

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0010

BETWEEN:

NET INTERNATIONAL PROPERTY LIMITED

Appellant

and

**ADV. EITAN EREZ
(As Trustee in Bankruptcy for Rachel Sofer Sayag)**

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mde. Vicki Ann Ellis

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington, QC for the Appellant
Ms. Tameka Davis and Ms. Allana-J Joseph for the Respondents

2020: November 26;
2021: February 22.

Commercial appeal – Recognition and assistance pursuant to common law or inherent jurisdiction of the court – Jurisdiction of the court to grant recognition and assistance to trustee – Parts XVIII and XIX of the Insolvency Act – Whether the Insolvency Act, expressly or by necessary implication, abrogated the common law right of recognition, notwithstanding that Part XVIII is not yet effective – Whether the common law power to grant assistance survives having regard to the provisions of Part XIX of the Insolvency Act – Res judicata – Whether issues raised by appellant in its defence are res judicata – Fixed date claim – Dealing with fixed date claim summarily – Rule 27.2(3) of the Civil Procedure Rules 2000 – Whether judge erred in exercise of discretion to try fixed date claim form summarily at first hearing – Jurisdiction to rectify register of members – Whether learned judge erred in ordering registered agent of the company to rectify the register of members – Costs

This appeal arises out of proceedings in Israel concerning ownership of the shares comprised in a bearer share certificate issued by the appellant, Net International Property

Limited ("Net International" or "the Company"). The District Court in Israel found that Mrs. Rachel Sayag Sofer ("Mrs. Sofer") was the owner of the bearer shares and the controlling owner and moving force of Net International. The District Court declared that all the assets of the Company belonged to Mrs. Sofer and that they were therefore acquired by the bankruptcy estate. The District Court also ordered the respondent, Advocate Eitan Erez ("the Trustee"), the sole trustee of Mrs. Sofer's assets in the bankruptcy proceedings, to take steps in the Territory of the Virgin Islands ("BVI") to register himself as shareholder of Net International in accordance with the Company's articles. On appeal, the Supreme Court adopted the findings of fact of the District Court, allowed the appeal and set aside the finding of the District Court insofar as it attributed ownership of the assets of Net International to Mrs. Sofer, and remitted the case to the District Court.

In January 2020, the Trustee applied to the Commercial Court in the BVI by fixed date claim form for an order, under the inherent or common law jurisdiction of the Court, for recognition of himself as the trustee of the assets of Mrs. Sofer in the BVI, namely, her beneficial and legal interests in all the shares of Net International. The Trustee also sought orders for assistance in registering himself as the shareholder of Net International and powers to deal with the shares of the Company as if he was the registered shareholder of the Company. The learned judge, having heard the claim summarily, recognised the Trustee as the trustee of the assets of Mrs. Sofer and ordered that the Trustee be registered as a shareholder of Net International. The learned judge also ordered the registered agent of the Company to rectify the register of members of the Company and gave the Trustee liberty to apply for an order that the costs of the proceedings in the Commercial Court be paid by the current shareholder of the Company.

Being dissatisfied with the learned judge's decision, Net International appealed against the orders of the learned judge. The following issues arise on appeal: (i) the jurisdiction of the court to grant recognition and assistance to the Trustee; (ii) whether the issues raised by Net International in its defence of the claim are res judicata having regard to the findings and decisions of the courts in Israel; (iii) whether the learned judge erred in hearing and disposing of the claim summarily; (iv) whether the learned judge erred in ordering the registered agent of Net International to rectify the register of members of the Company to show the Trustee as the owner of shares in the Company; and (v) Costs.

Held: allowing the appeal in part; affirming paragraph 1 of the judge's order dated 9th June 2020, setting aside paragraphs 2, 3 and 4 of the said order and directing that submissions on costs be filed, that:

1. Recognition was a part of the common law of the BVI before the passing of the Insolvency Act in 2003 and continues to be. A local court in the BVI has power under the common law to recognise a foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. Recognition is usually accompanied by assistance which gives the foreign office holder powers to deal with the local estate. However, recognition does not necessarily include assistance.

Re African Farms Ltd [1906] TS 373 applied; **Rubin and another v Eurofinance SA and others** [2012] UKSC 46 applied; **Re Manhattan Investments Fund Ltd** BVI Civil Suit No. 19 of 2000 (delivered 20th March 2000, unreported) considered; **Globe-X Management Limited and others v Clifford Johnson and another** AXAHC VAP2003/0004 (delivered 23rd May 2005, unreported) applied.

2. An established common law right may be abrogated by necessary implication where statute provides a comprehensive scheme that replaces the common law right. While Part XVIII of the Insolvency Act, 2003 provides a comprehensive scheme for the recognition of foreign office holders that may be sufficient to abolish the common law of recognition, Part XVIII is not yet effective. Therefore, the common law right of recognition survives in the BVI and the Trustee was entitled, under the common law jurisdiction of the local court, to seek recognition. The learned judge did not err in granting him common law recognition.

Part XVII of the **Insolvency Act, 2003**, Act No. 5 of 2003, Laws of the Virgin Islands applied; **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al** BVIHCMP2015/0010 (delivered 6th June 2016), [2016] ECSCJ No. 103 applied; **Islington London Borough Council v Uckak and another** [2006] EWCA Civ 340 applied.

3. Part XIX of the Act provides a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. However, Israel has not been designated as a relevant foreign country and the Trustee is not entitled to apply for assistance under Part XIX of the Act. Assistance is no longer available at common law to foreign office holders from non-designated countries.

Part XIX of the **Insolvency Act, 2003**, Act No. 5 of 2003, Laws of the Virgin Islands applied; **Re C (a Bankrupt)** BVIHC (Com) 0080 of 2013 (delivered 31st July 2013, unreported) followed.

4. The doctrine of res judicata comprising cause of action estoppel and issue estoppel provides that a decision of a court of competent jurisdiction cannot be reopened and relitigated in subsequent proceedings between the same parties or their privies. It is also an established principle that the court will prevent a party from raising, in extant proceedings, an issue that was essential to the existence or non-existence of the cause of action in an earlier case between the same parties, but which was not raised by the party who now seeks to rely on the issue. In this case, there is no cause of action estoppel because the substantive issue of the Supreme Court in Israel regarding the Trustee's ability to pierce the corporate veil of Net International and claim the assets of the Company was not resolved in favour of the Trustee and is not being challenged in the BVI proceedings. There is, however, an issue estoppel regarding the shares comprised in the bearer share certificate by which Net International

would be estopped from raising any issue that any person other than that Mrs. Sofer is the beneficial owner of the bearer shares. This estoppel does not apply to Net International's ability to give evidence as to the state of the Company's register and any related issue regarding the Company's current shareholding.

Henderson v Henderson (1843) 3 Hare 100, 114-115 applied; **Greenhalgh v Mallard** [1947] 2 All ER 255 at 257 considered.

5. A trial judge managing a case commenced by fixed date claim form has the power to try the claim summarily at the first hearing. This is a case management decision and it is inappropriate for an appellate court to interfere with the judge's decision unless it is plainly wrong. In this case, Net International was not given an opportunity to file evidence in support of its case, the Trustee did not apply to the Company to deal with the disabled bearer shares and the registered shareholder was not given an opportunity to resist what could amount to a cancellation of his or her shares. The judge erred in deciding to hear the fixed date claim summarily and this is an appropriate case to set aside his decision.

