

Neutral Citation Number: [2015] EWHC 1864 (Comm)

Case No: 2014 Folio 1434

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2015

Before :
THE HON. MRS JUSTICE CARR DBE

- -

Between :

VINCENT AZIZ TCHENGUIZ & ORS

Respondents/Claimants

- and -
(1) GRANT THORNTON UK LLP
(2) STEPHEN JOHN AKERS
(3) HOSSEIN HAMEDANI

Defendants

(4) KAUPTHING BANK HF
(5) JÓHANNES RÚNAR JÓHANNSSON

Applicants/Defendants

- and -
WILLIAM PROCTER

Third Party

- -

Mr Romie Tager Q.C., Mr Jonathan Crystal and Miss Samantha Knights (instructed by **McGuireWoods London LLP**) for the **Respondents/Claimants**
Mr Robert Miles Q.C., Mr Jeremy Goldring Q.C. and Mr Tom Gentleman (instructed by **Travers Smith LLP**) for the **Applicants/Fourth and Fifth Defendants**

Hearing dates: 9th, 10th, 11th June 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE CARR DBE

Mrs Justice Carr DBE :

A. Introduction

1. This is an application brought pursuant to CPR 11 by the Fourth Defendant, Kaupthing Bank hf ("Kaupthing"), and the Fifth Defendant, Jóhannes Rúnar Jóhannsson ("JJ"), (together "the Applicants"), seeking dismissal or a stay of proceedings brought against them by the First Claimant, Vincent Aziz Tchenguiz ("VT"), and others. VT is a well-known businessman and investor in the property industry. The Second Claimant, Rawlinson & Hunter Trustees S.A., is a company incorporated in Switzerland and trustee of a British Virgin Island trust, the Tchenguiz Family Trust ("the TFT"), of which VT is a beneficiary. The remaining claimants are entities associated with VT and the TFT. VT is a former customer of Kaupthing.

2. The First Defendant, Grant Thornton UK LLP ("GT"), is an accountancy firm. The Second Defendant, Stephen Akers ("SA"), and the Third Defendant, Hossein Hamedani ("HH"), are and were at all material times both partners in GT.

3. Kaupthing is now an insolvent Icelandic bank. It was established in 1982 and became licensed as a commercial bank in 2002 by the Financial Supervisory Authority of Iceland ("the FME"). It also provided integrated financial services to companies, institutional investors and individuals. Prior to October 2008 it was the largest bank in Iceland.

4. Kaupthing and its main foreign subsidiaries experienced financial difficulties during the international liquidity crisis in around 2008, with those difficulties becoming severe in October 2008 when one of its most significant (English) subsidiaries went into administration. The FME appointed a Resolution Committee to take over the responsibility for the bank, replacing the board of directors. Kaupthing was then made the subject of insolvency winding-up proceedings in Iceland, the Icelandic Court, specifically the District Court of Reykjavik, making a Moratorium Order on 24th November 2008 and a winding-up Order on 22nd November 2010 pursuant to the Icelandic Financial Undertakings Act 2003 ("the FUA"). The Icelandic Court declared that the winding-up proceedings are deemed to have been in effect as of 22nd April 2009. Kaupthing was under the control of the Resolution Committee until 1st January 2012 and since then of a Winding-up Committee. GT was instructed in late 2008 to assist Kaupthing in certain investigations into lending and the recovery of assets.

5. JJ is an Icelandic lawyer who was a member of Kaupthing's Resolution Committee and then of its Winding-up Committee.

6. The present proceedings were commenced on 27th November 2014, without any letter before action, but nevertheless accompanied by a full press release on behalf of the Claimants. Service on the Applicants was effected the next day (out of the jurisdiction in Iceland). CPR 6.33(1)(b)(i) was relied on to the effect that permission to serve out of the jurisdiction was not required. CPR 6.33(1)(b) provides materially :

> *"6.33(1) The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a*

claim which the court has power to determine under the [Civil Jurisdiction and Judgments Act 1982] or the Lugano Convention and –

b)(i) the defendant is domiciled in the United Kingdom or in any Convention territory..."

7. The Applicants acknowledged service on 19th December 2014 indicating an intention to contest jurisdiction. The present application was duly issued on 15th January 2015. Repleaded Particulars of Claim were served on 3rd March 2015.

8. Understandably, none of the other Defendants, all resident in England, challenge jurisdiction. They have served a substantive Defence and Counterclaim (on 12th May 2015), denying all allegations of wrongdoing.

9. Kaupthing, however, seeks dismissal or stay of the proceedings against it on two independent grounds, and JJ on one of those grounds :

a) the insolvency ground : it is said that that the Claimants are barred from bringing the proceedings against Kaupthing under Icelandic law, which has effect in England under the Credit Institutions (reorganisation and winding-up) Regulations 2004 ("the 2004 Regulations"). For the avoidance of doubt, this ground relates to and can avail only Kaupthing. Further, Kaupthing's case proceeds for this purpose on the assumption that, contrary to its case set out below, the English Court has territorial jurisdiction over the proceedings against it by virtue of the Lugano Convention;

b) the jurisdiction ground : it is said that, in any event, the English Court has no jurisdiction under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Lugano Convention") because the proceedings fall within the scope of the exception in Article 1(2)(b) of the Lugano Convention. This ground relates to both Kaupthing and JJ. Thus the basis for service out of the jurisdiction relied upon by the Claimants, namely CPR 6.33-++(1)(b), falls away.

10. The parties have adduced factual evidence as follows :

a) for the Applicants : a statement from JJ dated 15th January 2015 and from the Applicants' solicitor, Mr Stephen Paget-Brown, dated 26th March 2015; for the Claimants : a statement from their solicitor, Mr Hardeep Nahal, dated 27th February 2015;

and written expert evidence of Icelandic law as follows :

a) for the Applicants : Eiríkur Thorláksson. Mr Thorláksson practises in the fields of commercial, corporate and insolvency law, and is an assistant professor teacher in insolvency law, private international law and commercial law at Reykjavik University;

b) for the Claimants : Gísli Hall. Mr Hall is a partner at Jonsson & Hall Law Firm. The bulk of his practice since 2008 has been advising and litigating on issues involving financial undertakings and their relationship with customers, individuals and companies.

B. The claims

11. The claims arise out of the individual defendants' alleged involvement in the investigation by the Serious Fraud Office ("the SFO") into VT and associated entities, which resulted in a raid and VT's arrest in March 2011, and the continuing investigation thereafter. The investigation continued until June 2012.

12. The Claimants allege that the individual defendants committed the following torts: malicious prosecution of VT; conspiracy to injure the Claimants by unlawful means; and malicious procurement of the arrest and search warrants and execution of the same against VT. Kaupthing is alleged to be vicariously responsible for the acts of GT and JJ. The individual defendants (including JJ) are alleged to have conspired to put the Claimants under acute commercial pressure and financial pressure, amongst other things, to settle a £1.6 billion Commercial Court claim against Kaupthing and to obtain documents and information unlawfully. They are alleged effectively to have instigated and controlled the SFO investigation against VT by making false and malicious allegations of serious criminal misconduct in circumstances where they knew that there was no evidence of such misconduct or other wrongdoing of VT. The allegations are said to have been responsible for the issue of search warrants and the arrest of VT.

