Neutral Citation Number: [2020] EWCA Civ 599

Case No: A4/2019/2516 & A4/2019/2516(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Cockerill
[2019] EWHC 2481 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2020

Before:

LORD JUSTICE FLAUX
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between:

SAS INSTITUTE INC	**Respondent**
- and -	
WORLD PROGRAMMING LIMITED	**Appellant**

- -
- -

Thomas Raphael QC & Josephine Davies (instructed by **Keystone Law LLP**) for the **Appellant**
Monica Carss-Frisk QC & Andrew Scott (instructed by **Macfarlanes LLP**) for the **Respondent**

Remote hearing dates: 22nd & 23rd April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Tuesday 7th April 2020 at 10.30 a.m.

Lord Justice Males:

Introduction

1. By an order sealed on 27th September 2019 Cockerill J ("the judge") declined to continue an anti-suit injunction granted by Robin Knowles J at a hearing on 21st December 2018 held without notice to the respondent, SAS Institute Inc ("SAS"). However, she gave permission to appeal to this court and continued the injunction pending appeal. On this appeal the appellant, World Programming Limited ("WPL"), contends that the judge was wrong and that the injunction ought to be continued.

2. The injunction granted by Robin Knowles J restrains SAS, in outline, from taking steps to obtain orders from courts in the United States requiring WPL (a) to assign debts owed to WPL from its customers either now or in the future ("the Assignment Order") and (b) to turn over to a United States Marshal payments from customers which it has already received ("the Turnover Order"). Those are orders which the United States District Court for the Central District of California ("the California court") has indicated that it is minded to make by way of enforcement of a judgment for US $79,129,905 (being compensatory damages of US $26,376,645, tripled pursuant to the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA")). That judgment was obtained by SAS in an action before the United States District Court for the Eastern District of North Carolina ("the North Carolina court").

3. The Assignment Order, if made in the terms currently proposed, would apply to debts owed from WPL customers anywhere in the world except the United Kingdom, although SAS has reserved the right to seek an order which would extend to United Kingdom customers (albeit that, as explained below, it has offered an undertaking to give 14 days' notice in the event that it forms the intention to do so). The Turnover Order would apply to payments received from WPL customers anywhere in the world including the United Kingdom, wherever those payments were received, although in practice it appears that all payments by WPL customers are made to a bank or banks in the United Kingdom.

4. The dispute between the parties has a long history. It includes an action brought by SAS against WPL in this country in which SAS's claims were dismissed; a decision by WPL, following an unsuccessful challenge on *forum non conveniens* grounds, to submit to the jurisdiction of the North Carolina court and to fight the action there on the merits; a judgment in favour of SAS from the North Carolina court for some US $79 million; an attempt by SAS to enforce the North Carolina judgment in this jurisdiction which failed on the grounds that enforcement here would be (a) an abuse of process, (b) contrary to public policy and (c) prohibited by section 5 of the Protection of Trading Interests Act 1980 ("the PTIA"); and a judgment from the English court in favour of WPL for over US $5.4 million, which SAS has chosen to ignore.

The background

5. The circumstances in which this appeal arises are set out in detail in the judgment below and in previous judgments. For present purposes I can summarise them as follows.

The parties

6. SAS, a North Carolina corporation, is a developer of analytical software known as the SAS System which enables users to carry out a wide range of data processing and analysis tasks, including statistical analysis. The software enables users to write and run applications written in a language known as the SAS Language. SAS licenses its software to customers in the United States and elsewhere. Until WPL developed an alternative product, SAS customers wishing to run their existing applications or to create new ones had no alternative to continuing to license use of the SAS System.

7. WPL, a United Kingdom company, perceived that there would be a market demand for alternative software which would be able to execute applications written in the SAS Language. It therefore created a product called World Programming System ("WPS"). In doing so, it sought to emulate the functionality of the SAS System as closely as possible, so that its customers' application programs would execute in the same way when run on WPS as on the SAS System. For this purpose it took a licence of the SAS Learning Edition from SAS on terms which (in effect) purported to prohibit the use of the software to produce a competing product.[1] Contrary to these terms, WPL studied the functionality of the SAS System in order to replicate it in its own software, although it did not have access to or copy the source code of the SAS System or its structural design.

8. Having developed WPS, WPL licensed it to customers in the United Kingdom, the United States and elsewhere. In most cases (but not including United States customers) it did so on terms which provided for arbitration of any dispute in London or (since December 2018) for the exclusive jurisdiction of the English court. From December 2018 its standard terms for non-US customers have also included terms which provide that debts owed by customers are situated in England and a provision that all payments are to be recovered by collection against a deposit in England.

The English liability proceedings

9. SAS sought to prevent WPL from licensing or selling its competing product. It sued WPL in England for copyright infringement and breach of contract, alleging that WPL used the SAS software in breach of its "click-through" licence terms. Both claims were eventually rejected by Arnold J in a judgment of 25th January 2013 (the "English liability judgment" [2013] EWHC 69 (Ch), [2013] RPC 17) after a reference to the CJEU in Luxembourg.

10. Arnold J concluded that although WPL's use of the SAS software in developing WPS was contrary to the terms of its licence, those terms were null and void pursuant to Article 5(3) of Council Directive 91/250/EEC ("the Software Directive"), enshrined in English law in the Copyright, Designs and Patents Act 1988. The Directive permits a licensee to observe, study and test the functioning of a licensed computer program in order to ascertain the ideas which underlie it, which are not protected by copyright, and renders null and void any contract terms to the contrary. This promotes competition and benefits consumers.

[1] So held by Arnold J, although when the case went to the Court of Appeal it was unnecessary to decide this issue: see [10] and [11] below.

11. SAS appealed to this court against the dismissal of its claims, but its appeal was dismissed on the basis of the Software Directive (see [2013] EWCA Civ 1482, [2014] RPC 8).

The North Carolina liability proceedings

12. In January 2010, before the English liability proceedings had concluded, SAS brought proceedings against WPL in the North Carolina court. The claims brought included copyright infringement, breach of contract, fraudulent inducement to contract, and a statutory claim for contravention of the UDTPA, which was itself based on the fraud claim.

13. WPL challenged the jurisdiction of the North Carolina court on *forum conveniens* grounds and that challenge was initially successful. However, the decision of the District Court was reversed on appeal to the Court of Appeals for the Fourth Circuit which held that a defendant bears a heavy burden to overcome a presumption that a United States plaintiff is entitled to litigate in its home court, and that WPL had failed to overcome this presumption.

14. WPL then submitted to the jurisdiction of the North Carolina court and defended the action on the merits. Commercially, WPL may have had no choice. In order to do business in the United States, WPL could not sensibly ignore the jurisdiction of the United States courts. Nevertheless WPL did undoubtedly submit to the jurisdiction and made no attempt at that stage to obtain an anti-suit injunction from the English courts to prevent SAS from pursuing the North Carolina proceedings.

15. Both parties sought summary judgment on certain issues, relying on the findings made in the English liability proceedings. The North Carolina court held as follows: (1) the English court had found that what WPL had done in developing WPS was contrary to the terms of its licence agreement with SAS; (2) as a matter of comity and collateral estoppel, WPL was precluded from arguing otherwise; but (3) a United States court was under no obligation to apply the Software Directive because the licence was governed by an express choice of North Carolina law; and (4) accordingly the North Carolina court was not bound by the English court's decision that terms of the licence prohibiting what WPL had done were null and void. The result was that summary judgment was granted to SAS on its breach of contract claim. However, its claims for copyright infringement were dismissed. Subsequently the North Carolina court decided that it would determine the first of these issues for itself rather than treating the decision of Arnold J as giving rise to an issue estoppel. Having done so, however, it reached the same conclusion.

16. There followed a 14-day jury trial in September and October 2015 at which SAS succeeded on its claims for fraud (the fraud consisting of an implied representation that it intended to abide by the licence terms which the English court had held to be null and void) and under the UDTPA. Compensatory damages were set by a jury at some US $26 million for each of the breach of contract, fraud and UDTPA heads of claim; and the award in respect of the UDTPA claim was trebled to some US $79 million. Although SAS had pleaded a claim for damages based on lost sales worldwide, the compensatory element of the damages awarded was calculated exclusively by reference to past and prospective future sales lost to customers in the United States.

17. WPL appealed, initially to the Fourth Circuit (874 F.3d 370 (4th Cir.2017)), and then by a petition to the Supreme Court for *certiorari*, but to no avail. During the course of the appeals process it lodged security of US $4.3 million as the price of a stay of execution. The Court of Appeals said that, for the breach of contract claim, the English court was not an adequate forum (although it was SAS which had chosen it), that there were many factual and legal differences between the proceedings in England and in North Carolina, and that there was a conflict between North Carolina public policy (which was more protective of intellectual property and freedom of contract) and the EU public policy enshrined in the Software Directive.

18. By the time of the hearing before the judge which has given rise to this appeal, direct enforcement of the judgment in the United States had been limited to this US $4.3 million. In addition WPL had paid an amount of US $1,131,799.65 pursuant to an order made on 15th February 2019. We were told that by the date of the hearing before this court, SAS had recovered some US $8.2 million in total in the United States.