Part 27 of the **Civil Procedure Rules 2000** applied; **Richard Frederick and another v The Comptroller of Customs and another** Saint Lucia Civil Appeal HCVAP2008/0037 (delivered 6th July 2009, unreported) considered; **Agnes Danzie and others v Cecil Anthony** Saint Lucia Civil Appeal HCVAP2015/0009 (delivered 4th December 2015, unreported) considered; **Travis Augustin v Choc Estates Limited** Saint Lucia Civil Appeal HCVAP2014/0002 (delivered 9th June 2015, unreported) considered.

6. The court does not have jurisdiction to rectify the share register of the Company to show the owner of disabled bearer shares as a registered shareholder. Further, the rectification order should have been directed to the Company itself and/or its directors, and not the registered agent, especially where, as in this case, there is no evidence that the registered agent maintains the register of members of Net International.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned trial judge delivered orally on 9th June 2020 and in writing on 22nd June 2020, recognising the respondent, Advocate Eitan Erez, as the trustee of the assets of Mrs. Rachel Sayag Sofer in the Territory of the Virgin Islands ("BVI"), and ordering, inter alia, that the respondent be registered as a shareholder of the appellant, Net International Property Limited, a BVI company.

- [2] The appellant is referred to in this judgment as “Net International” or “the Company”, the respondent as “the Trustee”, and Mrs. Rachel Sayag Sofer as “Mrs. Sofer”.

Background

- [3] The parties to this appeal, and other persons, have been involved in multiple lawsuits in Israel concerning the role of Mrs. Sofer and members of her family in fraudulent activities, and the ownership of the assets of Net International. The litigation started in early 2003 when Citibank NA and Himalayan Bank Limited (together “the Banks”) brought an action against Mrs. Sofer and others in the District Court of Tel Aviv and Jaffa, Israel (civil case number 1790/03), alleging that they defrauded the Banks and that the proceeds of the fraud were transferred into an account in the name of Net International at the Israel Discount Bank Ltd (“Discount Bank”). Net International, which was then known as Clanport International Limited (“Clanport”), was joined as a defendant in the action. The Banks sought recovery of the monies in the Discount Bank account. The parties settled this action and entered into a settlement judgment on 18th October 2010. The Trustee intervened to cancel the settlement on the ground that Mrs. Sofer, as a bankrupt, could not have agreed a settlement and that the monies in the Discount Bank account belong to Mrs. Sofer’s bankrupt estate.
- [4] In the meantime, in separate proceedings described as bankruptcy case number 1381/09, the District Court declared Mrs. Sofer bankrupt and appointed trustees of her assets. The Trustee was later appointed sole trustee on 21st February 2012. Mrs. Sofer’s appeal against the bankruptcy order was dismissed.
- [5] On 29th February 2012, the Trustee filed a Motion for Instructions in the bankruptcy proceedings alleging, in summary, that the assets of Net International were acquired by Mrs. Sofer with bankruptcy funds and that the Company’s assets, including monies in bank accounts, should be paid over to the bankrupt estate. In response, Net International/Clanport claimed that Mrs. Sofer was not connected to and did not have a position in Net International, and that the shares of the Company were held by a Mr. Chandra Farkash aka Chandra Prakash, an Indian national. Further, the

District Court was not competent to determine that Net International's assets belong to Mrs. Sofer.

[6] The Motion for Instructions and the Trustee's application to set aside the settlement judgment were consolidated into a new claim 30725-04-14, which I describe in this judgment as "the consolidated action". There were two other claims before the District Court, but they are not material to this appeal.

[7] The District Court judge found that Mrs. Sofer was connected to Net International and that she had delivered the bearer share certificate to Advocate Cantor in 2005 as part of a separate transaction.¹ The trial judge concluded:

"[1] The motion is granted in part, in the sense that a declarative remedy is hereby granted according to which all of the assets, money and rights of the seventh respondent and the eight respondent [Clanport/Net International] belong to the debtor and her alone, and they are given over in full to the bankruptcy funds. This includes the rights of claim of either of respondents nos. 7 or 8 in proceedings that are taking place in Israel.

[2] In view of the aforesaid, the trustee will replace the eight respondent in the proceeding in CC 35769-04-11, which is taking place before this court.

[3] The trustee will take steps to register himself as a shareholder of the company in the company's registers in the Virgin Islands, in accordance with the company's Articles, insofar as he has not already done so.

[4] Remedies nos. 3-4, which concern the restitution of the money by the foreign banks, as stated in the motion, are denied." ²

In connection with order [1] above the District Court found that "[t]he debtor is indeed the controlling owner and moving force in Clanport."³

[8] The decision in the consolidated action number 30725-04-14, and related decisions of the District Court, were appealed to the Supreme Court sitting as the Court of Civil Appeals. The judgment of the Supreme Court was delivered by Justice (Emeritus) Uri Shoham. In paragraphs 55 to 57 of the Supreme Court's judgment, Justice Shoham dealt with the Court's treatment of the findings of fact made by the District Court. In paragraph 55 he stated:

¹ Record of Appeal, pg. 197.

² Record of Appeal, pg. 217.

³ Record of Appeal, pg. 199.

“After I have studied the judgment of the lower court, as well as the Statements of Appeal and the summations, and after listening to the oral arguments of the parties, I have reached the conclusion that the findings determined in the judgment should be adopted, pursuant to section 460(b) of the Civil Procedure Regulations, 5744-1984, apart from the finding of the lower court that all the assets, money and rights of Net International are those of the debtor, and that are acquired in full by the bankruptcy funds, and the determination that the trustee will replace Net [International] for the purpose of the proceeding taking place in Civil Case 35769-04-11 [reported by Nevo], which I shall discuss below.”⁴

- [9] Justice Shoham then dealt with the basis for adopting the District Court’s findings of fact and concluded:

“Therefore, it would appear that the lower court justly reached the conclusion that the debtor is ‘the controlling owner and the moving force’ in Net [International] and therefore that the trustee, in replacing the debtor, holds the shares of the company and is the controlling shareholder of the company.”⁵

- [10] However, the Supreme Court overturned the District Court’s finding that had effectively lifted the corporate veil of Net International and decided that all the assets, money and rights of the Company belong to Mrs. Sofer and were therefore acquired by the bankruptcy estate. The Supreme Court’s finding is at paragraph 62 of the judgment where Justice Shoham stated:

“Therefore, in my opinion, the lower court erred when it granted the remedies that were requested by the trustee, that seek to attribute to the debtor all the assets, money and rights of Net [International], without proof of foreign law that governs Net [International], with respect to the subject of raising the veil. At most, the lower court was entitled to attribute [Net International’s] share certificate to the debtor, and consequently to have the trustee acquire it ‘since he replaces the debtor’. It should also be said that since Net [International] is a foreign company that is registered in the British Virgin Islands and acts in accordance with the law that applies there, it would appear that proof of the foreign law, in the circumstances of the case, is required not only to raise the veil but also for the purpose of registering the trustee as the shareholder of Net [International], in accordance with the company’s Articles.”⁶

⁴ Record of Appeal, pg. 106.

⁵ Record of Appeal, pg. 107.

⁶ Record of Appeal, 109.