13. The claims are all governed by English law. It is not in dispute that they concern alleged harmful events which took place in England (see Article 5(3) of the Lugano Convention, assuming that it applies) and involve claims against all the Defendants which are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (see Article 6(1) of the Lugano Convention, again assuming that it applies).

14. The Applicants dispute vigorously the claims against them. They say that the allegations are wholly without foundation and go so far as to say that they should never have been made by the Claimants or their lawyers. There is no evidence to support either the making or condoning of lies to the SFO or any dishonest activity on the part of JJ. Moreover, the SFO, itself an independent specialist prosecutor, has confirmed that it was guilty of serious internal shortcomings. JJ regards the claims as a mere device by the Claimants to expert pressure on Kaupthing to secure an advantage for themselves in the winding-up proceedings, given that associated parties are indebted to Kaupthing for some £143 million, a debt guaranteed personally by VT up to a limit of £10 million.

15. However, no jurisdictional attack is made by reference to the merits, an assessment of which at this stage would therefore be inappropriate.

C. The insolvency process in more detail

16. As already indicated, Kaupthing has been in an Icelandic insolvency process under the FUA since the collapse of the financial system in 2008.

17. On 9th October 2008, while the Icelandic banking system was collapsing, a Resolution Committee was appointed over Kaupthing by the FME pursuant to an Emergency Act of 6th October 2008 (Act No 125/2008). On 24th November 2008, on an application by Kaupthing, the Icelandic Court made a Moratorium Order against Kaupthing due to its insolvency, under the FUA. The Moratorium Order was extended by the Icelandic Court by successive orders, namely on 19th February 2009, 19th November 2009 and 18th August 2010.

18. The precise rules applicable to the Moratorium Order were amended by an Act amending the FUA on 22nd April 2009 ("the 2009 Act"). Following the amendment, the FUA applies, amongst other Articles, Article 116 of the Icelandic Bankruptcy Act 1991 ("the Bankruptcy Act") ("Article 116") to credit institutions subject to a Moratorium Order, including Kaupthing.

19. On 25th May 2009, a Winding-up Committee was appointed over Kaupthing.

20. On 22nd November 2010, on an application by Kaupthing, the Icelandic Court made a winding-up order against Kaupthing. Kaupthing remains the subject of a winding-up order.

21. On 1st January 2012, the Resolution Committee was discontinued and the tasks handled by it were assumed by the Winding-up Committee.

D. The parties' rival submissions in outline

22. For Kaupthing it is said on the insolvency ground that the Claimants are barred from bringing the proceedings against Kaupthing under Icelandic insolvency law, which has effect in England under the 2004 Regulations. The proceedings against Kaupthing should be dismissed or stayed for the following reasons:

    a) under the FUA, which is the Icelandic law applicable to Kaupthing's ongoing winding-up proceedings, there is a prohibition on the bringing of court proceedings against the insolvent bank, which was in place at the date of the commencement of the issue of the proceedings and remains in place;

    b) in particular, the FUA applies Article 116 to the winding-up of a credit institution. This prohibits court proceedings against a bank in winding-up proceedings; rather a claim has to be submitted to the bank's Winding-up Committee (the decisions of which are subject to judicial scrutiny in the event of disagreement);

    c) this is entirely to be expected. A similar (though not identical) safeguard would apply in the case of insolvency proceedings in England in respect of an English company (or indeed foreign company). This is to protect

creditors and ensure an orderly, efficient and equitable working out of the insolvency proceedings without a free-for-all, with certain claimants stealing a march on others by advancing claims outside such proceedings;

d) this prohibition has effect in England under a European-wide cross-border insolvency regime for banks which extends to Iceland as a member of the European Economic Area ("EEA"). In particular:

i. Directive 2001/24/EC of 4th April 2001 on the reorganisation and winding-up of credit institutions (the "2001 Directive") created the regime, which was designed to allow cross-border bank insolvencies to function efficiently;

ii. the 2001 Directive was transposed into national law in the United Kingdom by the 2004 Regulations, made by the Treasury under section 2(2) of the European Communities Act 1972.

23. As to the Claimants' response that the stay under Article 116 is not extra-territorial as a matter of Icelandic law (see below), this is wrong as a matter of Icelandic law, but, even if it were right, it is irrelevant:

a) as a matter of Icelandic law, Article 116 would bar the commencement of proceedings if they had been commenced in the Icelandic Courts, instead requiring the Claimants to proceed by way of submitting a claim to the Winding-up Committee;

b) the effect of the 2001 Directive and 2004 Regulations is that Icelandic domestic law is incorporated into English insolvency law so that the stay which would be applicable to claims against an Icelandic bank in the Icelandic Courts applies in England, regardless of the territorial scope of Icelandic law. The stay has international, cross-border effect under that regime;

c) the Claimants' approach is both contrary to the wording of the 2001 Directive, and would fundamentally undermine the purpose of the cross-border regime by depriving a national stay of pan-European effect, so allowing the insolvent estate to be attacked by individual creditors in a free-for-all, contrary to the principles of unity and universality that underpin the 2001 Directive.

24. On the jurisdiction ground, the Applicants contend that, contrary to the Claimants' asserted basis for jurisdiction, the English Court in fact has no jurisdiction under the Lugano Convention because the proceedings are "*proceedings relating to the winding-up of insolvent companies*", so that they fall within the scope of the exception in Article 1(2)(b) of the Lugano Convention.

25. For the Claimants the following five propositions are advanced across both grounds :

a) the claims against Kaupthing are clearly within the Lugano Convention and are not excluded by Article 1(2)(b) of that Convention ("proposition 1");

b) in a situation where the Lugano Convention applies, the 2001 Directive only applies to proceedings that fall within Article 1(2)(b) of the Convention ("proposition 2");

c) if the Claimants are wrong about proposition 2, then the 2001 Directive does not grant the home state the power to take exclusive jurisdiction over any claim of whatever nature against a credit institution in liquidation, and nor do the 2004 Regulations ("proposition 3");

d) if the Claimants are wrong about proposition 3, neither the FUA nor any other Icelandic legislation has given Iceland exclusive jurisdiction over claims against a credit institution in liquidation where Iceland is the home state ("proposition 4");

e) the claim against JJ is clearly within the Lugano Convention and is not excluded by Article 1(2)(b) of that Convention ("proposition 5"). (As set out above, it is common ground that this claim is not affected by the 2001 Directive or the 2004 Regulations or any provisions in the Bankruptcy Act.)

26. It will be readily apparent that there is therefore a very marked difference, if not a huge gulf, between the parties' approaches on each side.