The English enforcement proceedings

19. SAS sought to enforce the North Carolina judgment in England by commencing this action on 8th December 2017. Because of the English liability judgment it did not seek to enforce the judgment on the breach of contract claim, recognising that the English court would be bound to refuse enforcement of that part of the judgment, on the basis of issue estoppel. It sought instead to enforce only the heads of judgment based on fraud and the UDTPA, and those confined to the compensatory element of some US $26 million.

20. The claim for enforcement in this country failed. In a judgment delivered on 13th December 2018 ("the Enforcement Judgment" [2018] EWHC 3452 (Comm), [2019] FSR 30) Cockerill J held that the terms of the contract which purported to prohibit WPL's conduct constituted a fundamental building block for the fraud claim and that without it that claim – as it was formulated in the North Carolina proceedings – could not have been run. Accordingly, the enforcement claim failed on four grounds:

    (1) First, the issue estoppel which would have defeated the breach of contract claim equally defeated the fraud claim, and hence the UDTPA claim which in turn was based on the fraud claim. That was because the fraud claim depended on the licence terms which the English court had held to be null and void.

    (2) Second, even if enforcement of the North Carolina judgment were not barred by issue estoppel, it would have been barred as an abuse of process, applying *Henderson v Henderson* (1843) 3 Hare 100, because the claims in that action could and should have been brought as part of the original claim in England.

    (3) Third, enforcement would be contrary to the important public policy, embodied in the Software Directive, of preventing the monopolisation of ideas and promoting competition and consumer welfare.

    (4) Fourth, following the decision of Lord Hodge in the Scottish case of *Service Temps Inc v MacLeod* [2013] CSOH 162, [2014] SLT 375, enforcement of the UDTPA element of the judgment, including the compensatory damages awarded in respect of that claim, was barred by section 5 of the PTIA.

21. In addition Cockerill J gave judgment in favour of WPL on its counterclaim pursuant to section 6 of the PTIA to recover so much of the damages paid to SAS as exceeded the part attributable to compensation.

22. SAS sought permission to appeal to this court against the Enforcement Judgment, but permission was refused by Flaux LJ on 4th December 2019 on the ground that the proposed appeal had no real prospect of success. Accordingly the decision that the North Carolina judgment will not be recognised or enforced in this jurisdiction is now final.

The Californian enforcement proceedings

23. Nevertheless, the North Carolina judgment is valid and enforceable under United States law. In order to take advantage of enforcement procedures available there, SAS registered the judgment in the Central District of California (a state in which WPL has customers) on 28th December 2017 and filed a Writ of Execution against WPL on 4th January 2018. The enforcement procedures available under Californian law include the orders for assignment and turnover which have given rise to WPL's claim for an anti-suit injunction.

24. As regards assignment orders, the key provision is Cal. Civ. P. §708.510, which provides that "the court may order the judgment debtor to assign to the judgment creditor" payment rights as further specified. The California court is thus empowered to make an order against a judgment debtor requiring it to assign specified assets.

25. As regards turnover orders, the key provision is Cal. Civ. P. §699.040, which provides for the making of "an order directing the judgment debtor to transfer to the levying officer" assets as further specified. The levying officer for these purposes is a United States Marshal.

26. Both these statutory provisions operate *in personam* as distinct from *in rem*. That is to say, they order the judgment debtor to assign or turn over the asset in question, as distinct from the court order itself having the effect of assigning or turning over the asset. Failure to comply with an order is punishable as a contempt of the California Court.

27. SAS's first application came in February 2018. It was for assignment and turnover orders but was directed only at receivables from WPL customers in the United States. WPL conceded that "an assignment order may properly enter with respect to WPL's direct customers located in the United States who are obligated to remit money to WPL"[2], but submitted that "enforcement with respect to any assets outside of the United States should be deferred to the U.K. courts, where [SAS] has already instituted an enforcement proceeding". WPL also submitted that comity should lead the United States courts to defer to the English court as regards property outside the United States.

[2] Mr Thomas Raphael QC for WPL told us that this concession was intended to be made on the basis that what SAS was seeking was an *in rem* order, although on its face the language of the concession seems clear.

28. In response SAS indicated that it was only seeking orders regarding United States based customers but stated that it "specifically reserves the right to seek to amend the assignment order once SAS obtains information regarding WPL sales outside the United States in the North Carolina proceedings", making clear that on its case the California Court has power to order the assignment of any property, wherever situated, of a judgment debtor over which it has personal jurisdiction.

29. It was at this point that WPL first sought injunctive relief in England. On 22nd March 2018 it sought an anti-suit injunction to restrain SAS from seeking assignment orders as regards "customers, licensees, bank accounts, financial information, receivables and dealings in England". The application failed. Robin Knowles J considered it inappropriate to grant an injunction concerned with United Kingdom assets when no order was pending from the United States courts which would bite on such assets.

30. In the event SAS's February 2018 application for assignment and turnover orders failed for lack of evidence that there were customers owing money to WPL.

31. The attempts at enforcement with which we are now concerned began with a motion to the California court on 18th June 2018 for an assignment order. Although the application was made pursuant to the California Court's *in personam* jurisdiction, the order made by the court on 5th September 2018 appears to have been in *in rem* terms; that is to say, it purported actually to assign WPL's rights to payment from specified customers to SAS. It appears likely that this was a drafting slip by SAS and that the order which it proposed was simply adopted by the court without this error being noticed.

32. This led to extensive procedural wrangling about the effect of this order and the court's jurisdiction to make it, including an appeal to the Ninth Circuit Court of Appeals. For present purposes, however, it is sufficient to say that the California court has indicated that if the matter is remanded to it by the Ninth Circuit, it would make the *in personam* orders which SAS seeks. These indicative orders were made on 20th September and 14th November 2018.

33. The Assignment Order which SAS seeks and which the California court has indicated that it is prepared to make is in the following terms:

> "The Court Grants in Part the Motion for Assignment Order … the Court orders WPL to assign to SAS its right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt's Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licenses. Within seven days of entry of this Order, WPL shall execute an assignment to SAS of all rights, whether or not conditioned on future developments, to payment due or to become due from these companies until such time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the court."

34. The identified customers are those based in the United States and elsewhere, but do not include customers based in the United Kingdom.

35. The Turnover Order which SAS seeks would require WPL to:

> "transfer to the United States Marshal Service for the Central District of California all money, accounts, accounts receivable, contract rights, residual accounts, deposits, streams of income, revenue streams and residual rights, which arise from, directly or indirectly, business conducted between WPL and customers with accounts receivable, active customers, and customers with recently expired licenses, as listed on the Customer List, as supplemented by Hewitt's Schedule 1-1 ('Customer List'), with the exception of non-customers and U.K. customers, … as well as possession of documentary evidence of any and all such assets. …".

36. There is an issue whether this order would require turning over of payments from customers already in WPL's bank accounts. SAS says that it would and I shall proceed on this basis. The judge commented that the drafting of this order was not clear, in particular whether it would extend to customers worldwide or exclude United Kingdom customers. However, SAS has indicated that the proposed order is not intended to apply to receivables from United Kingdom customers and I proceed on this basis. It appears that the order would extend to money received from customers outside the United Kingdom held in United Kingdom bank accounts.

37. As the judge said, it is not a foregone conclusion that the California Court would make the orders precisely in the terms sought by SAS and set out above. But there is, at any rate, a substantial risk that it would make orders either in these terms or in terms to substantially the same effect.[3]

38. Although neither of these proposed orders applies to debts owed by or received from United Kingdom customers, SAS has made clear that it reserves the right to seek orders which do so extend once the English enforcement proceedings are concluded, as they now are. However, it may be important to note that the California court has not, so far at any rate, indicated that it would be prepared to make such orders.

The English anti-suit injunction

39. On 19th December 2018, six days after delivery of the Enforcement Judgment, WPL issued its application for an interim anti-suit injunction. At a hearing on 21st December 2018, held without notice to SAS, Robin Knowles J granted the injunction with which we are now concerned. In short, it prohibits SAS from taking steps to seek either of the proposed orders or any similar relief from any court in the United States. In addition it prohibits SAS from taking any step before any United States court to restrain the pursuit of WPL's application in the English court for an anti-suit injunction or related relief.

Further developments in the United States

[3] If both orders are made in the terms currently proposed, there would appear to be a contradiction between them. While the Assignment Order requires WPL to assign receivables to SAS, the Turnover Order appears to require WPL to turn over those same receivables to a United States Marshal.

40. In February 2019 the North Carolina court issued an order of its own motion that no money collected by SAS in the United States would be subject to the "clawback" provisions of the PTIA.

41. In March 2019 SAS obtained an order from the North Carolina court, in what is described as an "All Writs Action", preventing WPL from licensing WPS to new customers in the United States until the judgment for US $79 million is satisfied. The court described the order made by Cockerill J pursuant to section 6 of the PTIA as an "affront" to the United States liability judgment, and stated that the anti-suit injunction obtained by WPL undermined enforcement of that judgment by "reach[ing] directly into proceedings in the United States" and "prevent[ing] SAS from seeking the full panoply of judgment collection tools" available.