The learned judge continued at paragraph 63:

“In view of the aforesaid, I am of the opinion that the finding of the lower court that all of the assets, money and rights of Net [International] are those of the debtor and are acquired in their entirety by the bankruptcy funds, as well as the finding that the trustee will replace Net [International] for the purpose of the proceeding being litigated in civil case 35769–04–11 [reported by Nevo] should be set aside.”⁷

[11] The Supreme Court allowed the appeal and set aside the order of the District Court insofar as it attributed ownership of the assets of Net International to Mrs. Sofer. It remitted the case to the District Court and effectively stayed those proceedings pending resolution of the issue of the raising of the corporate veil based on evidence of the foreign law that applies in the BVI. Justice Shoham also said that as a secondary question, the lower court should determine whether, under the law in the BVI, and under Net International’s Articles, it is possible to register the Trustee as a shareholder of the Company.

[12] The Supreme Court left standing its affirmation of the findings of fact of the District Court.⁸

BVI proceedings

[13] On 16th January 2020, the Trustee filed a fixed date claim form supported by the affidavit of the Trustee, followed by points of claim on 23rd March 2020, seeking orders pursuant to the inherent or common law jurisdiction of the court for recognition of the Trustee as the trustee of the assets of Mrs. Sofer in the BVI, namely, her beneficial and legal interests in all the shares of Net International. The Trustee’s pleadings also claim consequential orders registering the Trustee as the registered shareholder of Net International and giving him power to deal with the shares of Net International as if he was the registered shareholder of the Company. In short, the Trustee sought recognition and assistance from the BVI Courts. The claim does not

⁷ Ibid pg. 109.

⁸ See paragraph 8 above.

seek to lift the corporate veil and declare that the assets of Net International belong to the Trustee on behalf of the bankrupt estate.

- [14] Net International filed its points of defence on 9th April 2020 denying, inter alia, that: (a) the Trustee was entitled to recognition or assistance in the BVI, (b) that Mrs. Sofer is or was a shareholder of Net International and asserting that the shares issued by Net International are held by another (unidentified) person, (c) denying that the court in Israel made a ruling that Mrs. Sofer was the sole shareholder of Net International or made a conclusive finding that Mrs. Sofer was the shareholder of Net International.
- [15] On 26th May 2020, before the first hearing of the fixed date claim form scheduled for 2nd June 2020, counsel for the Trustee, Ms. Tameka Davis, wrote to counsel for Net International, Mr. John Carrington, QC, stating that it is apparent from the pleadings that the sole issue for determination by the Commercial Court is whether the appointment of the Trustee over the shares of Net International should be recognised in the BVI, and that the issues raised in the points of defence are res judicata having already been decided by the courts in Israel. The letter stated that the Trustee intended to ask the Court to determine the case summarily at the first hearing on 2nd June 2020.
- [16] At the first hearing, Ms. Davis raised the issue of the claim being dealt with summarily as foreshadowed in her letter of 26th May 2020. Mr. Carrington, QC did not agree with the summary procedure and the hearing was adjourned to 9th June 2020 with liberty to Mr. Carrington to file reply submissions.
- [17] On 9th June 2020, the learned judge proceeded to hear the claim summarily. He called upon Mr. Carrington to make submissions, and then delivered an *ex tempore* judgment by which he decided that:

- (a) the Trustee be recognised as the trustee of the assets of Mrs. Sofer in the BVI namely her beneficial and legal interests in all the issued shares of Net International in accordance with the order of the District Court in Case number 30725–04–14 as confirmed by the Supreme Court in its judgment dated 31st October 2018, and that the Trustee be registered as the shareholder of Net International;
- (b) the registered agent rectify the register of members of Net International in accordance with his order; and
- (c) the Trustee is at liberty to apply for the costs of the proceedings on notice to the current shareholder of Net International.

The Appeal

[18] Net International appealed against the orders of the learned judge. The notice of appeal lists seven grounds of appeal which, when considered with the written and oral submissions of counsel, and the evidence, raise the following issues:

- (i) The jurisdiction of the court to grant recognition and assistance to the Trustee.
- (ii) Whether the issues raised by Net International in its defence of the claim are res judicata having regard to the findings and decisions of the courts in Israel.
- (iii) Whether the learned judge erred in hearing and disposing of the claim summarily in breach of the express provisions of the Civil Procedure Rules 2000 dealing with claims brought by fixed date claim form and, in the absence of sufficient evidence, determining the claim summarily.
- (iv) Whether the learned judge erred in ordering the registered agent of Net International to rectify the register of members of the

Company to show the Trustee as the owner of shares in the Company.

(v) Costs.

Recognition and assistance

[19] The starting point on the issues of recognition and assistance is to determine what, if any, is the difference between recognition and assistance. There is, at least in theory, a difference between the two principles. Recognition is the formal act of the local court recognising or treating the foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. In this case, this means recognising the Trustee's position granted by the courts of Israel as being the trustee in bankruptcy of the assets of Mrs. Sofer and treating him as the trustee of those assets in the BVI.

[20] Assistance goes further. If granted by the BVI court, it allows the Trustee to deal with the BVI assets of Mrs. Sofer, namely, her legal and beneficial interest in the shares of Net International. Put another way, recognition gives the foreign office holder status in the BVI and assistance gives him or her power to deal with the BVI assets. However, the dividing line between the two principles is blurred in practice because recognition by itself is generally of little assistance to the foreign office holder unless it is accompanied by the grant of assistance to deal with the local assets. Viewed in this way, recognition is generally treated as recognition and assistance. The blurring of the lines between the two concepts is illustrated by the judgment of the Supreme Court of Transvaal, South Africa, in **Re African Farms Ltd.**⁹ In this celebrated case, the liquidator of an English company, with substantial assets in the Transvaal, sought recognition from the courts in Transvaal to deal with the company's assets in that province. In delivering the judgment of the court, Chief Justice Innes stated at page 377:

'It only remains to consider whether we are justified in recognising the position of the English liquidator. And by that expression I do not mean a

⁹ [1906] TS 373.

recognition which consists in a mere acknowledgment of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the Court may impose for the protection of local creditors, or in recognition of the requirements of our local laws. If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims."

This passage and the entire judgment of the Supreme Court illustrate that recognition, in the sense of conferring status on a foreign insolvency officer, is usually accompanied by powers to deal with the local estate (assistance). A more modern statement of the common law principle is in the judgment of Lord Collins in **Rubin and another v Eurofinance SA and others**¹⁰ wherein, he stated:

"Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element."

- [21] Notwithstanding the blurring of the lines between recognition and assistance, it is important to bear in mind that recognition does not necessarily include assistance. In this case, the trial judge's order recognising the Trustee included assistance.
- [22] The Trustee's fixed date claim form and points of claim seek relief in the form of recognition of the Trustee at common law or under the court's inherent jurisdiction, and associated reliefs including rectification of Net International's share register. Ms. Davis submitted that notwithstanding the provisions of the **Insolvency Act, 2003**,¹¹ ("the Insolvency Act" or "the Act") the court has the power at common law or under its inherent jurisdiction to recognise the appointment of the Trustee and to grant the

¹⁰ [2012] UKSC 46.

¹¹ Act No. 5 of 2003, Laws of the Virgin Islands.

orders sought. Mr. Carrington countered by submitting that recognition by virtue of the common law or under the inherent jurisdiction of the court is no longer available to a foreign office holder in the BVI.

