nevis.”

In resisting that ground, learned counsel Mr. Gonsalves argued that the court will consider the practical realities of the case, will pierce the corporate veil and treat all parts of a fraudulent operation as one operation. Mr. Gonsalves submitted that the reliance on the principle of separate legal entity misses the point that the court will not permit the use of the separate legal entity principle as an instrument of fraud.

[28] Whereas I accept the statement of principle upon which Mr. Gonsalves relied, I must differ as to its application in the circumstances of this case. I am not satisfied that Millennium Nevis, as distinct from Millennium Uruguay, played a “pivotal role”¹² in or was party to the international investment fraud scheme so as to warrant the piercing of the veil of incorporation. The use of Millennium Nevis’ account cannot, on its own, establish a sufficient nexus with Millennium Uruguay’s fraudulent operations. Further, it does not appear that Millennium Nevis was incorporated or transacted business merely as a vehicle for Millennium Uruguay’s fraud.¹³ In my view, the significance of separate corporate personality was not fully appreciated. The appellant accordingly succeeds on the third ground of appeal.

¹² See para. 9 above

¹³ Jones v Lipman [1962] 1 WLR 832, DHN Food Distributors Ltd. v Tower Hamlets LBC [1976] 1 WLR 852, Re A Company Ltd. [1985] BCLC 333 (CA), Adams v Cape Industries [1991] 1 All ER 929, Trustor AB v Smallbone [2001] 3 All ER 987, S Dunhill General Industries v Housepower Properties 19 February, 2001 (unreported)

Admissibility of hearsay evidence

- [29] The fourth ground of appeal is that inadmissible hearsay evidence was admitted by the court and there was not sufficient admissible evidence to sustain the decision after rejecting such inadmissible evidence. Mr. Scantlebury stated that the Declaration of Robert Kondrat which formed the basis of the order appointing the US Receiver was replete with inadmissible hearsay and unsubstantiated allegations. Mr. Scantlebury submitted that it would be unsafe to recognize a foreign order which was the fruit of proceedings where hearsay evidence was adduced and the right to challenge such was waived by the US Receiver. Mr. Gonsalves rebutted that no objection was made to the admissibility of the affidavit submitted, the affidavit did not contain inadmissible hearsay and the clear evidence contained in the affidavit provided more than ample factual foundation to support the judge's decision. I am of the view that no objection having been taken to the evidence before the judge it is rather late in the proceedings for the appellant to complain. This does not however change my view earlier expressed that the evidence as it stood, and glossed as it was without adequate particularization or distinctions between the various Millennium companies does not show a sufficient connection as it relates to Millennium Nevis.
- [30] Mr. Gonsalves argued that there are basically three grounds on which foreign judgments can be impeached. These grounds are: (a) if the foreign judgment was obtained by fraud; (b) if its recognition would be contrary to public policy; or (c) if it was obtained in proceedings contrary to natural justice.¹⁴ Mr. Gonsalves pointed out that not one of these grounds was proffered before the court below. I would think that the challenge as to whether the effect of recognition would be enforcing a foreign penal law is a public policy ground. This was argued below. Mr. Gonsalves further contended that even if one of the grounds were proffered in terms of the purported admission by the United States Court of evidence which would not be admissible in the courts in Nevis that would not ground the claim that

¹⁴ Halsbury's Laws of England, 4th Edition, Volume 8, para. 726

the judgment should not be recognized because the proceedings were contrary to natural justice. Mr. Gonsalves relied on **De Cosse Brissac v Rathbone**.¹⁵ In **De Cosse Brissac**, one of the allegations of the defendant was that the French court admitted as evidence against the defendants certain documents which would not have been admissible in England. It was pointed out that the reception or rejection of evidence must be governed by the *lex fori*. In giving judgment for the plaintiff, the court held that the judgment of a foreign court having jurisdiction over the parties and subject-matter of the suit cannot be impeached on the ground that it is erroneous upon the merits. I must point out that Millennium Nevis was not a party before the United States court, and had not submitted to United States jurisdiction. That principle of law would therefore not be applicable to the present case. I would therefore also allow ground 4 of the appeal.

- [31] Based on the foregoing reasons, the order that I would make is that the appeal is allowed and the order of the court of the Federation of Saint Christopher and Nevis, Nevis Circuit, dated 28th November 2008, recognizing and giving full effect within the Federation of Saint Christopher and Nevis to the order appointing a receiver of the United States District Court of New York pronounced on 6th December 2002, in the case of **Securities and Exchange Commission v Millennium Financial Ltd.** and **Newport Fiduciaries and Nominees SA** is set aside. The parties are to make written submissions on costs within 21 days.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]

¹⁵ 158 E.R. 123