E. Relevant statutory and legislative regimes

27. In order to understand the parties' respective submissions it is necessary to summarise the relevant European, United Kingdom and Icelandic statutory and legislative regimes.

28. Although Iceland is not a member state of the European Union, it is a member of the European Economic Area ("the EEA"). It is also bound by the Lugano Convention (as amended) as a member of the European Free Trade Association, and the Convention has the force of law in Iceland as of 1st May 2011. The Lugano Convention was incorporated into United Kingdom law by the Civil Jurisdiction and Judgments Regulations 2009.

The Lugano Convention

29. The Lugano Convention applies to determine jurisdiction in civil and commercial matters. Article 1 provides materially as follows :

> "*1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*

> *2. The Convention shall not apply to...*
>
> *b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;...*"

30. This exception is mirrored in the Brussels Convention and EC Regulation No 44 of 2001 ("the Judgments Regulation").

The Insolvency Regulation

31. The primary European instrument dealing with cross-border insolvency is the EC Regulation No 1346/2000 of 29th May 2000 on insolvency proceedings ("the Insolvency Regulation") which came into force on 31st May 2002 in relation to members of the European Community (save for Denmark). However, by Article 1 (2), the Insolvency Regulation expressly does not apply to insolvency proceedings concerning certain financial institutions, including credit institutions. As set out in recital (9), such institutions "*are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.*"

32. Nevertheless, the Insolvency Regulation is of relevance not only for a proper understanding of the authorities, but also because much of the wording is carried through into the relevant instruments that follow.

33. Recitals (7) and (8) to the Insolvency Regulation provide :

> "*(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (3), as amended by the Conventions on Accession to this Convention (4).*
>
> *(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.*"

34. The preamble goes on to address separately : jurisdiction (recitals 12 to 21), then recognition (recital 22) and then choice of law issues (recital 23).

35. In Chapter 1 of the Insolvency Regulation Articles 3 and 4 provide :

"*Article 3*
International Jurisdiction

1. *The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*

2. *Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State ...*

Article 4
Law applicable

1. *Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.*

2. *The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:*

   (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;..."

36. Chapter II of the Insolvency Regulation goes on to address recognition and enforcement of judgments in insolvency proceedings.

37. Thus, in summary and as explained in *Dicey & Morris, Conflict of Laws* (15th Ed.) ("*Dicey*") at paragraph 30-151, the basic jurisdictional rule under the Insolvency Regulation is that insolvency proceedings are reserved to the state of the centre of main interest, and that is the primary focus in relation to jurisdiction. However, the Insolvency Regulation does permit the opening of "secondary proceedings" in Regulation States, other than that of the main proceedings, in which the debtor has an establishment. Secondly and separately, the basic choice of law rule under the Insolvency Regulation is that the lex concursus, that is to say the law of the state where the company is being wound up, is to apply. By Article 4(2)(f), the effects of the insolvency proceedings on separate proceedings brought by individual creditors are to be governed by the law of the state of the opening of the winding-up proceedings (save for lawsuits pending, namely lawsuits which have been commenced at the time that the winding-up proceedings are commenced but not

determined). Thirdly, there are separate provisions for the recognition of enforcement proceedings.

The 2001 Directive

38. The gap relating to cross-border insolvency involving credit institutions was filled by the 2001 Directive. Iceland adopted it as a member of the EEA. The Recital includes the following :

> "*(4) It would be particularly undesirable to relinquish such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings...*
>
> *(6) The administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State. Owing to the difficulty of harmonising Member States' laws and practices, it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised.*
>
> *(7) It is essential to guarantee that the reorganisation measures adopted by the administrative or judicial authorities of the home Member State and the measures adopted by persons or bodies appointed by those authorities to administer those reorganisation measures, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims and any other measure which could affect third parties' existing rights, are effective in all Member States...*
>
> *(12) The principle of equal treatment between creditors, as regards the opportunities open to them to take action, requires the administrative or judicial authorities of the home Member State to adopt such measures as are necessary for the creditors in the host Member State to be able to exercise their rights to take action within the time limit laid down...*
>
> *(14) In the absence of reorganisation measures, or in the event of such measures failing, the credit institutions in difficulty must be wound up. Provision should be made in such cases for mutual recognition of winding-up proceedings and of their effects in the Community...*
>
> *(16) Equal treatment of creditors requires that the credit institution is wound up according to the principles of unity and universality, which require the administrative or judicial authorities of the home Member State to have sole jurisdiction and their decisions to be recognised and to be capable of producing in all the other Member States, without any*

formality, the effects ascribed to them by the law of the home Member State, except where this Directive provides otherwise...

(30) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending are governed by the law of the Member State in which the lawsuit is pending, by way of exception to the application of the lex concursus. The effects of those measures and procedures on individual enforcement actions arising from such lawsuits are governed by the legislation of the home Member State, in accordance with the general rule established by this Directive...

39. Articles 9 and 10 then substantively provide :

"***Article 9***

Opening of winding-up proceedings — Information to be communicated to other competent authorities

1. The administrative or judicial authorities of the home Member State which are responsible for winding-up shall alone be empowered to decide on the opening of winding-up proceedings concerning a credit institution, including branches established in other Member States.

A decision to open winding-up proceedings taken by the administrative or judicial authority of the home Member State shall be recognised, without further formality, within the territory of all other Member States and shall be effective there when the decision is effective in the Member State in which the proceedings are opened...

Article 10
Law applicable

1. A credit institution shall be wound up in accordance with the laws, regulations and procedures applicable in its home Member State insofar as this Directive does not provide otherwise.

2. The law of the home Member State shall determine in particular:...

(e) the effects of winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending, as provided for in Article 32;...

40. Article 32 provides :

"***Lawsuits pending***

> *The effects of reorganisation measures or Winding-up proceedings on a pending lawsuit concerning an asset or a right of which the credit institution has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending."*

41. By Article 34, Member States were to bring into force the laws, Regulations and administrative provisions necessary to comply with this Directive on 5th May 2004.

42. Thus the 2001 Directive sets out a detailed code governing the insolvency of banks. The principles of unity and universalism are applied to "*reorganisation measures*" (defined as "*collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure*") and "*winding-up proceedings*" (defined as "*collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other similar measure*").

43. The basic rule for both is that the laws, Regulations and procedures of the lex concursus will be effective across all Member States, save where the Directive provides otherwise, for example in relation to law suits pending. The logic for that exception is that if litigation or arbitration has begun before insolvency occurs, the natural expectation of businesses would be that it should be that law that should determine whether the proceedings should continue (see for example *Syska v Vivendi Universal* [2009] EWCA Civ 677 ("*Syska*") at paragraph 16 in the context of the parallel provisions in the Insolvency Regulation).

44. The 2001 Directive can also be said to contain a simpler code than that set out in the Insolvency Regulation. Specifically, there is no need to search for the debtor's centre or main interest. Nor is there any question of secondary insolvency proceedings.