[23] I am satisfied that recognition is and has always been a part of the common law of the BVI. It was first recognised in 2000, before the passing of the Insolvency Act, in **Re Manhattan Investments Fund Ltd**¹² when Benjamin J recognised the appointment of provisional liquidators appointed by the High Court of Bermuda of a BVI company operating in Bermuda and permitted the provisional liquidators to pursue an application under the Companies Act, Cap. 285 for the compulsory winding up of the company under the Companies Act.¹³

[24] Recognition at common law was also accepted and applied by the High Court of Anguilla and the Court of Appeal (Gordon JA) in **Globe-X Management Limited and others v Clifford Johnson and another**.¹⁴ The High Court judge recognised the appointment by the Supreme Court of the Commonwealth of the Bahamas of liquidators of the Globe-X companies that had re-domiciled in Anguilla. The Court of Appeal affirmed the trial judge's recognition order, applying the common law of recognition in the wider sense of including assistance.

Effect of the Insolvency Act, 2003

[25] The Insolvency Act was passed in 2003. Parts XVIII and XIX provides the regulatory framework for recognition and assistance respectively. Part XVIII contains a comprehensive scheme for recognising foreign office holders. However, Part XVIII has not been brought into force and is still not an effective part of the Act. Part XIX sets what appears to me to be a comprehensive scheme for assisting foreign office holders without the necessity of applying for or being recognised under the Act (or the common law).

¹² BVI Civil Suit No. 19 of 2000 (delivered 20th March 2000, unreported).

¹³ Paragraph 20 of the judgment.

¹⁴ Anguilla Civil Appeal No. 4 of 2003, AXAHCVP2003/0004 (delivered 23rd May 2005, unreported).

- [26] The issues that arise from the passing of the Act are:
- (a) Did the Act, and in particular Part XVIII, abrogate the common law principle of recognition, notwithstanding that Part XVIII is not yet effective.
 - (b) If Part XVIII did not abrogate recognition, is it still available at common law or under the inherent jurisdiction of the court.
 - (c) Did the learned judge err in recognising the Trustee
 - (d) If common law assistance is no longer available how can a foreign office holder who does not qualify for assistance under Part XIX get assistance from the BVI courts.

The abrogation of the common law

- [27] An established common law right such as the principle of recognition cannot be abrogated by statute unless the intention is clear from the wording of the statute, or by necessary implication of the words used in the statute. Ms. Davis relied on this principle and submitted that Part XVIII cannot be construed as abrogating the common law of recognition for the simple reason that Part XVIII is not effective. Further, that Part XIX does not by necessary implication abrogate the common law of recognition – in fact, Part XIX does not even mention the word recognition. She relied on this Court's decision in **Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al**¹⁵ and that of the English Court of Appeal in **Islington London Borough Council v Uckak and another**¹⁶ for the general principle that the court will not lightly conclude that Parliament has ousted common law and equitable rights, but such rights may be abrogated expressly or by necessary implication. This principle has been applied in other cases in the courts of the Eastern Caribbean.¹⁷ I have no hesitation in accepting it and applying it in this case.

¹⁵ BVIHCMP2015/0010 (delivered 6th June 2016), [2016] ECSCJ No. 103.

¹⁶ [2006] EWCA Civ 340.

¹⁷ *Burrill and another v Shrader and another* (1995) 50 WIR 193; *St. Kitts Marriott Resort v Deborah Stevens* SKBMCAP2016/0001 (delivered 30th October 2020, unreported).

[28] There is no express provision in Parts XVIII or XIX, nor elsewhere in the Act, that abrogates the common law right of recognition. The issue then is whether the Act, by necessary implication, abrogated the right. One way to test whether a right has been abrogated by necessary implication is to examine the statute to see if it provides a scheme that comprehensively replaces the common law right. Part XVIII comprises 29 sections. The sections when read together provide a comprehensive scheme for the recognition of foreign office holders. But for the fact that part XVIII is not effective, I would say that it constitutes a complete scheme of recognition that would have abolished the common law right of recognition. However, as part XVIII is not effective, I do not have to resolve this issue. Suffice it to say that in the absence of an effective Part XVIII there is nothing else in the Act that establishes a statutory scheme of recognition, far less one that is sufficiently comprehensive to displace and therefore abrogate the common law right of recognition. The common law right of recognition survives in the BVI.

Recognition of the Trustee

[29] Mr. Carrington submitted that if common law right of recognition is available in the BVI (which he disputes) it should not be accorded to the Trustee because he did not satisfy the common law criteria for recognition, namely, that the debtor was domiciled in the country having jurisdiction over the bankruptcy estate (Israel), or that the debtor submitted to the jurisdiction of the Israeli bankruptcy court.¹⁸

[30] The learned judge's judgment suggests that he accepted that the Israeli courts had jurisdiction over the bankruptcy estate, without analysing the issues of Mrs. Sofer's domicile or her submission to the courts of Israel. This is understandable. There is no evidence to suggest that she was not domiciled in Israel and there is abundant evidence that she participated in the proceedings. The level of her participation in the Israeli proceedings is extensive and more than capable of amounting to

¹⁸ Per Lord Collins in *Rubin v Eurofinance and others* [2012] UKSC 46, at para 46.

submission to the jurisdiction of the Israeli courts in the sense that submission is understood under BVI law.

[31] The Trustee did not file expert evidence of Israeli law on what amounts to submission to the jurisdiction in Israel. However, this is not fatal. The conflict of laws rule in the BVI is that where there is no evidence of foreign law, the BVI court will apply BVI law.¹⁹ The relevant BVI rule on submission to the jurisdiction is that the person has to voluntarily participate in the proceedings and his or her conduct must be wholly consistent with submission and there is no other explanation for it.²⁰ Applying this test and considering the evidence before the courts in Israel, I am satisfied that Mrs. Sofer submitted to the jurisdiction of the Israeli courts by participating in the various cases before the District Court and the Supreme Court. Her participation went as far as filing two appeals to the Supreme Court.

[32] In the circumstances, the learned judge did not err in impliedly finding that the Trustee had satisfied the criteria for being recognised at common law and expressly recognising him as the trustee of the assets of Mrs. Sofer in the BVI. I would affirm the recognition but only in the narrow sense of giving him the status of recognition in the BVI. As stated above²¹ the judge's recognition went further and granted assistance to the Trustee. I disagree with the judge's recognition order insofar as it granted assistance to the Trustee. The issue then becomes whether the common law right of assistance survived the enactment of Part XIX of the Act and/or whether the BVI court can grant assistance to the Trustee under Part XIX. I will now deal with these issues.

¹⁹ Dicey, Morris and Collins on the Conflict of Laws (14th ed. OUP 2006), rule 18(2).

²⁰ Alexander Katunin et al v JSC VTB Bank and another BVIHCVAP2017/0004 & 000 7 of 2017 (delivered 20th June 2016, unreported) at paragraph 18.

²¹ Paragraphs 17 and 21.

Part XIX of the Act

- [33] Part XIX of the Act establishes a procedure by which a foreign office holder can apply to the courts in the BVI for assistance. The applicant does not have to apply for recognition to receive assistance. It is an independent right.
- [34] Part XIX is headed “Orders in aid of foreign proceedings” and comprises seven sections. Section 466 is the interpretation section of Part XIX. The definitions include:
- (i) A “foreign representative” as “a person or body ...authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s property or affairs or to act as a representative of the foreign proceeding.”
 - (ii) An “insolvency officer” as “the Official Receiver, a liquidator, provisional liquidator, bankruptcy trustee, administrator, receiver, supervisor, or interim supervisor.”

But for the definition of a ‘relevant foreign country’ which I deal with in the next paragraph, I am satisfied that the Trustee would be a foreign representative and an insolvency officer within the meaning of section 466.