42. WPL appealed against that order to the Fourth Circuit Court of Appeals. Its appeal was dismissed. In a judgment dated 12th March 2020 the court emphasised that WPL does business in the United States and that the orders which SAS had sought applied to income received by WPL other than from customers in the United Kingdom. It is worth quoting some of the passages from the court's judgment:

> "While we take the occasion to express our respect for the judicial system and judges of the United Kingdom, the district court here needed to ensure that a money judgment reached in an American court under American law – based on damages incurred in America – was not rendered meaningless. The court chose to enforce its judgment in the most measured terms, concentrating on the litigants' U.S. conduct and collection efforts. Failing to take even these modest steps would have encouraged any foreign company and country to undermine the finality of the US judgment. …
>
> Rather than the district court's anti-clawback injunction being an affront to comity, actions by WPL have shown a lack of respect for American courts and American law. 'The conflict … we confront today has been precipitated by the attempts of another country to insulate its own business entities from the necessity of complying with legislation of our country designed to protect this country's domestic policies.' *Laker Airways*, 731 F.2d at 955. Comity is not advanced when a foreign country condones an action brought solely to interfere with a final U.S. judgment. See *Paramedics Electromedicina Comercial Ltda v GE Med. Sys. Info. Techs., Inc*, 369 F.3d 645, 654-55 (2d. Cir. 2004); *Laker Airways*, 731 F.2d at 930. Nor is comity advanced when one country enjoins legitimate collection efforts in another country. …
>
> The question before us did not have to come about. WPL could have proceeded differently at many points. It could have developed its product without violating SAS's license agreements. Or it could have declined to enter the U.S. market. But WPL cannot participate in the U.S. market, violate U.S. law, and expect to avoid the consequences of its conduct. …"

43. Clearly these are comments which we must take seriously. Equally clearly, public policy in our two countries pulls in opposite directions. It is the policy of the United States courts that damages for certain types of claim should be trebled and that judgments for trebled damages should be enforced; but it is the policy of the United Kingdom Parliament, enacted in primary legislation, that the non-compensatory element of such damages should be clawed back.

SAS's motivation

44. It was WPL's case before the judge that SAS's object in seeking the Assignment and Turnover Orders is to damage WPL and force it out of business. The judge was not prepared to find that this was so, considering it irrelevant. Although Mr Raphael reiterated the submission, I am not prepared to make such a finding either. I do not find it surprising that a business such as SAS which has suffered losses assessed at US $26 million should seek to use all available means to recover those losses. Nor is it surprising that SAS, having the benefit of a jurisdiction which will treble the compensatory element of its claim, should seek to take advantage of that. There is no need to search for darker motives.

45. I note, however, that the compensatory damages of US $26 million included not only loss of past sales which SAS would have made to United States customers if it had not been for competition from WPL, but also an assessment of lost future sales. Presumably, if WPL is prevented from licensing new customers in the United States, SAS will in fact be better placed to win those new customers for itself. That, however, is not a matter for us.

The judgment under appeal

46. The injunction granted by Robin Knowles J was expressed to continue until it could be fully considered at a hearing attended by both parties. Although it was envisaged that this further hearing would take place within a matter of weeks, in the event it did not take place until the hearing before the judge in May 2019. When the hearing did take place, WPL contended that the injunction should be continued, submitting in outline that the proposed Assignment and Turnover Orders "reached in" to this jurisdiction and, in so doing, conflicted with both the Enforcement Judgment and the original English liability judgment.

47. The judge declined to continue the injunction. She held that the court has jurisdiction to grant an anti-suit injunction and, in an appropriate case, an anti-enforcement injunction, but that the latter would only be granted in an exceptional case, generally requiring conduct akin to fraud or, at any rate, of sufficient gravity to rank similarly with cases where judgment had been obtained by fraud. She said that injunctions have been granted to restrain conduct which the English court regards as vexatious or oppressive, and also where an injunction is necessary to protect the English court's jurisdiction and judgments, but she did not regard this as such a case. An injunction to restrain vexatious conduct will generally be granted only where England is the natural forum to resolve the dispute, but the fact of WPL's submission to the North Carolina court created an obvious difficulty for it. On the other hand, an injunction to protect the Enforcement Judgment was "something of an uncomfortable fit" in circumstances where that judgment was not a judgment on the merits of the dispute. Moreover, while

public policy might justify an injunction, it would only be in highly unusual circumstances that this would provide an independent ground for an injunction.

48. Applying these principles, the judge held that the proposed Assignment and Turnover Orders were exorbitant in the sense that they would amount to enforcement against assets in this jurisdiction and that they went beyond any relief which an English court would grant, but that they were not "markedly exorbitant" or "exorbitant in any great measure" because they did not require anything to be done by WPL in this jurisdiction. Further, while the Orders would have the effect of enforcing in this jurisdiction a United States judgment which had been held to be contrary to English public policy in more than one respect, that did not cut across or interfere with the Enforcement Judgment which had decided nothing more than that the English court would not lend its enforcement processes to SAS. As I read the judgment, the judge's essential conclusion was that:

> "181. In those circumstances I am unable to accept WPL's submission that the relief is so exorbitant as to trigger relief. Nor can I accept the submission that if this Court's judgment in itself, and as reflecting English policy, is not to be set at naught, it is necessary that this court protect itself and WPL from the interference that SAS seeks to create."

49. It was in the context that WPL had failed, in the judge's view, to make good its essential case for an injunction that she went on to consider discretionary factors such as delay, submission to the jurisdiction of the United States courts and comity. She indicated that these were factors of some weight telling against the grant of an injunction, but the overall tenor of her judgment makes it clear that, if she had accepted WPL's essential case, these would not have deterred her from granting the injunction sought.

The submissions on appeal

50. In brief outline, the submissions of the parties on appeal were as follows.

51. Mr Thomas Raphael QC for WPL emphasised that WPL does not seek to prevent SAS from enforcing the North Carolina judgment in its entirety. He accepted that the judgment is enforceable by normal methods of enforcement against assets in the United States, but contended that the proposed Assignment and Turnover Orders would constitute an illegitimate interference with the enforcement jurisdiction of the English court. That is because they reach into this jurisdiction by having an effect on assets which are situated here and require WPL on pain of contempt proceedings in California to do acts here, and because they create in substance the same result as if SAS had succeeded in obtaining recognition and enforcement here of the North Carolina judgment when in fact such recognition and enforcement was refused on grounds of public policy. In those circumstances Mr Raphael submitted that an anti-suit injunction to restrain SAS from seeking such orders was necessary to prevent illegitimate interference with the jurisdiction of the English court. He submitted also that it was vexatious and oppressive for SAS to seek such orders from the California court because of their extra-territorial reach and interference with the Enforcement Judgment and the public policy on which it was based.

52. In his written submissions and in his initial oral submissions Mr Raphael insisted that an anti-suit injunction should extend even to restrain SAS from seeking an order for the assignment of debts due from WPL's United States customers. In his reply, however, no doubt in response to questions from the court, he offered an undertaking in these terms:

> "As a condition of the court granting the injunction sought, and if the court requires it, WPL would be prepared to undertake, subject to a liberty to apply:
>
> (a) to pay to SAS all revenues that will be received from customers who are located in the USA where such customers and revenues are within the scope of the *in rem* assignment order; however
>
> (b) this would be without prejudice to any rights WPL might have to claim sums under its section 6 PTIA counterclaim and the judgment orders thereon."

53. Mr Raphael submitted that such an undertaking was unnecessary, but that it was (as he described it) a pragmatic undertaking which WPL was prepared to give if the court took a different view.

54. Finally, Mr Raphael submitted that, if all else failed, there should nevertheless be an injunction to restrain SAS from seeking an anti-suit injunction in the United States which would interfere with WPL's counterclaim under the PTIA.

55. For SAS, Ms Monica Carss-Frisk QC supported the judge's reasoning and conclusion. She emphasised the evaluative and discretionary nature of the issue, the fact that WPL carries on business in the United States and submitted to the jurisdiction of the North Carolina court, which included submission to the enforcement jurisdiction of the United States, and that the orders sought are *in personam* orders against the defendant over whom the United States courts have personal jurisdiction, which are not so very different from the kind of order which an English court might make in comparable circumstances. She relied also on considerations of comity, emphasising in particular the views expressed by the North Carolina court and the Court of Appeals for the Fourth Circuit.

56. Ms Carss-Frisk also offered two undertakings in the course of her oral submissions. One related to debts due to WPL from United Kingdom customers. She informed us that, although it has reserved the right to do so, SAS has no current intention of seeking to extend its proposed Assignment Order to require an assignment of debts due from United Kingdom customers of WPL, and that it would undertake to give 14 days' notice to WPL if its intention were to change. That would give WPL an opportunity, if so advised, to seek relief from the English court.

57. The second undertaking offered related to WPL's counterclaim under the clawback provisions of the PTIA. Here Ms Carss-Frisk said that SAS has no current intention to seek any further injunction to prevent enforcement of that counterclaim beyond the order which the North Carolina court has already made of its own motion and that it would undertake to give 14 days' notice if that intention were to change. On that basis

she submitted that an order from this court is unnecessary and that, if the position were to change, the correct course would be for WPL to make an application to the Commercial Court.