The 2004 Regulations

45. In accordance with Article 34 of the 2001 Directive, the 2004 Regulations were introduced into English law on 5th May 2004. The 2004 Regulations provide materially as follows :

> ***"INSOLVENCY MEASURES AND PROCEEDINGS: JURISDICTION IN RELATION TO CREDIT INSTITUTIONS***
>
> ***Prohibition against Winding-up etc. EEA credit institutions in the United Kingdom***
>
> *3.—(1) On or after the relevant date a court in the United Kingdom may not, in relation to an EEA credit institution or any branch of an EEA credit institution —*

> *(a) make a winding-up order pursuant to section 221 of the 1986 Act or Article 185 of the 1989 Order;*
>
> *(b) appoint a provisional liquidator;*
>
> *(c) make an administration order...*
>
> ***Reorganisation measures and winding-up proceedings in respect of EEA credit institutions effective in the United Kingdom***
>
> *5—(1) An EEA insolvency measure has effect in the United Kingdom in relation to—*
>
> *(a) any branch of an EEA credit institution*
>
> *(b) any property or other assets of that credit institution*
>
> *(c) any debt or liability of that credit institution*
>
> *as if it were part of the general law of insolvency of the United Kingdom...*
>
> *(6) In this Regulation*
>
> ...
>
> *"EEA insolvency measure" means as the case may be a directive reorganisation measure or directive winding-up proceedings which have effect in relation to an EEA credit institution by virtue of the law of the relevant EEA State;..."*

46. It can be seen that the wording of Regulation 5 does not reflect precisely the same terminology as that of the 2001 Directive. The United Kingdom was of course obliged to introduce laws as necessary to implement the 2001 Directive (by Article 34 thereof). Any question mark as to the efficacy of the 2004 Regulations in doing so was addressed by the Supreme Court in *Joint Administrators of Heritable Bank plc v The Winding-up Board of Landsbanki Islands hf* [2013] 1 WLR 725 ("*Heritable*"). There Lord Hope said (at paragraph 31) :

> *"...the structure of the Regulations which were made to implement the [2001] Directive as from 5 May 2004 does not mirror exactly that of the Directive which they transpose. But it has not been suggested that the [2001] Directive has not been properly implemented by the Regulations..."*

and he proceeded on the basis that the 2001 Directive had been implemented properly.

Icelandic law

47. It is common ground that Icelandic law is applicable to the winding-up proceedings of Kaupthing themselves. The FUA (by various amendments) applies Article 116 to the winding-up of a credit institution. Article 116 provides materially as follows :

> *"Legal action shall not be brought against a bankruptcy estate in the district court unless expressly permitted by law, except for criminal litigation in which a request is made for criminal sanctions applicable to bankruptcy estates. In such event, the action may be brought in the district where the bankruptcy proceedings take place." (emphasis added)*

48. There are no applicable relevant provisions falling within the phrase "*expressly permitted by law*". (To the extent that it has been suggested that the effect of the Lugano Convention in conferring jurisdiction is to override Article 116, I reject it. The Lugano Convention was not concerned with whether and how claims against a company subject to insolvency proceedings could be pursued.)

49. The purpose of Article 116 is to uphold the equal treatment of claimants and the *pari passu* principle, in that all claims are to be determined and controlled by a single insolvency process. No creditor is to be allowed to take judicial proceedings outside that process.

50. By Articles 117 and 118 of the Bankruptcy Act, a party wishing to uphold a claim against a bankruptcy estate, but unable to pursue it as provided for in Article 116, must submit a claim to the bankruptcy estate or, in the case of Kaupthing, to the Winding-up Committee within certain time limits failing which, subject to certain exceptions, it is cancelled. There is no exception for claims relating to events after the insolvency process has commenced, but Article 118 permits the bringing of such a claim provided that it is lodged without undue delay and before a meeting of the creditors is convened to consider a proposal for distribution.

51. Article 116 thus provides a gateway requiring a claimant against the insolvent entity first to file a claim with the insolvency office holder and then for the court to deal with any disputes.

F. Previous authorities

52. An authoritative recent discussion and overview of the Insolvency Regulation, the 2001 Directive and the 2004 Regulations is to be found in the judgment of Gloster J in *Lornamead Acquisitions Ltd v Kaupthing Bank hf* [2013] 1 BCLC 73 ("*Lornamead*"), in the very context of a claim against an Icelandic bank, indeed Kaupthing itself. Having reviewed the insolvency regime for credit institutions, Gloster J said :

> *"93 There was no argument presented to me, on Lornamead's behalf, to the effect that art 116 only prohibited actions brought in an Icelandic District Court and did not prohibit actions brought in other member states...In other words, Lornamead accepted that the Icelandic insolvency regime, as a matter of Icelandic law, prohibited the commencement of court actions –*

in any jurisdiction – against Kaupthing after the date of the moratorium order. Thus the only issue in contention was whether reg. 5 applied at all in the circumstances of the case.

94 In my judgment, Kaupthing's arguments in relation to issue 2 are correct. If Kaupthing were indeed subject to an EEA insolvency measure in May 2010, any attempt by this court to determine the merits of Lornamead's claim in the English proceedings, even for the so-called limited purpose of deciding whether Kaupthing had any "property or assets" would undermine the purpose of the 2001 Directive, namely to give effect throughout the EEA to all aspects of the relevant insolvency regime of a credit institution's home state, as part of one universal and unitary process, including its moratorium and dispute resolution mechanisms. It would also undermine the role of the Icelandic court, as the supervisory court of Kaupthing's insolvency. Accordingly, in my judgment, were the Court of Appeal to allow the appeal from Burton J's judgment, and to hold that Kaupthing was subject to an EEA insolvency measure in May 2010, this court should stay the English proceedings pursuant to reg.5, so that Lornamead's claim can be resolved in Kaupthing's liquidation in accordance with the Icelandic insolvency procedure,

95 My reasons for this conclusion may be summarised as follows:

i) Regulation 5(1) of the 2004 Regulations, must be construed purposively to implement the 2001 Directive as the dominant text: see The Director-General of Fair Trading v First National Bank plc [2002] 1 AC 481 [31] (per Lord Steyn); Litster v. Forth Dry Docks [1990] 1 AC 546 at 559D-F (per Lord Oliver). That is a broad and far-reaching obligation: see the summary of principles in Vodafone 2 v. HMRC [2009] EWCA 446; [2010] 2 WLR 288, [37] to [38] (per Sir Andrew Morritt, C).

ii) It is critical to the analysis to appreciate that, because of Regulation 3 of the 2004 Regulations, no administration or windingg-up order (whether ancillary or otherwise) could ever be made by the English Court in relation to a non-United Kingdom credit institution, such as Kaupthing, or its branch in the United Kingdom. Thus, recourse to the Home State's insolvency regime is a practical means of avoiding predatory, "first-come, first-served", action by creditors, or, indeed, debtors, and the dissipation of the insolvent credit institution's (necessarily limited) resources in litigation expenditure.

iii) A reality check is to see how one might have approached the problem if Kaupthing had been a United Kingdom credit institution, subject to a UK winding-up or administration order. In those circumstances, there would have been an

automatic statutory stay under the Insolvency Act, preventing proceedings without the leave of the Companies Court. Thus, if an English winding-up order had been made, section 130(2) would have applied with the effect that

> *"no action or proceeding shall be proceeded with or commenced against the company or its property except by leave of the Court and subject to such terms as the Court might impose".*

In those circumstances, Lornamead could not have issued proceedings without the Court's leave, whether in Iceland or in England. There would have been a statutory gateway, designed to protect the interests of the insolvent estate and the general body of creditors, preventing a free-for-all of proceedings.