- [35] A ‘relevant foreign country’ is defined as a ‘country, territory or jurisdiction designated by the Commission as a relevant foreign country for the purposes of this Part.’ The Commission is defined in section 2 of the Act as the Financial Services Commission established under the **Financial Services Commission Act, 2001**.²² The Commission has not designated Israel as a relevant foreign country. Therefore, the Trustee is not entitled to apply for assistance under Part XIX of the Act, a situation that has far-reaching consequences in this appeal.
- [36] Notwithstanding my conclusion in the preceding paragraph, I will deal with sections 467 and 470 of the Act because of the important role that they play in counsels’ submissions.

²² Act No. 12 of 2001, Laws of the Virgin Islands.

[37] Section 467(2) provides that a foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized. Subsection (3) provides that:

“ Subject to section 468, upon an application under subsection (1),²³ the Court may

- (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
- (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by a foreign representative of the debtor or any person could be examined in a Virgin Islands insolvency proceeding respect of debtor;
- (g) stay or terminate or make such other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
- (h) make such other order or grant such other relief as it considers appropriate.”

The section speaks for itself. A foreign representative can apply, with or without recognition, for assistance in any of the matters listed in paragraphs (a) – (g) of section 467(3), or under paragraph (h) for “*such other relief as the court considers appropriate*”. The effect of paragraph (h) is to expand the court's powers in granting assistance.

[38] The extent of the court's power to grant assistance is further expanded by section 470 headed “Additional assistance” and reads:

²³ This should be a reference to subsection (2).

“Subject to section 443,²⁴ nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands.”

This means that in considering an application for assistance under section 467 of the Act, the court has the wide powers granted under section 467(3) as well as additional assistance where permitted under any other provision of the Act or any other enactment or rule of law.

[39] For completeness, I would add that even if the inclusion of the words “rule of law in the Virgin Islands” in section 470 means that the statute itself preserved the common law right of assistance, this would not help the Trustee because he was not appointed by the courts of a relevant country and so could not benefit from a right created or preserved by the section. Bannister J said as much in the case of **Re C (a Bankrupt)**.²⁵

[40] To recap, Part XIX creates the statutory power for the courts of the BVI to assist foreign representatives from designated countries in cross-border insolvency matters. Section 467(3) lists specific areas in which assistance can be granted followed by the general power of assistance in appropriate cases in paragraph (h) of section 467(3), and additional assistance that can be provided under section 470. This is a complete code for a qualified foreign representative to apply for assistance without having to resort to the court’s common law power to grant assistance.

[41] Having regard to the principles relating to abrogating established common law principles set out above,²⁶ I am satisfied that when the Legislature enacted Part XIX of the Act the intention was to provide a complete code for foreign representatives to apply to the BVI courts for assistance in cross-border insolvency matters such that

²⁴ Section 433 is a part of Part XVIII and is not yet effective.

²⁵ BVIHC (Com) 0080 of 2013 (delivered 31st July 2013, unreported).

²⁶ Paragraphs 27 and 28 above.

foreign representatives from non-scheduled countries are unable to obtain assistance.

[42] This leads to the situation that confronts the Trustee in this case. He was appointed as the trustee (in bankruptcy) by the courts of Israel. Israel is not one of the countries that have been designated by the Commission whose representatives can apply for assistance under section 467. The issue is whether representatives from non-designated countries such as Israel have any right to apply in the Virgin Islands for assistance at common law. The conclusion that I have arrived at in the preceding paragraphs suggests that such persons cannot apply for assistance.

[43] This conclusion reflects the finding of the Commercial Court in the case of **Re C**.²⁷ The case involved an application by a foreign representative appointed by the High Court of Hong Kong. Hong Kong is a designated country under Part XIX and therefore there was no question that the applicant was entitled to apply for assistance under Part XIX. Unsurprisingly, Bannister J granted the assistance on the ground that the applicant was appointed in one of the countries designated by the Commission as a relevant foreign country and it was otherwise appropriate to grant assistance. Having disposed of the case on that basis, the learned judge went on to provide helpful comments on the situation advanced by counsel for the applicant on the wider question whether the common law approach to recognition and assistance survived generally in this jurisdiction in parallel with Parts XVIII and XIX. On this question Bannister J stated at paragraph 24:

“I have no doubt that it does not. The provisions of Part XIX (and, for that matter, Part XVIII) are quite clearly intended to be restrictive of the class of persons who may be the object of the Court’s recognition and beneficiaries of its assistance. Those restrictions will be rendered futile if it were the case that the court remained at liberty to grant recognition to any officeholder it chose, regardless of the jurisdiction in which he had been appointed – certainly if it could proceed to confer upon any such office holder the powers of a person holding office under IA 2003. In my judgment, what Lord Neuberger said in **re HIH Insurance Ltd**²³ [2008] 1 WLR 852 about the existence

²⁷ Supra paragraph 35.

of an inherent power in tandem with but not extending further than section 426 of the UK Insolvency Act 1986 applies with equal or greater force in this case.”

[44] Ms. Davis submitted that **Re C** was wrongly decided because there is a common law right of recognition and assistance in the BVI and also because Bannister J erred in relying on dicta in the **HIH Insurance Ltd**²⁸ case to support his conclusion that the common law right of assistance was repealed by section 467 and only office holders from designated countries could be afforded assistance. Further and in any event, the common law right of assistance and recognition has not been repealed by Part XIX and recognition and assistance continue to exist in this jurisdiction alongside Parts XVIII and XIX.

[45] It is correct that Bannister J referred to the **HIH Insurance** case and, in my opinion, he was correct in doing so. The **HIH insurance** case is a 2008 decision of the House of Lords involving the compulsory liquidation of Australian insurance companies that had assets in both Australia and the United Kingdom. The Australian court-appointed joint provisional liquidators in the main liquidation proceedings of the companies. The English High Court appointed the Australian liquidators in ancillary liquidation proceedings in England. The Australian High Court then issued a letter of request to the English High Court, pursuant to section 426 of the Insolvency Act 1986, for the Court to direct the remission of the English assets to Australia to be distributed in the main liquidation proceedings in Australia. Section 426 of the Insolvency Act provides that ‘[t]he courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in ... any relevant country...’.

[46] The Secretary of State has power under subsection (11) to designate a country as ‘relevant’ and has so designated Australia. Their Lordships were unanimous in finding that the English assets should be remitted to Australia under the powers granted by section 426 of the Insolvency Act 1986. However, their Lordships were

²⁸ [2008] UKHL 21.

divided equally on the issue of whether the remission could be done under the court's inherent jurisdiction. Lord Hoffman and Lord Walker found that the court has an inherent jurisdiction, parallel to its powers in section 426, to remit the assets to Australia. Lord Neuberger and Lord Scott opined that the court did not have an inherent jurisdiction to remit the assets. The remission could only be done under the statutory power in section 426. Lord Phillips, having decided that the remission should be done under section 426, expressly declined to express an opinion on the court's inherent jurisdiction to order the remission. The opinions expressed by their Lordships on the inherent power of the court are obiter and neither of the two views represents the majority view of the Board.