Relevant legal principles

58. I begin by summarising some basic principles.

The situs of a debt

59. The judge explained that under English conflicts of law principles, the general rule is that a debt is situated in the place of the debtor's residence or domicile. However, this general rule is displaced if the debt is owed pursuant to an agreement providing for arbitration in England or the exclusive jurisdiction of the English court. In such a case, the debt will be situated in England. She cited the decision of Mr Peter Macdonald-Eggers QC in *Hardy Exploration & Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm), [2019] QB 544:

> "82. … (5) The general rule or presumption is that the debt or chose in action is properly recoverable or enforceable in the place of residence, or domicile, of the debtor (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, 1040-1041; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, paragraph 72; *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986, paragraph 33; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64, [2018] AC 690, paragraph 30). …
>
> (6) That general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a 'special agreement' or an 'exclusive right of suit' agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a Third Party Debt Order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 111-112, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, paragraphs 72-74)."

60. Neither party challenged this as an accurate summary of English law.

61. The significance of these principles for the present case, when applied to the Assignment Order and Turnover Order sought by SAS from the California Court is as follows:

(1) Debts due from United States customers of WPL are not subject to any contractual term providing for arbitration in England or the exclusive jurisdiction of the English court. Accordingly the general rule applies, which means that these debts are situated in the United States.

(2) Debts due from customers in the United Kingdom are situated in the United Kingdom. That is not only the residence of the debtor, but also (and primarily) because they are subject to arbitration here or the exclusive jurisdiction of the English court.

(3) Debts due from the majority of WPL's customers in third countries are also situated in the United Kingdom, because they are subject to arbitration here or to the exclusive jurisdiction of the English court. However, there are some customers in third countries whose contracts do not provide for arbitration or exclusive jurisdiction here. Debts due from this minority are situated in the country of the customer's residence.

(4) Funds already received from customers from any jurisdiction (including the United States) which are held in a United Kingdom bank account represent a debt owed by the bank to its customer, WPL. The *situs* of such a debt is the United Kingdom, that being the residence or domicile of the debtor bank.

62. Accordingly, the Assignment Order, if made, would require WPL to assign to SAS debts due from customers in third countries which are situated in this jurisdiction. Similarly it would do so if SAS were to seek to extend the proposed Assignment Order to cover debts due from United Kingdom customers, as it has reserved the right to do. Equally, the Turnover Order, if made would require WPL to transfer to a United States Marshal debts due from banks which are also situated in this jurisdiction.[4]

63. SAS did not dispute that this would be the effect of the Assignment and Turnover Orders which it seeks or reserves the right to seek. Conversely, WPL could not dispute that the effect of the injunction granted by Robin Knowles J is to prevent SAS from seeking an order from the California Court for the assignment of debts due from United States customers which are situated in the United States.

Territorial enforcement of judgments

64. It is recognised internationally that the enforcement of judgments is territorial. When a court in State A gives judgment against a defendant over whom it has personal jurisdiction, it is for that court to determine in accordance with its own procedures what process of enforcement should be available against assets within its jurisdiction.

[4] To the extent that the Turnover Order requires receivables situated here to be turned over to a United States Marshal, it would appear to raise the same issues as the Assignment Order. Accordingly, when considering the Turnover Order, I shall focus on funds held by WPL's banks and will not address separately its impact on receivables owed to WPL.

But for a court in State A to seek to enforce its judgment against assets in State B would be an interference with the sovereignty of State B. As Lord Hoffman explained in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260:

> "54. … The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries."

65. Lord Millett expressed the same idea:

> "79. The principle was succinctly stated by Lord Russell of Killowen CJ in *R v Jameson* [1896] 2 QB 425, 430. In describing the canon of statutory construction that, if another construction be possible, general words in an Act of Parliament will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the enacting power, he observed:
>
> > 'That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.'
>
> 80. The near universal rule of international law is that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals. …
>
> … 98. If the debt is situate and payable overseas, however, it is beyond the territorial reach of our courts. The books contain many statements to this effect. In *Ellis v M'Henry* (1871) LR 6 CP 228, 234 Bovill CJ said:
>
> > 'In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. … Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country. …

> 108. … Just as the English court would not regard a foreign court as being a court of competent jurisdiction to discharge a debt recoverable here, so a foreign court would not regard our court as competent to discharge a debt recoverable there; and that was sufficient in itself to preclude the making of the order in respect of a foreign debt. Although in places this was described as a matter of discretion and in other places as a matter of principle, I think that the rationale was based on principle.
>
> 109. However that may be, I have no doubt that the issue should be regarded as one of principle. Our courts ought not to exercise an exorbitant jurisdiction contrary to generally accepted norms of international law and expect a foreign court to sort out the consequences."

66. In *Société Eram* a judgment creditor sought to enforce a judgment obtained in a French court and registered in England against a judgment debtor resident in Hong Kong. It did so by seeking to obtain a third party debt order (previously known as a garnishee order) against a credit balance of the judgment debtor in a bank account with a Hong Kong bank. The evidence was that Hong Kong law would not recognise such an order made in England in relation to a debt sited in Hong Kong. Accordingly, as a matter of Hong Kong law, payment to the judgment creditor by the bank pursuant to a third party debt order would not operate to discharge the bank's debt to the judgment debtor.

67. The House of Lords held that it was not open to the English court in these circumstances to make a third party debt order. Such an order was a proprietary remedy which operated by way of attachment of the debtor's property and discharged the third party from its obligation to the judgment debtor. Accordingly such an order was an infringement of Hong Kong sovereignty and was not available where there would be no such discharge under the law where the debt was situated, that is to say Hong Kong.

68. The House of Lords affirmed "the distinction between 'personal jurisdiction, i.e. who can be brought before the court' and 'subject matter jurisdiction, i.e. to what extent the court can claim to regulate the conduct of those persons'", previously explained by Hoffmann J in *Mackinnon v Donaldson, Lufkin & Jenrette Securities Corpn* [1986] Ch 482. As Hoffmann J had put it:

> "It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters which the court may properly apply its own rules or things which it can order such a person to do."

69. In *Société Eram* the English court had personal jurisdiction over the judgment debtor, but did not have subject matter jurisdiction over the debt due from the bank which was situated in Hong Kong. That was fatal to the application for a third party debt order.

70. It is important to note that these principles do not depend upon the nature of the claim or the nature of the loss suffered upon which the court in State A adjudicates. They are concerned with the location of the assets against which enforcement of that judgment is sought. It is, therefore, nothing to the point that the conduct of which the claimant complains occurred, or the losses which it suffered were incurred, in State A where the trial on liability takes place. Those matters may justify the exercise of personal jurisdiction over the defendant by the courts of State A if the defendant is resident elsewhere, but do not confer enforcement (or subject matter) jurisdiction on the courts of State A over assets located in other jurisdictions.

71. It is important also that these principles are recognised internationally. Lord Hoffmann referred to a "general principle of international law that one sovereign state should not trespass upon the authority of another". Lord Millett described the exercise of an exorbitant enforcement jurisdiction as "contrary to generally accepted norms of international law". It follows that, just as the English courts will give effect to these principles when enforcing an English judgment, so too we can expect that foreign courts will respect the territorial jurisdiction of the English courts over assets located here when making orders for the enforcement of their own judgments.

72. Applying these internationally recognised principles to the present case, the North Carolina and California courts have personal jurisdiction over WPL but do not have subject matter jurisdiction over debts owed to WPL which are situated in England. That is so notwithstanding that the losses for which the North Carolina court has given judgment were incurred by SAS in the United States. Nevertheless the effect of the proposed Assignment Order would be to require WPL to assign debts situated in England to SAS which would at least purport to discharge its customers from any obligation owed to WPL, while the effect of the proposed Turnover Order would be to require WPL to give instructions to its banks in England which would discharge the debts situated in England currently owed by the banks to WPL. In substance, therefore, the proposed orders are exorbitant in that they affect property situated in this country over which the California court does not have subject matter jurisdiction, thereby infringing the sovereignty of the United Kingdom.

73. Ms Carss-Frisk submitted that it makes all the difference that the Assignment and Turnover Orders would operate not *in rem* but *in personam*, as orders against WPL over whom the Californian Court has personal jurisdiction. While that is so as a matter of form, in substance the effect of the proposed orders would be precisely that which the House of Lords in *Société Eram* held to be contrary to internationally recognised principles.

74. The English courts will in some circumstances make an order against a defendant over whom there is *in personam* jurisdiction affecting property situated abroad. But they will only do so subject to such orders being recognised and enforced by the courts in the state where the property is situated. In this way the English courts ensure that their orders do not have exorbitant effect and do not infringe the sovereignty of the state concerned. The House of Lords in *Société Eram* recognised this important limitation on the scope of extra-territorial *in personam* orders made by the English courts. For example, Lord Bingham referred to the practice of the English courts when granting a worldwide freezing order against a defendant over whom the court has personal jurisdiction:

> "23. Similar reticence was approved by the Court of Appeal (Kerr, Neill and Nicholls LJJ) when considering world-wide *Mareva* injunctions in *Babanaft International Co SA v Bassatne* [1990] Ch 13. The court accepted that there was nothing to preclude English courts from granting *Mareva* type injunctions against defendants extending to assets outside the jurisdiction, but insisted (per Kerr LJ, page 32) that:
>
> > 'there can be no question of such orders operating directly upon the foreign assets by way of attachment, or upon third parties, such as banks, holding the assets. The effectiveness of such orders for these purposes can only derive from their recognition and enforcement by the local courts, as should be made clear in the terms of the orders to avoid any misunderstanding suggesting an unwarranted assumption of extraterritorial jurisdiction.'
>
> Nicholls LJ was similarly concerned (page 44) at the 'extraterritorial vice' of unqualified orders. He pointed out (page 46):
>
> > 'The enforcement of the judgment in other countries, by attachment or like process, in respect of assets which are situated there is not affected by the order. The order does not attach those assets. It does not create, or purport to create, a charge on those assets, nor does it give the plaintiff any proprietary interest in them. The English court is not attempting in any way to interfere with or control the enforcement process in respect of those assets.'
>
> As is well known, this judgment was reflected in what became the standard form of *Mareva* injunction order, until further protection was afforded to those holding overseas assets of persons subject to *Mareva* injunctions pursuant to the judgment of Clarke J in *Baltic Shipping Co v Translink Shipping Ltd and Translink Pacific Shipping Ltd* [1995] 1 Lloyd's Rep 673."