...

iv) *In such circumstances, how would an English Court have viewed the determination by (say) an Icelandic Court, in proceedings started by a Lornamead-type party in Iceland, without the English Court's leave, of the issue whether the insolvent credit institution, subject to an English winding-up order, in fact had any claim at all? Not favourably, I suggest. If the English Court, for example, took the view that the claim was subject to an Icelandic jurisdiction clause, it might well give leave to the claimant, particularly if it was not a creditor, to start such proceedings in Iceland, if an application for leave to do so was made. But that would be an exercise of the Court's supervisory powers over the credit institution's insolvency measures. The fact that the proceedings were issued by a party claimed by the insolvent credit institution to be a debtor, rather than a creditor, makes little difference to the analysis. The orderly process of a winding-up (or other insolvency procedure) could be equally be disrupted, and the insolvent's estate dissipated, by proceedings for declaratory relief brought in different jurisdictions by persons claiming that they were not debtors of the estate. An English supervisory court would want to ensure that actions against the insolvent credit institution were properly co-ordinated and disciplined.*

v) *Thus principles of comity reinforce an interpretation of Regulation 5 that would reflect the mirror image of the situation that the English Court would expect to pertain as a result of the universal application of the section 130 regime throughout the EEA, in the event of the winding-up of a UK credit institution.*

vi) *The language of the 2001 Directive provides no support for a result whereby a foreign insolvency regime would have a different effect in England than in the home Member State in a fundamental respect, because of a requirement for the insolvent credit institution to satisfy a "merits" criterion, before applying for a stay in accordance with*

its own domestic insolvency regime. Its effect would be that the scope of the stay on proceedings would be significantly narrower in the UK than in Iceland. But that, in my judgment, would subvert the fundamental purpose of the 2001 Directive, which is to provide a unified and universal regime, by instead fragmenting the effect of the Home State insolvency in relation to a very important aspect of an insolvency regime, namely protection from claims.

vii) To put it another way, a narrow definition, which gave an EEA insolvency measure only limited effect in the UK, would subvert the universal insolvency of banks across the EEA, and undermine the purpose of the 2001 Directive, by allowing differential treatment of claimants dependent on whether they sought to proceed in the home Member State or another state in the EEA. It would be wrong in principle under the 2001 Directive, if a claimant under a contract were entitled to initiate proceedings in the UK, when it would have no such right in the lex concursus. Recital (16) makes plain that cross-border equality of treatment is an important principle of the 2001 Directive.

viii) Moreover, a credit institution subject to an EEA insolvency measure which was denied full effect in the UK would be exposed to the risk of uncontrolled litigation. Unlike an ordinary company, there would be no prospect (because of Regulation 3) of obtaining any insolvency protection at all, whether from an administration or a winding-up order. The obvious consequence for a credit institution such as Kaupthing, which had numerous trading relationships with banks and others throughout the EEA prior to its collapse, might be a flood of claims in different jurisdictions in the EEA, from debtors claiming, for example, that because of misrepresentation, or other avoidance grounds, they no longer had any liability to the insolvent institution. But that is precisely the sort of dispute that is likely to arise in the context of the insolvency of a credit institution. It is also notable that neither the 2001 Directive, nor the 2004 Regulations, provide any sort of carve out, or statutory exception, for claims simply on the grounds that they are governed by contractual exclusive jurisdiction clauses. That is despite the fact that, at least as a matter of Icelandic law, the insolvent credit institution remains free to take advantage of such a clause and to bring a claim in a foreign jurisdiction, outside the winding-up proceedings..."

53. This analysis has been endorsed on several occasions, at both first instance and appellate level : see *Isis Investments Ltd v Oscatello Investments Ltd* [2013] EWHC 7 (Ch) and [2013] EWCA Civ 1493 ("*Oscatello*") ; and *LBI hf v Stanford* [2014] EWHC 3921 (Ch) ("*Stanford*").

54. Reference has also been made to additional authorities and material in the context of a consideration of the cross-border insolvency regime.

55. *Syska* has already been referred to above in the context of explaining the rationale for the different regimes for new proceedings and pending lawsuits. It also confirms (at paragraph 27 of the judgment of Patten LJ) that the objective of the Insolvency Regulation was to seek "*to co-ordinate the operation of cross-border insolvency proceedings within the EC not only by restricting the opening of secondary insolvency proceedings but also by regulating which system of law should govern the main insolvency proceedings.*"

56. In *Fondazione Enasarco v Lehman Brothers* [2014] 2 BCLC 662 ("*Enasarco*") David Richards J addressed the interaction between the general rules applying to civil jurisdiction and the insolvency regime. At paragraph 28 he said this :

> "*28. Although the bankruptcy convention never came into effect, the distribution of jurisdiction in insolvency matters was achieved by [the Insolvency Regulation]. In para 53 of his report on the accession of the UK, Denmark and Ireland to the Brussels Convention, Professor Peter Schlosser stated that the Brussels Convention and the intended bankruptcy convention were "intended to dovetail almost completely with each other". Although the planned bankruptcy convention was replaced by the Insolvency Regulation, I agree with the observation of Briggs J in Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus lr 1245 at [47], that :*
>
> > "*nothing which thereafter occurred appears to me to have been intended to detract from the plan that the bankruptcy exclusion should exclude from the Judgments Regulation nothing more, and nothing less, than what was included within the scope of the Insolvency Regulation.*"
>
> *As regards the exclusion of insolvency proceedings, the Judgments Regulation and the Insolvency Regulation must be read in the light of the other, and the same in my judgment is true of the Lugano Convention.*"

57. Later in *Enasarco* (at paragraph 43) David Richards J rightly referred to the *Virgos-Schmit Report* as being regarded as "*an authoritative commentary both on the Convention and on the Insolvency Regulation*". The report commented on the draft convention that was never implemented but which was replaced by the Insolvency Regulation. At paragraph 42 the authors stated as follows :

> "*42. The Convention on insolvency proceedings goes beyond the scope for the 1968 Brussels Convention, since it not only governs international jurisdiction and the recognition of judgments but also contains rules on conflicts regarding the law applicable to the proceedings and effects thereof. A Convention on the mutual recognition of insolvency proceedings would not be possible without the guarantee of respect for acquired rights offered by a uniform system of rules on conflict of laws. Harmonized conflict of laws guarantee acquired rights so that, in the event of insolvency, rights*