- [47] The judgments of Lord Scott and Lord Neuberger are illuminating on the situation where the court has a statutory power to remit alongside a claimed inherent power to do so. The judgment of Lord Scott contains dictum that is relevant to the facts of this appeal. At paragraph 61 Lord Scott opined:

“...section 426 does not apply to all countries. It does not apply where the principal winding up is being conducted in a country which is neither part of the United Kingdom nor has been designated by the Secretary of State as a ‘relevant country or territory’. The proposition that the assistance and directions sought by the Australian court and the Australian liquidators in the present case could be given under the inherent power of the court without reference to section 426(4) and (5) is, in my respectful opinion, unacceptable. It would mean that the assistance and directions could be given in relation to a winding up being conducted in a foreign country that had not been designated a ‘relevant country or territory’ by the Secretary of State. It would constitute the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State. Moreover, the issue is one that does not arise in the present case. If the assistance and directions sought cannot, on a proper exercise of the court's discretion, be given pursuant to section 426(4) and (5), they could hardly be given as a proper exercise of the court's inherent power.”

- [48] The guidance from Lord Scott and Lord Neuberger illustrates that where Parliament creates a power that is available to designated countries, that power cannot be exercised by insolvency office holders from other countries. Had the power to remit assets been available under the inherent jurisdiction of the court this would mean

that office holders from non-designated countries could apply for the remission of assets to countries that are not relevant countries. Lord Scott in particular, regarded this as a usurpation of a role expressly reserved by Parliament to designated countries. Bannister J was obviously mindful of the situation when he found, albeit obiter, that extending the common law power of assistance to office holders from non-designated countries would amount to usurpation by the judiciary of the power expressly reserved by Parliament to designated countries.

[49] The fact that Part XIX is a comprehensive scheme for applying for assistance which contains restrictions on how the court is to deal with applications for assistance and has limited the countries from which applications will be entertained, reflect the public policy of the BVI in extending assistance to foreign office holders.

[50] I agree with the views expressed by Lord Scott and Lord Neuberger and I find that **Re C** was correctly decided. Although the decision is not binding on this Court, I think it should be followed. Therefore, I conclude that the Trustee, not being appointed by the courts of a relevant foreign country, is not entitled to receive assistance from this Court under its inherent jurisdiction. I come to this conclusion with some regret because it does not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross border insolvency matters. However, the Legislature of the Territory of the Virgin Islands has chosen to set up a comprehensive scheme for granting assistance and has deliberately restricted the countries from which applications can be entertained. The delegation of the power to the Commission to designate the relevant countries also seems to be deliberate, as that body is well placed to understand and administer offshore insolvency matters in the BVI. This appears to be the public policy of the BVI in dealing with requests for assistance in cross-border insolvency matters. It is not for this Court, exercising its common law or inherent jurisdiction, to allow office holders from non-designated countries to apply for assistance through the alternative door of the court's inherent jurisdiction. This would undermine the policy in Part XIX.

- [51] This conclusion is sufficient to dispose of the appeal. However, in deference to the very able and complete submissions of counsel, and in the event that another court is interested in this Court's views on the other main issues raised in the appeal, I will now proceed to deal with those issues.

Res judicata

- [52] The doctrine of res judicata provides that a decision of the court of competent jurisdiction cannot be reopened and relitigated in subsequent proceedings between the same parties or their privies. There are three aspects of the doctrine to be considered. The first two are described in the following terms by the learned editors of Halsbury's Laws of England:

"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."

- [53] Both cause of action estoppel and issue estoppel are part of the doctrine of res judicata and are based on the rules of estoppel in that they bar a party from relitigating decided cases and issues. The acknowledged object of the res judicata doctrine is the public policy of preventing a multiplicity of lawsuits concerning the same issues.

- [54] There is a third principle that has been developed alongside the estoppel rules in the res judicata doctrine. It is different from res judicata in the strict sense because it is not dependent on a prior decision or finding in a case between the same parties or their privies. It is that a court will prevent a party from raising in extant proceedings

an issue that was essential to the existence or non-existence of the cause of action in an earlier case between the same parties but was not raised by the party who now seeks to rely on the issue. This is the well-known rule in **Henderson v Henderson**²⁹ where Sir James Wigram V.-C. expressed the matter thus:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case[s], not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[55] This aspect of the res judicata doctrine is based on abuse of the court's process (as well as the usual public policy considerations). Somerville LJ described this aspect of the rule in **Greenhalgh v Mallard**³⁰ as:

"... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

[56] Turning to this appeal, the judge was obviously concerned with the binding effect of the decisions of the courts of Israel on the as yet unidentified registered shareholder of Net International and focused his reasoning and decision on whether the registered shareholder was a privy of Net International and therefore bound by the decisions of the Israeli courts. At paragraph 9 of his judgment, he stated that:

"However, that is completely at variance with the reality of the matter, which is that Net International, who were represented by counsel in the Israeli

²⁹ (1843) 3 Hare 100, 114-115.

³⁰ [1947] 2 All ER 255 at 257.

proceedings both at first instance and on appeal, were clearly acting on instructions of the registered shareholder who was able to appoint a director who would have been the person giving the direct instructions to the Israeli representatives of Net International. “

Based on this finding, the evidential basis of which is dubious according to Mr. Carrington, and also his consideration of the decision in **Henderson v Henderson**, the learned judge found that the unknown registered shareholder is a privy of Net International and is also bound by the decisions of the Israeli courts.

[57] Mr. Carrington submitted that the position that Net International has taken in the BVI proceedings is that there is a registered shareholder of Net International. The issue of a registered shareholder was never raised in the Israeli proceedings. Those proceedings were concerned with the ownership of the shares represented by the bearer share certificate, and if they were found to be owned by Mrs. Sofer, this would make her the alter ego of Net International and therefore the real owner of its assets. This, Mr. Carrington continued, was not a concern of the registered shareholder – it was an issue between the Trustee and Mrs. Sofer. The interest of the registered shareholder would only be affected if, as has happened, the Trustee is seeking to become a registered shareholder of Net International. The registration of the Trustee as a shareholder was not an issue in the Israeli proceedings. Therefore, the position that Net International took in the BVI proceedings is not caught by the *res judicata* doctrine and is not abusive in the sense understood by the **Henderson v Henderson** principle.

[58] Ms. Davis submitted that the decision of the Supreme Court regarding the ownership of the shares of Net International and the control of the Company by Mrs. Sofer is *res judicata* and binding on Net International and its privies. Further, Net International should not be allowed to abuse the court's process by raising any issue that could have been raised in the Israeli proceedings. Specifically, that neither Net International nor its privies can raise the issue of the Company having shareholders other than Mrs. Sofer as this latter point would be caught by the **Henderson v Henderson** principle.