75. Lord Hoffmann spoke to similar effect:

> "57. So in *Babanaft International Co SA v Bassatne* [1990] Ch 13 the late Kerr LJ, who was a master of international commercial law, said, at p 35:
>
> > 'Unqualified *Mareva* injunctions covering assets abroad can never be justified, either before or after judgment, because they involve an exorbitant assertion of jurisdiction of an *in rem* nature over third parties outside the jurisdiction of our courts,'
>
> 58. The result was that freezing orders have been tailored to make it clear, first, that they do not affect anyone outside the

> jurisdiction unless enforced by a court of the relevant country and, secondly, that they do not prevent third parties such as foreign banks, which have an English presence and are therefore subject to the jurisdiction, from complying with what they reasonably believe to be their obligations under the law of the *situs* or proper law of the debt or any order of a local court: see *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673.
>
> 59. The conclusion I draw from this survey of principle and authority is that there are strong reasons of principle for not making a third party debt order in respect of a foreign debt. …"

76. These principles were affirmed in *Masri v Consolidated Contractors International (UK) Ltd (No. 2)* [2008] EWCA Civ 303, [2009] QB 450. The claimant obtained judgment in English proceedings against defendants who had submitted to the jurisdiction of the English court and defended the proceedings on the merits. When the defendants failed to pay the judgment debt, the claimant sought an order for the appointment of a receiver by way of equitable execution to receive oil revenue due to the defendants. The order made by the judge included modified *Babanaft* provisos, broadly to the effect that foreign customers of the defendants were not affected by the order except to the extent that the order was declared enforceable by or was enforced by a court in the country or state of the customer concerned (see [24] of the judgment).

77. Lawrence Collins LJ explained at [53] that an order for the appointment of a receiver by way of equitable execution operates *in personam*, having effect "as an injunction restraining the judgment debtor from receiving any part of the property which it covers, if that property is not already in his possession, but it does not vest the property in the receiver". However, this did not avoid the necessity for the court to have subject matter jurisdiction in accordance with recognised principles of international law in order to make an order affecting foreign assets:

> "35. Consequently the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court."

78. He referred in this connection to the *Babanaft* provisos, which were necessary to ensure that the English court was not claiming an exorbitant extra-territorial jurisdiction, and to the decision of the House of Lords in *Société Eram*. Having done so, he summarised the following principles:

> "47. The following propositions can be derived from this important decision. First, it is not permissible as a matter of international law for one state to trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within the foreign state's boundaries. Second, it would be

> an exorbitant exercise of jurisdiction to put a third party abroad in the position of having to choose between being in contempt of an English court and having to dishonour its obligations under a law which does not regard the English order as a valid excuse. Third, an *in personam* order against a person subject to the English jurisdiction may be contrary to international comity. Fourth, a garnishee or third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor, and creates a proprietary interest by way of security in the debt or fund and gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it including that of the judgment debtor himself (Lord Bingham at [24]), or has proprietary consequences and takes effect as an order *in rem* against the debt owed by the third party to the judgment debtor (Lord Millett at [87]-[88]), or is in essence execution *in rem* against the property of the judgment debtor, because the discharge of the third party's indebtedness is an essential part of the execution. Fifth, a third party debt order cannot be made where it will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt, even if the order is directed *in personam* to a bank with a branch in London, because the order in respect of a foreign debt was an attempt to levy execution on an asset in the foreign jurisdiction."

79. Thus, in accordance with these propositions, an *in personam* order against a person subject to English jurisdiction *may* be contrary to international comity because of its extra-territorial effect, in which case it would not be permissible to make such an order as a matter of international law. How then was the distinction to be drawn between *in personam* orders which do infringe this principle and those which do not? Lawrence Collins LJ's answer to that question was as follows:

> "59. As I have said, the fact that it acts *in personam* against someone who is subject to the jurisdiction of the court is not determinative. In deciding whether an order exceeds the permissible territorial limits it is important to consider: (a) the connection of the person who is the subject of the order with the English jurisdiction; (b) whether what they are ordered to do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties.
>
> 60. CCOG's connection with the English jurisdiction is that it submitted to the jurisdiction of the English court, defended the case on the merits, and has a substantial English judgment outstanding against it. I do not consider that the court exceeded the bounds of international jurisdiction by ordering CCOG not to receive the proceeds of oil, or in ordering it to co-operate with the receiver and to give notice of his appointment to its customers. CCOG will have to inform customers of the position

and they will have to take advice. I suggested in the course of argument that the reality of the matter is that CCOG will be concerned that customers may think that a receiver has been appointed because it is bankrupt. CCOG has only itself to blame for that, and if it wishes to avoid that impression it has only to pay the judgment debt, which the group can well afford to do.

61. Nor do I consider that the effects on third parties show that the exercise of jurisdiction is exorbitant. CCOG accepts that the third party is protected by the *Babanaft* provisos from being found in contempt by interfering with the order. I do not consider that there is anything in the point that the effect of the order may be that, because the judgment debtor (if he complies with the order) has to decline to receive payment, the third party will be put in a quandary in that he cannot pay his creditor, who is refusing payment. Oil contracts are high value, and it will not take many customers or many shipments to clear the judgment debt. The number of potential purchasers is limited and they will be well able to take advice. …

… 70. Does the receivership order infringe any of the principles in *Société Eram*? In my judgment it does not.

71. First, it is not a proprietary remedy. It does not change the title to the debts, nor impose any charge. Second, the third party is not required by the order to pay the receiver, and there is no question of any discharge of the debts being effected by the order. Third, the consequence is that the third party debtor is not in danger of being compelled to pay twice. Fourth, the only person who is directly subject to the order is CCOG, which is subject to the jurisdiction of the court, and is being ordered to perform certain acts which have a genuine connection with England, namely compliance with an English judgment against it. Fifth, the third party debtors are protected from being put in the position of having to choose between being in contempt and having to dishonour their obligations under the applicable law by the *Babanaft* provisos in the order. Sixth, the right of the receiver to sue for the debts in a foreign country is limited to cases where his title to sue will be recognised by the foreign court.

72. The essence of the decision in *Société Eram* so far as it concerns international jurisdiction is that it is wrong for one legal system to reach out and affect title to property in another country (the judgment creditor's interest in a foreign debt), and, as in the case of attachment of debts, place the citizens of that other country in a position where they may have to pay twice. To do so is an impermissible exercise of extraterritorial jurisdiction. This is not such a case."

80. For these reasons the receivership order made in *Masri (No. 2)* fell on the right side of the line. But critical to this conclusion were "the careful and proportionate limitations on the scope of the receivership order" (as Lawrence Collins LJ described them at [135]), that is to say the modified *Babanaft* provisos, ensuring that foreign customers of the defendants were not affected by the order except to the extent that the order was declared enforceable by or was enforced by a court in the country or state of the customer concerned.

81. There is much in the reasoning of Lawrence Collins LJ explaining why the receivership order in that case was not exorbitant which can be applied to the proposed Assignment and Turnover Order in the present case. Those orders would operate *in personam* against WPL, which has a substantial connection with the United States in view of the business which it does there and submitted to the jurisdiction of the North Carolina court. Nobody is forced to do business in the United States. On the other hand, unlike the receivership order in *Masri (No. 2)*, which merely ordered the defendant not to receive the revenue in question, the proposed orders would require positive action by WPL in this country. While the Assignment Order would not necessarily have to be complied with in England, in practice it would require action by WPL here where its offices and all of its directors and staff are based. The Turnover Order would necessarily require action by WPL in England, as that is where instructions would have to be given to its banks, and because it requires WPL to provide documentary evidence of its customer receivables. These are orders, therefore, which compel action within this jurisdiction by an English company in respect of assets situated here.

82. Moreover compliance with the Assignment Order would purport to have an impact on third parties, namely WPL's customers, by discharging their obligations owed here to WPL and replacing them with a corresponding obligation owed to SAS.[5] But customers would not have the protection of any *Babanaft* proviso or the assurance that their position would not be affected unless and until the Assignment Order was declared enforceable by the English court as the court of the *situs* of the debt. And they would know that the assignments by WPL had been effected under penalty of contempt proceedings in the United States in circumstances where the English court has held that the North Carolina judgment is contrary to public policy and will not be recognised or enforced here. That could leave customers in real uncertainty.