> *created in each state will be recognized in other Contracting States.*"

58. *Commission v AMI Semiconductor Belgium and others* Case C-294/02 (*"AMI Semiconductor"*) is a case where jurisdiction was achieved through contractual arbitral provisions. Thus the court did not have to consider the Lugano Convention, for example. It concluded that it did have jurisdiction to decide the case. It then proceeded, quite separately, to consider the choice of law rules under Article 4(2)(f) of the Insolvency Regulation. Although this was not a case of direct application of the Insolvency Regulation, it was "*necessary to deduce what rules [were] applicable from the principles common to the procedural laws of the Member States in this area.*" (see paragraph 68). Then at paragraphs 69 and 70 the court said this :

> "*69. In that connection, it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible. Moreover, the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them. That is clear from Article 4(2)(f) of [the Insolvency Regulation] according to which the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened, which in this case means Austrian law and German law. Furthermore, by virtue of Articles 16 and 17 of the same Regulation, the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.*
>
> *70. As the Advocate General observed in points 84 and 85 of her Opinion, the aim of [the Insolvency Regulation] is, as is clear in particular from recitals 2, 3, 4 and 8 in its preamble, to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors. The Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible.*"

59. Thus again, questions of choice of law were dealt with distinctly from questions of jurisdiction. Having decided that it had jurisdiction, the court went on to consider choice of law. It decided, by analogy with national proceedings, that Article 4(2)(f) of the Insolvency Regulation required reference to the rules of the state in which the insolvency proceedings were opened. On that basis the mandatory stay arising under Austrian and German law was to apply.

60. Finally, at this stage, there is *LBI hf v Kepler Capital Markets SA* [2013] EUECJ C-85/12 (*"Kepler"*), a case involving another insolvent Icelandic bank and accordingly the 2001 Directive and the Lugano Convention. A creditor in France brought

proceedings against the bank and in the French court obtained an attachment order against a third party in support of its claims. The bank contended that the order was inconsistent with Icelandic insolvency law. The material (second) issue was whether or not the attachment offended Icelandic law as the lex concursus. It was held that it did. There was no suggestion that the proceedings in the French courts were not within the Lugano Convention or that the French courts lacked territorial jurisdiction. Nor was it suggested that, as a result of the French courts having territorial jurisdictional, the insolvency regime did not apply.

G. The insolvency ground

61. Against this background, I turn to consider the insolvency ground. For the purposes of this debate, it is to be assumed that the claim against Kaupthing falls within the Lugano Convention and does not come within the exception in Article 1(2)(b). Thus territorial jurisdiction is not in issue for present purposes.

Kaupthing's case

62. I accept Kaupthing's central proposition that Iceland and the United Kingdom are party to a pan-European legal order which provides for insolvency proceedings concerning credit institutions to be conducted in, and according to the laws and procedures of, the relevant "home" Member State. As part of the mutual recognition of and respect for that regime, the insolvency law of the home Member State is to have effect in relation to a lawsuit commenced in any EEA state after the start of the insolvency proceedings. This is part of a European cross-border insolvency regime for banks implementing a system of unity and universalism. So much is clear from the instruments set out above, which speak with one voice, and the authorities referred to above.

63. I also accept that the effect of Articles 9 and 10 of the 2001 Directive is that, by Article 9, the only court with jurisdiction to wind-up a credit institution is the home Member State, here Iceland, and, by Article 10, the effects of those winding-up proceedings on proceedings brought by individual creditors are governed by the lex concursus, here Iceland. (There is no question here of the present proceedings being lawsuits pending.) The choice of law provision in Article 10(2)(e) of the 2001 Directive provides clearly that the law of the home Member State shall determine the effects of winding-up proceedings brought by individual creditors (with the exception of pending law suits). *Dicey* at paragraph 30-206 (under the heading "*Choice of Law*" and with reference to the *Virgos-Schmit* report) confirms that the doctrine of *renvoi* does not apply. The relevant law is the domestic substantive and procedural law of the home state. Here that relevant law is Article 116. Applying that law, legal action cannot be brought against Kaupthing, and there is a prohibition on these proceedings so far as they relate to Kaupthing.

64. The next stage is to consider whether or not the 2001 Directive has been implemented as necessary into English law by the 2004 Regulations. I accept that it has been. The 2004 Regulations must be read purposively to give effect to the 2001 Directive as the dominant text, as set out by Gloster J in *Lornamead* (at paragraph 95(i)), applying the principles set out in *Vodafone 2 v HMRC* [2010] Ch 77 (at paragraphs 37 to 38)). As already indicated, *Heritable* indicates that the 2001 Directive has been implemented

as necessary. And when referring to Regulation 5 of the 2004 Regulations Gloster J said this (at paragraph 79 of her judgment in *Lornamead*) :

> *"Thus, an EEA insolvency measure, which will necessarily be governed by the insolvency law of the EEA state in question, has effect in the United Kingdom as if it were part of the English statutory insolvency regime. As the Explanatory Note to the 2004 Regulations puts it : "EEA reorganisation measures and winding-up proceedings are to be recognised in the UK."*

65. I also conclude that the prohibition under Article 116 has been imported into English law irrespective of whether or not Article 116 has extra-territorial effect as a matter of Icelandic law. If Regulation 5 were not to be treated as giving effect to Article 116 in the United Kingdom, the fundamental purpose and effect of the 2001 Directive and the 2004 Regulations, namely to give local insolvency laws of the home Member State extra-territorial effect and to provide a unified and universal regime, would be undermined. For credit institutions such as Kaupthing, by Regulation 3 of the 2004 Regulations, there is no option of commencing secondary winding-up proceedings in this country. Thus, for Regulation 5 not to be treated as importing Article 116 into English law would mean that a bank the subject of insolvency proceedings could be the subject of proceedings without any limitation or protection at all relating to its insolvent status. There would be a *"free-for-all"*, in the words of Gloster J, that the regime was expressly designed to prevent.

66. This conclusion is in my view supported by the relevant authorities referred to above, particularly *Lornamead*. Although it was accepted there that Article 116 applied to proceedings commenced abroad, the reasoning in paragraph 95 of the judgment of Gloster J strongly supports the view that, even if Article 116 were limited in territorial effect, this court should nonetheless apply it as part of English law. Nor have any of the authorities referred to a limitation by reference to any territorial limitation on the prohibition of proceedings.