- [59] To deal with the submissions of counsel the starting point is to determine what was decided by the Supreme Court in Israel. The judgment of the Supreme Court dealt many issues. I tried to capture the essence of the judgment for this appeal in paragraphs 8-12 above.
- [60] The main issue in the Israeli proceedings was whether Mrs. Sofer was the alter ego of Net International by being the real owner of the shares represented by the bearer share certificate and her control of the Company. As a result, the assets of the Company should be attributed to her and become a part of the bankruptcy estate. In effect, the court should pierce the corporate veil of Net International and attribute the assets of the Company to the bankruptcy estate. The District Court found that she was the owner of the shares and the person in control of the Company and therefore the assets of the Company belong to the bankruptcy estate.³¹ On appeal, the Supreme Court made two important decisions - it accepted the findings of fact made by the District Court and set aside the District Court's decision that the assets of Net International were acquired entirely by the bankruptcy estate and belong to the estate. Having set aside the District Court's decision to attribute Net International's assets to the bankruptcy estate, which was the main cause of action in the Israeli proceedings, there is no decision binding on Net International on this issue and therefore no cause of action estoppel. The Israeli cause of action is further removed from the BVI court by the fact that the Trustee is not seeking in the BVI proceedings to pierce the corporate veil or to get a declaration that the assets of Net International are owned by the bankruptcy estate. The Trustee's claim is for BVI recognition as a trustee of the estate and assistance in dealing the shares of the Company represented by the bearer share certificate.
- [61] Ms. Davis' alternative submission was that Net International is estopped from raising, in the BVI proceedings, issues relating to the ownership of the shares of Net International. She submitted that there is an issue estoppel because the District Court found that Mrs. Sofer is the sole owner of the shares represented by the bearer share

³¹ Paragraph 7 above.

certificate; that there is no other shareholder in the Company; and that Mrs. Sofer is the controlling shareholder and moving force of Net International. Further, that the principle in **Henderson v Henderson** applies and Net International is further estopped from raising any issue in the BVI proceedings concerning the shares in Net International because these issues could have been raised in the Israeli proceedings and Net International failed to do so. The Company cannot raise them now. Having regard to the Supreme Court's decision to adopt the findings of fact of the District Court in effect making them findings of the Supreme Court, I have to consider these matters in assessing the issue of issue estoppel.

[62] I do not think there is any serious question that the District Court decided, as a matter of fact, that Mrs. Sofer was the person entitled to all the shares comprised in the bearer share certificate. At page 66 of the District Court's judgment (page 197 of the electronic record of appeal) the Court found:

“As stated, the aforesaid bearer share was delivered to Adv. Cantor by the debtor herself, within the framework of the Cornucopia transaction, in a manner that supports the conclusion that she, and no one else, is the sole shareholder of Clanport.”

This is a finding of fact that would be included in the Supreme Court's adoption of the findings of the District Court. The Supreme Court itself noted at paragraph 16 of its judgment that Net International asserted in an affidavit by Mr. Chandra Prakash that he was ‘... the only shareholder in Clanport, who holds the bearer share certificate of Clanport that was issued to him on January 5, 2005...’, and in response to the Motion for Instructions that ‘... the shares are entirely held by Mr. Prakash, pursuant to the (bearer) share certificate ...’. Ms. Davis submitted that these assertions were raised by Net International in the Israeli proceedings and the Company cannot raise them again in the BVI proceedings. Therefore, Net International is estopped from asserting in this Court that there is any other shareholder of Net International.

[63] I agree with Ms. Davis that some form of issue estoppel applies in this matter, but I do not accept that it goes as far as saying that Net International cannot assert in these proceedings a position other than that Mrs. Sofer, and only Mrs. Sofer, is the

shareholder of Net International. I repeat that the main issue regarding the shares in the Israeli proceedings was whether Mrs. Sofer was the owner of the bearer shares and the alter ego of the Company. The Israeli Courts found against Mrs. Sofer and Net International on this issue and Net International is now estopped from asserting that any person other than Mrs. Sofer owned the beneficial interest in the shares comprised in the bearer share certificate. But that is not the end of the matter.

[64] Notwithstanding the finding of a limited issue estoppel, the Trustee still has to get over the hurdle of satisfying a BVI court that the Trustee should be registered as the sole registered shareholder of Net International. This, apart from recognition, is the substantive claim in the BVI proceedings, and I cannot see any good reason why Net International should be estopped from dealing with the issue.

[65] Mr. Carrington submitted that there is another reason relating to the merits of the rectification claim why his client should not be barred from dealing with the claim. The essence of his submission is that the BVI **Business Companies Act, 2004**³² (“the BC Act”) mandates that all bearer shares must be deposited with an authorised custodian or converted to registered shares. The cut-off date for depositing or converting the shares was 31st December 2009. Shares that were not deposited by the cut-off date were deemed to be disabled and the only remaining right of the owner of the shares was to apply to the Company under paragraph 36 of the Transitional Provisions in Schedule 2 of the BC Act to redeem the shares. Paragraph 36 reads:

“36 (1) Where an existing bearer share in a grandfathered bearer share company is not deposited with a custodian who has agreed to hold the share on or before the transition date, the company may, notwithstanding sections 59 to 62 or any provision in the memorandum or articles, in any shareholders’ agreement or in any other agreement, redeem the share.”

The core of Mr. Carrington’s submission on this point is that paragraph 36 vests the power to redeem disabled bearer shares in the company that issued the shares (Net International), and the court does not have jurisdiction to convert or redeem the

³² Act No. 16 of 2004, Laws of the Virgin Islands.

disabled shares, far less to rectify the share register of Net International to reflect the owner of the disabled bearer shares as a registered shareholder of the Company.

[66] There is no evidence that the bearer shares in this case were put into custody or converted into registered shares before the deeming date, or that the Company redeemed the shares after the deeming date. The shares are disabled and the Trustee has to apply to Net International to redeem them. All of this is made clear in the carefully reasoned judgment of Mendes JA [Ag.], in **The Bank of Nova Scotia Trust (Bahamas) Limited v The Registrar of Companies and others**,³³ that was referred to and relied on by Mr. Carrington. In this case, the companies in question did not have boards of directors and new directors could not be appointed because the shares were disabled. To address this situation, the Court of Appeal appointed a receiver of the companies to effect the redemption of the disabled shares. The Court of Appeal did not skip the redemption stage and proceed to order the rectification of the register. It honoured the provisions of the BC Act and the Transitional Provisions, by appointing a receiver of the companies so that the companies could act on the shareholders' requests for redemption.

[67] I accept Mr. Carrington's submission that the learned judge erred in ordering the registration of the Trustee as the shareholder of Net International and otherwise breathing life into the disabled bearer shares, without regard to the relevant sections of the BC Act and the Transitional Provisions.

[68] The treatment of the disabled shares is an issue that the BVI court will have to deal with in this action and I do not think that Net International should be barred from giving evidence in any proceedings to rectify the register of members of Net International. Net International's pleading that there is a registered shareholder must be relevant, if not essential. Net International was not given an opportunity to give evidence on this aspect of the case, even in light of the Israeli Supreme Court's decision that this issue should be decided according to BVI law. In the circumstances,

³³ BVIHCVA2016/0009 & 0010 (delivered 10th October 2018, unreported).

I do not accept that it would be res judicata or an abuse of power for Net International to raise issues in the BVI proceedings regarding the share register of the Company and the updating of the register.

- [69] In summary, on the issue res judicata, I find that there is no cause of action estoppel because the substantive issue of the Supreme Court regarding the Trustee's ability to pierce the corporate veil of Net International and claim the assets of Net International was not resolved in favour of the Trustee and is not being challenged in the BVI proceedings. However, there is an issue estoppel regarding the shares comprised in the bearer share certificate. Net International would be estopped from raising any issue in these proceedings that any person other than that Mrs. Sofer is the beneficial owner of the bearer shares. However, on the issue of updating the share register, Net International should be allowed to give evidence as to the current state of the register and any related issue regarding the Company's current shareholding.

Trying the case summarily

- [70] Part 8 of the **Civil Procedure Rules 2000** ("CPR") lists the ways that a claim can be brought in the High Court: by claim form or fixed date claim form. CPR Rule 8.1(5) authorises the commencement of proceedings by fixed date claim form, which is the procedure that was adopted by the Trustee in this matter. Following service of the fixed date claim form on Net International, the parties exchanged pleadings as outlined in paragraph 13 and 14 above.
- [71] One of the interesting features about the fixed date claim form procedure is that the right to apply for summary judgment, in CPR Part 15, is not permitted. Notwithstanding, the judge proceeded to deal with the case summarily. He heard submissions from Mr. Carrington and decided that the facts relating to res judicata are clear, and there was no dispute about the facts. He relied on his case management powers under CPR Rule 25.1(e) that allow the case management judge

to actively manage cases and dispose of issues that do not need full investigation. Ms. Davis also relied on the rule in CPR Part 27.2, which I will deal with below.