83. In the circumstances, the proposed Assignment and Turnover Orders can properly be regarded as exorbitant, being contrary to the internationally accepted principle that enforcement of a judgment is a matter for the courts of the state where the asset against which it is sought to enforce the judgment is located.

84. The judge held that these Orders were not "markedly exorbitant" or "exorbitant in any great measure" because they did not require anything to be done by WPL in this jurisdiction. In that I think she was mistaken as a matter of fact. More importantly, however, her conclusion on this issue was coloured by her view that the Orders would not cut across or interfere with the Enforcement Judgment which had decided nothing

[5] So too would the Turnover Order, to the extent that it applies to receivables situated here, save that the customers' new obligation would be owed to a United States Marshal.

more than that the English court would not lend its enforcement processes to SAS. I turn next to that issue.

What did the Enforcement Judgment decide?

85. The Enforcement Judgment undoubtedly did decide that the English court will not permit its enforcement processes to be used by SAS to enforce the North Carolina judgment. Accordingly it is not open to SAS to obtain from the English court (for example) a third party debt order requiring payment to itself of debts owed here to WPL or a receivership order over WPL's assets here. But in my judgment, the Enforcement Judgment was more than a merely procedural decision about the availability of English enforcement remedies. It was a decision, as a matter of substance, that the North Carolina judgment would not be recognised and is not enforceable in this jurisdiction. This follows from the internationally recognised principles concerning the territorial allocation of enforcement jurisdiction to which I have referred.

86. As Lord Millett put it in *Société Eram* at [98], in the passage more fully quoted above:

> "If the debt is situate and payable overseas, however, it is beyond the territorial reach of our courts."

87. The converse is also true. A debt situated and payable here is beyond the territorial reach of foreign courts unless the foreign judgment is one which the English court will recognise. To require that the foreign judgment is recognised by the English court is not a mere formality. On the contrary, it gives proper effect to the principle that enforcement is a matter for the courts of the state where an asset is situated.

88. Because SAS initially sought recognition and enforcement here, we know from the Enforcement Judgment that the North Carolina judgment will not be recognised or enforced in this jurisdiction and that it is contrary to English public policy. That is now a final and binding decision between the parties. However, even if there had been no enforcement proceedings here, it would remain relevant to consider whether the North Carolina judgment is one which the English courts would be prepared to recognise and enforce. For the reasons given in the Enforcement Judgment, the North Carolina judgment would not have been recognised or enforced here even if there had been no English enforcement proceedings. It follows that assets located here are beyond the territorial reach of the courts of the United States.

89. It follows also that the judge's conclusion that the Assignment and Turnover Orders were not "markedly exorbitant" was based upon a mistaken premise.

Anti-suit injunctions

90. The jurisdiction of the English court to grant an anti-suit injunction is of long standing. The basic principle is that the jurisdiction is to be exercised "when the ends of justice require it": *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871, 892A-B; *Airbus Industrie G.I.E. v Patel* [1999] 1 AC 119, 133D-E. It was common ground between the parties that established categories of case where an injunction may be appropriate (which may overlap) include cases where an injunction is necessary to protect the jurisdiction of the English court and cases where the pursuit

of foreign proceedings is regarded as vexatious or oppressive: *Aerospatiale* at 892G-893D. Equally, it was common ground that the jurisdiction is not confined to these categories and must be applied flexibly: *Castanho v Brown & Root (U.K.) Ltd* [1981] AC 557, 573 ("the width and flexibility of equity are not to be undermined by categorisation"); *Aerospatiale* at 892G (the cases "show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories"). I understand that broadly similar principles apply to the grant of anti-suit injunctions in the United States: see the discussion of the *Laker* litigation by Lord Goff in *Airbus* at 136C-137C.

91. The English cases, including in particular *Airbus,* emphasise that great caution must be exercised before such an injunction is granted, at any rate in cases where the injunction is not sought in order to enforce an arbitration or exclusive jurisdiction clause, and that this is necessary because of the requirements of comity. I shall return to this topic.

Anti-enforcement injunctions

92. Before I do so, I need to refer to the cases dealing with anti-enforcement injunctions. These are cases where the foreign proceedings have proceeded as far as judgment and the unsuccessful defendant seeks an injunction from the English court to restrain the successful claimant from enforcing the judgment. Ms Carss-Frisk submitted that such injunctions may only be granted in exceptional cases, supporting the judge's approach that, in general, it would be necessary for an applicant to show conduct akin to fraud or, at any rate, of similar gravity. Mr Raphael acknowledged that such injunctions would be rare, but submitted that exceptionality was not a distinct jurisdictional requirement.

93. In my judgment there is no distinct jurisdictional requirement that an anti-enforcement injunction will only be granted in an exceptional case. Such injunctions will only rarely be granted, but that is because it is only in a rare case that the conditions for the grant of an anti-suit injunction will be met and not because there is an additional requirement of exceptionality. That accords, in my judgment, with the approach of Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503 at [94], where he commented that such injunctions would only be granted in rare cases, or in exceptional circumstances, but did not identify this as a distinct jurisdictional requirement. In any event, exceptionality would be a vague and somewhat elastic criterion and (if it matters) it is hard to see why this case, with its complex procedural history, should not be regarded as exceptional.

94. Only two cases were cited to us in which an anti-enforcement injunction has been granted. These were *Ellerman Lines Ltd v Read* [1928] 2 KB 144 and *Bank St Petersburg OJSC v Archangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360. In both of these cases the injunction was granted to enforce compliance with a contractual jurisdiction agreement. In *Ellerman Lines v Read* the judgment abroad had been obtained by fraud, while in the *Bank St Petersburg* case enforcement of the judgment was described as being contrary to both the letter and the spirit of the applicable jurisdiction agreement. Counsel resisting the injunction in the latter case emphasised what he described as "the exceptional nature of an anti-enforcement

injunction as opposed to an anti-suit injunction", but the Court of Appeal did not endorse this as a distinct requirement which had to be satisfied for such an injunction to be granted.

95. *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231 contains at [107] to [119] a review of the cases in which an anti-enforcement injunction has been refused. Christopher Clarke LJ concluded that:

> "118. In short, the cases in which the English courts have granted anti-enforcement injunctions are few and far between. Of the two examples to which we were referred, one was based on the fraud of the respondent and the other involved an attempt to execute a judgment when, after it had been obtained, the respondent had promised not to do so. Knowles J suggested another circumstance where an injunction might be granted, namely where the judgment was obtained too quickly or too secretly to enable an anti-suit injunction to be obtained, a circumstance far removed from this case. No example has been cited to us of a case where an anti-enforcement injunction has been granted simply on the basis that the proceedings sought to be restrained were commenced in breach of an exclusive jurisdiction or arbitration clause.
>
> 119. This dearth of examples is not surprising. If, as has heretofore been thought to be the case, an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him. That is not this case."

96. In all of the cited cases in which an anti-enforcement injunction has been refused the applicant sought to prevent any enforcement of the foreign judgment. We were not shown any case such as the present where the injunction applicant sought only to restrain certain kinds of enforcement, leaving the claimant in the foreign proceedings free to enforce its judgment in other ways. It is evident that such a case may raise different considerations.

97. That said, it is worth noticing one of the cases where an injunction was refused. In *ED & F Man (Sugar) ltd v Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429 the defendant had obtained a judgment in Indonesia which was inconsistent with a prior decision of the English court. The claimant sought an injunction to restrain him from relying on the Indonesian judgment, including in further proceedings in Indonesia. Neill LJ said at 437 rhc:

> "The position in Indonesia also is clear. In my view it would be wrong for this Court to grant an injunction which is designed to

> take effect inside Indonesia and which would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country."

98. As Lawrence Collins LJ observed in *Masri (No. 3)* at [93] after citing this passage:

> "it is plainly a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country."

99. This is of some relevance to the extent that the injunction obtained by WPL prevents SAS (as it does) from seeking an order for the assignment of debts due from customers located in the United States which are situated in that country.

Comity

100. Comity is undoubtedly an important consideration in this case, not least in view of the comments made by the Court of Appeals for the Fourth Circuit, but it is necessary to appreciate its proper scope in the circumstances of this case. A number of strands are relevant.

101. First, the English court has great respect for the work of foreign courts, particularly those in countries such as the United States with which we share common traditions and fundamental principles, and which have a high regard for the rule of law. To grant an injunction which will interfere, even indirectly, with the process of a foreign court is therefore a strong step for which a clear justification must be required.

102. In *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023, Toulson LJ said:

> "50. An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention."

103. When an anti-suit injunction is sought on grounds which do not involve a breach of contract, comity, telling against interference with the process of a foreign court, will always require careful consideration. The mere fact that things are done differently elsewhere does not begin to justify an injunction. It is evident in the present case that

the anti-suit injunction granted by Robin Knowles J is viewed by the United States courts as an unwelcome interference with their process. That is inevitably a cause for concern and regret. However, as Toulson LJ's summary explains, comity will be of less weight where the order made or proposed to be made by the foreign court involves a breach of customary international law.

104. Second, there is a relationship between comity and delay. In general, the greater the delay in seeking relief, the further the foreign proceedings will have advanced, and the more justifiable will be the foreign court's objection to an order by the English court which is liable to frustrate what has gone before and waste the resources which have been expended on the foreign proceedings.