67. Support for such a purposive approach to interpretation is to be gleaned for example from *Kepler* (at paragraph 55) :

> *"A contrary interpretation of Directive 2001/24 would be capable of calling into question the effectiveness of the principle of universality established by it and which seeks to make reorganisation measures and winding-up proceedings subject to proceedings having universal effect. Since the measures and the proceedings laid down in Directive 2001/14 have the very object of suspending individual enforcement actions in order to restore to viability the credit institutions concerned, any enforcement action would reduce the availability of the assets administration and, accordingly, would undermine the principle of universality."*

and also cases such as *Schmid v Hertel* [2014] 1 WLR 633, albeit that the court there was considering questions of jurisdiction, not choice of law. The question there was whether or not the Insolvency Regulation conferred international jurisdiction on a

German liquidator taking proceedings in Germany against a Swiss national to set aside a transaction under German bankruptcy legislation. Under German domestic law there were territorial limitations on the ability of the German court to do so. The Court of Justice of the European Union held that there was jurisdiction by virtue of Article 3 of the Insolvency Regulation. In doing so it expressly took into account the objectives of the Insolvency Regulation towards universality and harmonisation across the European Union on questions of insolvency as follows :

> *"33. Furthermore, the objectives pursued by Article 3(1) of the Regulation, consisting...in the promotion of foreseeability as regards bankruptcy and liquidation jurisdiction and, therefore, of legal certainty, support an interpretation to the effect that that provision also creates jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is in a third country. Harmonisation, in the EU, of the rules governing jurisdiction over actions to set a transaction aside by virtue of insolvency contributes to the attainment of those objectives irrespective of whether the defendant's place of residence is in a Member State or a third country."*

68. Additionally, a consideration of the position under s.130 of the Insolvency Act 1986 ("s.130") is apt, an exercise that Gloster J carried out in *Lornamead* (at paragraphs 95 (iv) and (v)). The statutory prohibition against creditors bringing proceedings against a company in winding-up proceedings is of only domestic effect. Gloster J nevertheless clearly interpreted the 2001 Directive as meaning that a s.130 stay would have extra-territorial effect. Any other conclusion would mean that English credit institutions subject to winding-up would be unprotected by a stay anywhere else in the European Union, undermining an orderly and unified winding-up process.

69. In this context, Kaupthing can also point to *Re Arm Asset Backed Securities (no 2)* [2014] BCC 260 ("*Arm*"), which is said to be the "mirror image" of the present proceedings. The English Court appointed provisional liquidators over a Luxembourg company on the basis that England was the company's centre of main interests. The regulator in Luxembourg indicated that it intended to bring winding-up proceedings in Luxembourg. It was common ground that the proceedings were not insolvency proceedings listed in the Insolvency Regulation. Nugee J held that the stay created by s.130 was effective under the Insolvency Regulation to prevent proceedings in Luxembourg. Thus, although the Luxembourg regulator did not appear before Nugee J, it can be relied on as support for the proposition that the effect of Article 4 of the Insolvency Regulation, which is echoed in Article 10 of the 2001 Directive, is to export territorially limited law to proceedings throughout the Member States.

70. *Arm* is cited with approval in *Sheldon on Cross Border Insolvency* (4th Ed.) ("Sheldon") in the context of Article 4 of the Insolvency Regulation. At paragraph 2.59 and following the author states :

> *"Thus, Article 4 applies to any insolvency proceedings opened in accordance with Article 3, whether they are main or territorial and, in the case of the latter, whether they are independent or secondary...*

> *2.61 The relative scarcity of reported decisions so far would suggest that Article 4 itself calls for little comment, save to the extent that certain of its provisions interact with the exceptions that follow...*
>
> *2.62 Two recent cases have confirmed the effect throughout Member States of a provision prohibiting the commencement of proceedings by individual creditors, which applies by virtue of Article 4(2)f... The second case [namely Arm] related to a company incorporated in Luxembourg whose COMI was in England where main proceedings had been opened, such that English insolvency law applied. The stay under [the Insolvency Act] 1986 operated by virtue of Articles 4(2)f) and 17 of the Insolvency Regulation to prevent the initiation by the public prosecutor in Luxembourg of proceedings under the Luxembourg Securitisation Law, without leave from the English Court."* (emphasis added)

71. For all these reasons, in my judgment Regulation 5 of the 2004 Regulations has the effect contended for by Kaupthing, namely that the prohibition on proceedings in Article 116 is effective in England.

The Claimants' case

72. In reaching these conclusions, I have considered carefully the Claimants' opposition to them.

73. The Claimants mount a vigorous attack on Kaupthing's position, firstly by reference to proposition 2, namely that where the Lugano Convention applies, the 2001 Directive only applies to proceedings falling within Article 1(2) (b) of the Lugano Convention. This raises the question of the interface between the Lugano Convention and the insolvency regime as set out above on the question of choice of law rules.

74. At the outset, there are in my judgment a number of difficulties in the Claimants' approach on proposition 2, which is novel and unprecedented. As is already apparent, in none of the cases where territorial jurisdiction has been accepted or established, has it been suggested that the 2001 Directive does not apply.

75. Thus, for example and significantly, Gloster J proceeded in *Lornamead* on the basis that the Lugano Convention would apply. The Claimants point out rightly that proposition 2 was not advanced in *Lornamead* and thus the issue was never considered. It is correct that the proposition was not advanced, but the court had the Lugano Convention well in mind, as is apparent from, for example, paragraph 61 of the judgment. Equally, the point was not taken in *Kepler*.

76. Fundamentally, proposition 2 confuses questions of jurisdiction with questions of choice of law. The two are entirely separate and different concepts, treated quite separately in each of the Insolvency Regulation, the 2001 Directive and the 2004 Regulations. That there is dovetailing on jurisdiction is not controversial : see for example paragraph 28 of *Enasarco*. But there is no basis for saying that such dovetailing carries over to questions of choice of law so as to exclude from the insolvency regime all matters falling within the Lugano Convention – see for example the Virgos- Schmit report as set out above. The insolvency instruments go beyond

jurisdiction and recognition and impose separate conflicts of laws rules which play no part in the Lugano Convention (or other jurisdictional instruments).

77. I have asked myself whether, as the Claimants put it, this is merely a "*play on words*". I do not consider that it is. Jurisdiction and choice of law rules are quite separate and discrete notions. They are treated separately and discretely in the instruments. Whilst the application of choice of law rules may create a bar to proceeding in a particular jurisdiction, that does not lead one to equate the two concepts.

78. This flaw cuts across all of the Claimants' submissions on the applicability and scope of the 2001 Directive : thus, for example, paragraph 36 of the Claimants' skeleton contends that it is clearly established as a matter of EU law that the Insolvency Regulation on the one hand and the Brussels Regulation/Lugano Convention on the other are mutually exclusive regimes : "*Taken together they are intended to provide a unified and coherent regime of jurisdiction, recognition of judgments and enforcement. As such, the jurisdictional scope of the Insolvency Regulation is confined to matter which would fall within Article 1(2)(b) of the Lugano Convention...*" (emphasis added). This submission misses the point : the issue is not one of jurisdiction, but one of choice of law.