[72] On appeal, Mr. Carrington submitted that CPR Rule 15.3 is a specific provision of the CPR which prohibits summary judgment on the claim and the judge should not have relied on the general power of case management in Part 25. Therefore, the judge did not have jurisdiction to dispose of the claim summarily. And even if he did have jurisdiction, he should not have tried the case summarily, and by doing so, denied Net International the opportunity of filing evidence in support of its position.

[73] Ms. Davis responded by submitting that the judge did not grant summary judgment on the claim. The hearing in June 2020 was the first hearing of the fixed date claim form and the judge had the jurisdiction at the first hearing to treat the matter as a summary trial of the claim. In support of this submission learned counsel relied on CPR Rule 27.2, which reads:

“(1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.

(2) On that hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.

(3) The court may, however, treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.” (Emphasis added)

Ms. Davis also relied on this Court’s decision in **Richard Frederick and another v The Comptroller of Customs and another**³⁴ where the claimants filed a fixed date claim form seeking constitutional relief. The respondents filed an acknowledgment of service containing admissions and did not file a defence. When the matter came up for the first hearing the trial judge heard an application by the claimants for judgment on admissions. The judge treated the application as an application for summary judgment and refused it. The decisions of the trial judge and the Court of Appeal on the substantive issues in the claim are not material to this appeal. What is relevant is that the Court of Appeal addressed the issue of proceeding summarily on

³⁴ Saint Lucia Civil Appeal HCVAP2008/0037 (delivered 6th July 2009, unreported).

a fixed date claim form. The majority judgment of the Court was delivered by George-Creque JA who addressed the issue of a summary trial of a fixed date claim form.

The headnote reads:

“Dealing with a claim summarily under CPR 27.2 does not mean entering summary judgment but requires a trial of the issues between the parties to be conducted in a summary manner. The claimant must still prove that he is entitled to the relief sought.”

[74] The dictum of George-Creque JA has been followed with approval in subsequent cases of the Court of Appeal – **Agnes Danzie and others v Cecil Anthony**³⁵ (per Thom JA) and **Travis Augustin v Choc Estates Limited**³⁶ (per Michel JA). It represents the established view of the Court of Appeal on the interpretation of CPR Rule 27.2 that a trial must be held, albeit in a summary manner, before a judge can enter judgment on a fixed date claim form under CPR Rule 27.2.

[75] In the circumstances, I agree with Ms. Davis’ submission that the trial judge, in managing the case, had the power to try the fixed date claim form summarily at the first hearing. The issue for this Court is whether the trial judge erred in so doing to the extent that this Court should interfere with his decision to proceed summarily.

[76] It is now settled law that a case management decision is peculiarly that of the first instance judge and that it is inappropriate for an appellate court to interfere with the judge’s case management decision unless it is ‘plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree’.³⁷

[77] The learned judge decided that he could try the claim summarily for the reasons set out in paragraph 69 above. However, the evidence in this case is neither clear nor complete. The Trustee seeks recognition as a foreign representative and rectification of the register of members of Net International in circumstances when there was no

³⁵ Saint Lucia Civil Appeal HCVAP2015/0009 (delivered 4th December 2015, unreported).

³⁶ Saint Lucia Civil Appeal HCVAP2014/0002 (delivered 9th June 2015, unreported).

³⁷ Per Lord Neuberger in *HRH Prince Abdulaziz v Apex Global Management Ltd and another* [2014] UKSC 64 para. 13, followed by Baptiste JA in *Aqueduct Limited and another v Faelesseje and another* SVGHCVAP2014/0017 (delivered 18th April 2016, unreported).

evidence of the state of the Company's register. Net International pleaded in its defence that there is a registered shareholder but was not allowed to give evidence of who is this shareholder or how and when he, she or it acquired the registered shares, nor any other details of the state of the register. There are also serious legal issues regarding the court's jurisdiction to grant assistance and the court's ability to make orders for rectification of the share register based on disabled bearer shares. This is not a fixed date claim that was ready for trial that could be determined summarily under CPR Rule 25.1(e) as stated in the judgment, or under CPR Rule 27.2 as advocated by the Trustee's counsel. It is a case that was determined prematurely, applying what was in substance the summary judgment procedure in CPR Part 15. The prematurity arises from not allowing Net International to file evidence in support of its case and the Trustee's failure to apply to the Company to deal with the disabled bearer shares. Further, the registered shareholder did not get the opportunity to resist what could amount to a cancellation of his or her shares.³⁸

- [78] In deciding whether to interfere with a trial judge's case management decision each case must be decided on its own facts. I find that the judge erred in proceeding summarily and the consequences of his decision are far-reaching, requiring intervention by this Court. The error was significant and was plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. Subject to my decision that the court does not have jurisdiction to grant assistance to the Trustee, I would set aside the decision of the learned trial judge and remit the case to the lower court for case management and trial.

Mandatory order against the registered agent to rectify the register of Net International

- [79] The judge's order included a mandatory order directed to the registered agent of Net International to rectify the register of members of the Company to show the Trustee as the shareholder of the Company. The registered agent, Icaza Gonzales–Ruiz & Aleman (BVI) Trust Ltd, is not a party to the action. This is a short point. I would set

³⁸ Paragraph 13 of the judgment.

aside this order for at least two reasons. Firstly, the court does not have jurisdiction to rectify the share register of the Company to show the owner of disabled bearer shares as a registered shareholder. Secondly, the rectification order should have been directed to the Company itself and/or its directors, and not the registered agent, especially where, as in this case, there is no evidence that the registered agent maintains the register of members of Net International.

Costs

[80] Having regard to the proposed order allowing the appeal against the trial judge's order, I would set aside the order that the Trustee has liberty to apply for the costs of the action from the unknown shareholder of Net International and order the parties to file written submissions on costs for consideration by the Court on papers.

Conclusion

[81] Summarising my findings above:

- (a) I would affirm the order of the learned judge recognising the Trustee as the trustee of the assets of Mrs. Rachel Sayag Sofer in the BVI, but the Court does not have the power to grant assistance to the Trustee because he was not appointed by a court in a relevant foreign country as defined in Part XIX of the Insolvency Act.
- (b) There is a limited issue of estoppel that would bar Net International from asserting in the proceedings in the court below that the shares comprised in the bearer share certificate are owned by any person other than Mrs. Sofer.
- (c) The learned judge should not have heard and determined the case summarily.
- (d) The court does not have the power to rectify the share register of Net International to enter the name of the holder of bearer shares that are disabled.

Orders

[82] I would make the following orders:

(1) The appeal is allowed in part.

(2) Paragraph 1 of the judge's order dated 9th June 2020 is affirmed and paragraphs 2, 3 and 4 of the said order are set aside.

(3) The parties are directed to file written submissions on the incidence of costs in this Court and in the court below within 21 days of the date of this judgment.

[83] I gratefully acknowledge the very able and complete assistance from leading counsel and those assisting them.

I concur.

Janice M. Pereira

Chief Justice

I concur.

Vicki Ann Ellis

Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]