105. The relationship between comity and delay was explained by Christopher Clarke LJ in *Ecobank Transnational Inc v Tanoh* in a passage which, despite its length, is worth quoting in full

> "132. Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial *amour propre* but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administration of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.
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> 133. Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not *per se* a bar to an anti-suit injunction: see the *AES* case. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.
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> 134. Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a

consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offence to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business.

135. Mr Coleman submitted that "comity has no role to play in the timing of the application for, or the grant of, an anti-enforcement injunction". I disagree. Timing is of considerable significance. The grant of an interlocutory injunction to prevent the commencement or continuance of a duplicate set of proceedings may well be a sound step which (a) gives effect to contractual rights and (b) avoids the cost and waste of rival proceedings operating in tandem and the risk of inconsistent judgments – results which considerations of comity would favour. In the case of an anti-enforcement injunction the application will, by definition, be made after the rival proceedings have run to judgment. The grant of an injunction will mean that the cost of those proceedings and the resources of the rival court will (unless the injunction is discharged) have been wasted. It will not avoid the risk of inconsistent decisions although it will preclude the respondent from enforcing the existing potentially inconsistent decision.

136. In the case of anti-enforcement injunctions there are further considerations which underpin the need for caution expressed in the cases. First, an order precluding enforcement in countries outside England and Wales or those States which are subject to the Brussels/Lugano regime will, if obeyed, in effect preclude the consideration by the courts of those countries as to whether they should recognise or enforce the judgement in question. That is a matter which it is, intrinsically, for the relevant court to decide according to its applicable law. Moreover, insofar as the order prevents enforcement in the country of the court which gave the judgment it is, indirectly, an interference with the execution in its own country of the judgment which the court has given and can expect to be obeyed.

137. In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch. In the *Transfield Shipping* case [2009] EWHC 3629 (QB) at [78] I observed that ‘comity, which involves respect for the operation of different legal systems, calls for challenges … to be made promptly in

> whatever is the appropriate court". Whilst recognising that delay is not necessarily a bar to relief, and the importance of upholding the rights of those who are the beneficiaries of exclusive jurisdiction agreements, I do not regard the cases subsequently decided by this court as rendering that statement inaccurate."

106. Christopher Clarke LJ's comments about the waste of resources caused by delay, in particular where an anti-enforcement injunction is sought, were made in the context of an application to restrain enforcement of a foreign judgment in its entirety. To grant such an injunction would render the entire liability proceedings a waste of time and resources. That is not this case. In the present case the injunction sought by WPL does not seek to prevent SAS from enforcing the North Carolina judgment in its entirety. WPL does not invite the English court to prevent SAS from enforcing the North Carolina judgment by normal methods of enforcement against assets in the United States. Nor does it suggest that the English court has any role in considering the appropriateness of the order upheld by the Fourth Circuit preventing WPL from licensing new customers in the United States. Accordingly, regardless of the outcome of this appeal, the North Carolina judgment will stand and there are processes of enforcement available to SAS in the United States. These have already achieved some (albeit not a full) recovery and may well continue to do so in any event.

107. WPL's application to the English court is based essentially on what it contends to be the exorbitant and therefore illegitimate effect of the proposed Assignment and Turnover Orders. I shall have to consider whether the injunction which it has obtained goes beyond this objective. However, the grant of an anti-suit injunction limited to dealing with the exorbitant effect of the proposed Orders would not "frustrate all that has gone before" and would not involve the same kind of waste of resources as that described in *Ecobank.*

108. Third, comity requires that in order for an anti-suit injunction to be granted, the English court must have "a sufficient interest" in the matter in question. As Lord Goff explained in *Airbus* at 138G-H:

> "As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an antisuit injunction entails."

109. Often that sufficient interest will exist by reason of the fact that the English court is the natural forum for determination of the parties' dispute. But as Lord Goff was careful to emphasise at 140 B-D, this is only a general rule, which must not be interpreted too rigidly. In a case where the injunction is sought in order to protect the jurisdiction or process of the English courts, the existence of a sufficient interest will generally be self-evident. Indeed, the need to protect the jurisdiction of the court has been described as "the golden thread". In *Masri (No. 3)* at [86] Lawrence Collins LJ said this:

> "In *Bank of Tokyo Ltd v Karoon (Note)* [1987] A.C. 45, 58, Robert Goff LJ referred to Judge Wilkey's statement in *Laker Airways Ltd v Sabena Belgian World Airlines* (1984) 731 F 2d 909, 926-927 that anti-suit injunctions were most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum, and concluded [1987] AC 45, 60:
>
> > 'without attempting to cut down the breadth of the jurisdiction, the golden thread running through the rare cases where an injunction has been granted appears to have been the protection of the jurisdiction; an injunction has been granted where it was considered necessary and proper for the protection of the exercise of the jurisdiction of the English court.'"

110. *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606 is an example of such a case. Thomas J was unable to conclude that England was the natural forum for the trial of the claim, but nevertheless held that the English court had a sufficient interest to justify an injunction.

111. Fourth, however, comity is a two-way street, requiring mutual respect between courts in different states. This need for mutual respect means that comity requires a recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally accepted principles of customary international law, which I have already described. Lord Bingham explained this in *Société Eram* at [26]:

> "If (contrary to my opinion) the English court had jurisdiction to make an order in a case such as the present, the objections to its exercising a discretion to do so would be very strong on grounds of principle, comity and convenience: it is … inconsistent with the comity owed to the Hong Kong court to purport to interfere with assets subject to its local jurisdiction …"

112. Just as it is inconsistent with comity for the English court to purport to interfere with assets subject to the local jurisdiction of another court, so it is inconsistent with comity for another court to purport to interfere with assets situated here which are subject to the jurisdiction of the English court.

Submission and delay

113. The passage from the judgment of Christopher Clarke LJ in *Ecobank Transnational Inc v Tanoh* set out above explains that delay by an applicant for anti-suit relief may be an important and sometimes decisive factor against the grant of an injunction, but is not necessarily a bar to relief. It is a factor to be considered, but the weight to be accorded to it will depend on all the circumstances of the case.

114. The fact that an applicant for anti-suit relief submitted to the jurisdiction of the foreign court may also be an important and sometimes decisive factor, but again is not

necessarily fatal. The position is fairly summarised in *Briggs, Civil Jurisdiction and Judgments* (6th Edition), at page 550:

> "No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. … But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."

115. In the present case WPL submitted to the jurisdiction of the North Carolina court and fought the liability proceedings there on the merits. Accordingly it was (or rapidly became) far too late for it to seek an anti-suit injunction to restrain SAS from pursuing its claim there despite the existence of the judgment in WPL's favour in the English liability proceedings. For the same reasons, it would be impossible for WPL to seek an injunction to prevent SAS from enforcing the North Carolina judgment at all. But it does not follow, in my judgment, that it is too late for WPL to seek an injunction preventing SAS from enforcing the judgment in ways which have exorbitant effect. Its submission to the jurisdiction of the North Carolina court can fairly be treated as a submission to normal enforcement procedures conforming to generally accepted international principles, but not as a submission to enforcement measures which are not of that nature. An application could not have been made any earlier for an anti-suit injunction on the ground that SAS *might* seek to enforce any judgment extra-territorially. That would have been regarded as an implausible speculation.

116. Similarly, WPL took part in the California court proceedings objecting to the orders sought by SAS, essentially on the ground that measures of that nature were a matter for the English court. Whether or not that is regarded as a submission to the jurisdiction of the California court seems to me of little significance. In substance WPL was objecting to the making of the Assignment and Turnover Orders on jurisdictional grounds (or, at any rate, on grounds closely connected with jurisdictional issues) and (as Mr Raphael put it) did not waive its jurisdictional objections by making them.

117. In these circumstances I consider that the judge was, if anything, too harsh on WPL in concluding that submission and delay were factors telling against the grant of an injunction in this case, at any rate to the extent that such an injunction is limited to dealing with the exorbitant effect of the proposed Assignment and Turnover Orders on assets located within the jurisdiction of the English court. However, that is a matter which need not be pursued further, as it is apparent that she accorded these factors relatively little weight and would not have regarded them as preventing the grant of an injunction if the conditions for such a grant had been satisfied.

The approach of an appellate court

118. The approach of an appellate court in a case such as this was set out by Rix LJ in *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep 376:

> "2. The essential question which arises on this appeal is whether Teare J was right to say that JFC's Russian proceedings were vexatious or oppressive. It is suggested on behalf of Star Reefers that that finding was an exercise in discretion, and that no effective appeal can be mounted against it. In my view, however, such a finding is an evaluative judgment, and a condition precedent to the grant of any injunction in such a case as this, where no exclusive English jurisdiction or arbitration clause has been agreed between the parties. In this respect it is analogous to the concept of abuse of process: see *Aktas v. Adepta* [2010] EWCA Civ 1170, [2011] QB 894 at [53]. In both cases, those of vexatious or oppressive conduct and abuse of process respectively, an evaluative assessment has to be made, which is not an exercise of discretion but a matter on which there is, in theory, a right or wrong answer. If the answer is that such conduct exists, there then arises a question of discretion as to whether an injunction against foreign proceedings in the one case, or a stay of domestic proceedings in the other case, will be granted. It may be of course that the finding of vexatious conduct or of an abuse of process carry the court almost the whole way to its decision to grant an injunction or a stay: but that does not affect the fact that the prior finding is not itself an exercise of discretion. Factors which may come in at the second, discretionary, stage in the context of an anti-suit injunction include the important matter of comity.
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> 3. Of course, the finding of an experienced judge of the Commercial Court that there has been vexatious conduct (I will adopt that shortened expression) is entitled to proper respect, and if it involves an assessment of a large number of factors may for that reason be hard for an appellate court to dislodge. However, it is a serious finding, reflecting a view of what is to count as unacceptable behaviour in the sphere of international litigation. Moreover, in the typical case, such as this, all the evidence is documentary. In such circumstances, this court is entitled to conduct a serious review of the issue."

Should an anti-suit injunction be granted in this case?

119. Adopting that approach, it is time now to apply these principles, to the extent I have not already done so, in answering the question whether an injunction should be granted to restrain SAS from seeking the proposed Assignment and Turnover Orders. For this purpose it is convenient to divide the issue into four separate categories.

Debts due from customers in the United States

120. The injunction granted by Robin Knowles J prevents SAS from seeking an order for the assignment of debts due from WPL customers in the United States. As I have indicated, these are debts which under English conflicts principles are situated in the United States. There is no good reason why the English court should seek to prevent SAS from enforcing the North Carolina judgment against United States assets of WPL by whatever procedures are available to SAS under United States law. To do so would itself represent an exorbitant exercise of jurisdiction by the English court, contrary to principles of comity, and it is no surprise that the United States courts have taken exception to this aspect of the injunction.

121. I conclude, therefore, that the injunction should not have been granted in these wide terms and that the judge was right not to continue it.

122. As I have indicated, Mr Raphael sought to deal with this particular issue by offering an undertaking. However, I do not think that this would be satisfactory. There is no justification for the English court to interfere with enforcement of the North Carolina judgment against assets in the United States. It is better to say so, rather than continuing an injunction in wide terms which is wrong in principle against an undertaking to make payments which, if there were any question about whether it had been complied with, would have to be policed by the English court.

123. However, my conclusion that the injunction should not have been granted in the wide terms in which it was granted does not mean that no injunction at all was appropriate.

Debts due from customers in the United Kingdom

124. Debts due from United Kingdom customers are situated in this jurisdiction. Accordingly, as I have explained, for SAS to seek an order for the assignment of such debts in circumstances where the North Carolina judgment will not be recognised or enforced in this jurisdiction would be an exorbitant interference with the jurisdiction of the English court, in the light of the internationally recognised principles for the territorial allocation of enforcement jurisdiction which I have described. For that reason such an order could also be characterised as vexatious. If necessary, therefore, I would conclude that the criteria for an anti-suit injunction to restrain SAS from seeking such an order are satisfied. Such an injunction would be necessary to protect the territorial enforcement jurisdiction of the English court.

125. It would remain to consider whether such an injunction should be refused as a matter of discretion, having regard to issues of comity, delay and submission. Of these, comity would present the most serious obstacle but, for the reasons I have explained, would not in my judgment prevent the grant of an injunction. It is notable that SAS has not so far sought, and the United States courts have not indicated that they would be prepared to grant, an Assignment Order extending to debts due from WPL customers in the United Kingdom. It may be that this forbearance involves some recognition of the exorbitant effect of such an order and the proper role of the English court in relation to such debts. Whether or not that is so, such an order would be exorbitant in the sense I have described, which means that relatively little, if any, weight should be given to comity as a factor telling against the grant of an injunction. While it would be a matter of regret to grant an injunction which would risk causing offence to a United States court, it would in my judgment be our duty to do so.

126. As it is, however, the question does not directly arise in the light of the undertaking offered by SAS to give 14 days' notice in the event that it intends to seek an order from the United States courts extending to the assignment of debts due from United Kingdom customers. I would accept that undertaking, which provides sufficient protection to WPL and means that an injunction is unnecessary.

Debts due from customers in other countries

127. The Assignment Order which SAS intends to seek, and which the California court has indicated that it would be prepared to grant, would order WPL to assign to SAS debts due from WPL customers in countries other than the United States and the United Kingdom. Such debts are less obviously situated in the United Kingdom than debts due from customers here. Nevertheless it was not disputed that such debts are indeed situated here pursuant to English conflicts rules when WPL's contract with the customer concerned provided for arbitration here or for the exclusive jurisdiction of the English court. In principle, therefore, these debts are in the same position as debts due from United Kingdom customers and, for the same reasons, no undertaking being offered, there should be an injunction to restrain SAS from seeking an Assignment Order extending to these debts.

128. The judge expressed the hope that, in the light of her judgment and in particular of her explanation regarding the *situs* of outstanding debts, the California court might choose to draw the line of the relief which it was prepared to grant in some different place, but she regarded this as a matter which should properly be left to that court. I respectfully disagree. While I too would hope that the California court will recognise and understand the position of the English court, in accordance with internationally recognised principles the enforceability of the judgment of a foreign court against assets located in this jurisdiction is a matter for the English court.

129. The position is different, however, as regards customers in third countries who did not contract with WPL on terms providing for arbitration here or for the exclusive jurisdiction of the English court. Such debts are not situated in England but in the country of the customer's residence. An Assignment Order requiring WPL to assign such debts to SAS might be regarded as exorbitant, but is not an order in which the English court would have a sufficient interest to intervene. Accordingly the injunction which I would grant should be limited in the case of third country customers to debts which are situated here.

The Turnover Order

130. The proposed Turnover Order would require WPL to turn over to a United States Marshal funds held in its bank accounts in this jurisdiction which also comprise a debt or debts situated here. Again, therefore, there should be an injunction to restrain SAS from seeking a Turnover Order requiring WPL to turn over such funds.

131. The injunction should make clear, to avoid misunderstanding, that it is limited to bank accounts in this jurisdiction. It should not prevent SAS from seeking a Turnover Order relating to any accounts which WPL may have in other countries. Again, while such an order might be regarded as exorbitant, it is not one in which the English court would have a sufficient interest to intervene. As it is, however, the evidence before

this court is that WPL's only bank accounts are here, so this point is probably academic.

132. To the extent that the proposed Turnover Order would also require WPL to turn over receivables (that is to say, debts due from customers) situated in the United States or in third countries, it raises the same issues as the proposed Assignment Order and should therefore be dealt with in the same way.

The PTIA counterclaim

133. The judge concluded the Enforcement Judgment by giving judgment in favour of WPL on its counterclaim pursuant to section 6 of the PTIA to recover so much of the damages paid to SAS as exceeded the part attributable to compensation. Although no such order was contained in the injunction granted by Robin Knowles J, the order made by the judge following the judgment under appeal included the following:

> "Further to paragraph 6 of the Knowles J injunction until the Court of Appeal's final order on WPL's Appeal is made, SAS shall not seek or pursue before any US court any relief which restrains or prohibits WPL from effectively pursuing or enforcing this action and/or any orders granted therein and/or its claims under s.6 of the Protection of Trading Interests Act 1980 or taking any steps or applications in relation thereto (including anti-suit injunctive relief to protect the same), or interferes with the aforesaid. …"

134. Mr Raphael submitted that this order, the effect of which, broadly speaking, is to restrain SAS from seeking an anti-suit injunction in the United States which would interfere with WPL's counterclaim under the PTIA, should be continued.

135. In response Ms Carss-Frisk said that SAS has no current intention to seek any further injunction to prevent enforcement of that counterclaim beyond the order which the North Carolina court has already made of its own motion and that it would undertake to give 14 days' notice if that intention were to change.

136. I would accept that undertaking. Although the judge made the order which I have set out, we have no judgment explaining her reasons for doing so and, in any event, the landscape has now changed in the light of our judgment. The undertaking offered provides sufficient protection to WPL and, if SAS's intention changes, it would be preferable for WPL (if so advised) to make any application to the Commercial Court, which can deal with the matter in the light of whatever circumstances then exist and provide a reasoned judgment for whatever course it decides to take.

Disposal

137. For the reasons which I have sought to explain I would:

(1) discharge the injunction granted by Robin Knowles J which was continued by the judge pending this appeal;

(2) accept the undertaking by SAS to give 14 days' notice of any intention to seek an Assignment Order extending to debts due from WPL customers in the United

Kingdom and, on that basis, decline to grant any injunction in respect of such debts;

(3) grant an injunction to restrain SAS from seeking an Assignment Order extending to debts due from WPL customers in countries other than the United States and the United Kingdom with whom WPL has contracted on terms providing for arbitration in London or for the exclusive jurisdiction of the English court;

(4) grant an injunction to restrain SAS from seeking a Turnover Order relating to (a) funds held with banks in the United Kingdom (but not to any funds held with banks elsewhere) and (b) debts due from WPL customers in countries other than the United States and the United Kingdom with whom WPL has contracted on terms providing for arbitration in London or for the exclusive jurisdiction of the English court; and

(5) accept the undertaking by SAS to give 14 days' notice of any intention to seek any further injunctive relief to prevent enforcement of WPL's counterclaim under section 6 of the Protection of Trading Interests Act 1980 and, on that basis, decline to continue the order made by the judge in this respect which will expire when our final order on this appeal is made.

Lord Justice Popplewell:

138. I agree.

Lord Justice Flaux:

139. I also agree.