79. Additionally, proposition 2 ignores the plain wording of Article 10 of the 2001 Directive. Article 10 of the 2001 Directive is unlimited in its scope when it refers to proceedings brought by individual creditors (save for pending lawsuits) : it applies to "*the effects of winding-up proceedings on proceedings brought by individual creditors (with the exception of lawsuits pending)*". There is no limitation on the proceedings affected by the winding-up proceedings : it applies to any lawsuits brought by individual creditors (save for lawsuits pending). Whether or not the proceedings fall within the Lugano Convention is an irrelevance. Anything else would be inconsistent with the objectives of the 2001 Directive. If proposition 2 were correct, individual creditors could bring proceedings against the insolvent company anywhere where the Lugano Convention permits. It would involve a "reading-down" of Article 10 (by effectively inserting the words "*provided that those proceedings fall outside the Lugano Convention*") that would be quite contrary to the intention and spirit of the 2001 Directive.

80. At a general level, Mr Tager Q.C for the Claimants submitted that, if one were to put the facts of this case to one side, the consequences of Kaupthing's position would be startling, indeed so startling that it cannot be that Member States and Councils could have intended them when adopting the 2001 Directive.

81. On Kaupthing's case, it would follow that each and every claim covered by each of the specialist areas to which the Lugano Convention applies would be covered by the insolvency regime upon the insolvency of a defendant credit institution. Thus, for example, if Kaupthing had operated a branch in Bulgaria, and as a result of its insolvency, the employees in the Bulgarian branch were made redundant; any redundancy dispute would not be heard in the Bulgarian equivalent of an employment tribunal, but rather Iceland. Reference was made to the basic rule in Article 2 of the Lugano Convention, namely that persons domiciled in a state bound by the Convention are to be sued in the courts of that State, subject to the other provisions of the Convention. There follow articles addressing special jurisdictions including for contract, tort, trusts, consumer contracts and employment contracts. Article 6 also

provides for a person to be sued where he is one of a number of defendants in the course for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. It also provides for jurisdiction to be sued on a counterclaim.

82. Thus it is submitted that no-one can ever have intended or even understood that the effect of the Insolvency Regulation, carried through into the 2001 Directive so far as credit institutions were concerned, would be to "trump" those many provisions. It cannot, for example, have been the intention of the drafters of the Insolvency Regulation to deprive claimants and co-defendants, of the opportunity of having their case being heard together. And banks do not stand in some special position or fall to be treated in some special way. If they choose to operate internationally, the risk of litigation abroad is one inherent in their business. Equally, it cannot, for example, have been the intention that if there were a dispute between two neighbours, one foreign and who then went in to bankruptcy, over a matter covered by land registration, the dispute would not be tried in the local court.

83. The Claimants point to the fact that no writer or textbook has suggested as much. They rely also on a Common Position paper : Common Position (EC) No 43/2000 of 17th July 2000 ("the Common Position Paper"), commenting on a draft of the 2001 Directive. That draft contained Article 10 in the same form as later enacted. In the Statement of the Council's Reasons the Objectives are set out as follows :

> *"OBJECTIVES*
>
> *In order to guarantee equal treatment of creditors and the smooth functioning of the reorganisation and the winding-up of credit institutions within the European Union, the Directive aims to ensure that:*
>
> - *the administrative and judicial authorities of the home Member State have sole power to adopt and to implement reorganisation measures and winding-up proceedings according to the law and practices in force in that Member State, except where the Directive provides otherwise, and*
>
> - *the rights of creditors domiciled in Member States other than the home Member State are safeguarded.*
>
> *The Directive does not aim at harmonising national legislation but at ensuring mutual recognition of Member States' reorganisation measures and winding-up proceedings as well as the necessary cooperation.*
>
> *In order to achieve these aims, the Common Position amends and gives a more explicit formulation of some provisions compared to the Commission proposal. It further introduces some new provisions, largely based on Council Regulation (EC) No 1246/2000 of 29 May 2000 on insolvency proceedings (4), hereinafter referred to as the Insolvency Regulation. This has been done in order to*

> *ensure consistency in Community legislation and, where appropriate, to align the specific rules on insolvency issues in the banking sector with the rules on similar issues in the Insolvency Regulation which applies generally within the European Union. These provisions are aimed at enhancing the objectives set out above and primarily concern the protection of the position of creditors domiciled in a Member State other than the home Member State of the credit institution in winding-up proceedings, the definition of the powers and obligations of the administrator/liquidator and the introduction of provisions enhancing legal certainty by laying down which law will be applicable in certain specific cases, e.g. concerning immovable property.*"

84. It is suggested that the references to safeguarding the rights of creditors must mean that the position contended for by Kaupthing was not envisaged. The point is also made that, when referring later to Article 10 and when considering the principle of universality, the position now contended for by Kaupthing is not expressly raised.

85. I do not accept that the consequences of Kaupthing's position are startling in any way. The fact that no express mention of it has been made hitherto is because proposition 2 does not appear ever to have been advanced previously (despite previous obvious opportunities for it to have been raised). If anything, it is the Claimants' position that could be said to have the more dramatic effect on the scope and application of Article 10(2)(e) : it would bring many claims outside the Article, such as debt claims based on pre-existing deposits by creditors into banks. Such claims would not fall within the exception in Article 1(2)(b). Additionally, it would mean that there would be no insolvency-related fetter of any kind on proceedings against an insolvent credit institution. A bank would be in a less protected position than any other company, because of the effect of Regulation 3 of the 2001 Directive which prevents secondary or ancillary winding-up proceedings.

86. Beyond that, there is in my judgment nothing surprising in the insolvency of a debtor affecting the manner in which a claim can be brought. Where a company becomes insolvent, the ability of creditors to pursue claims is likely to be curtailed in some way. The entity with which they are dealing is in liquidation and they are not the only creditor. An individual's freedom to sue in a particular place becomes subject to the principle that all creditors are to be treated fairly and equally in a universal single process. Nor do I accept that this is a question of primacy of one instrument over another. The Insolvency Regulation presumes territorial jurisdiction under the Lugano Convention (or equivalent) in the first place.

87. Support for this approach is to be found in the opinion of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (*"HIH"*) at paragraph 33 :

> "*Furthermore, it seems to me that the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law. Policy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all; to expect that in the event of insolvency their*

> *rights will be determined by Australian law. Indeed, the preference given to insurance creditors may have been seen as an advantage of a policy with and Australian company.*"

88. Moreover, the 2001 Directive makes special provision for some of the very types of specialist claims identified in the Lugano Convention and referred to by the Claimants. Thus Articles 20, 21 and 23 set out particular rules for the effect of a reorganisation measure or the opening of Winding-up proceedings on employment contracts, contracts relating to immovable property, third party rights in re and set-off rights.

89. As for the Common Position Paper, references to the safeguarding of the rights of creditors do not assist the Claimants. Such references are directed at the equal treatment of creditors, not some jurisdictional safeguarding so that creditors can sue insolvent credit institutions wherever they can under the Lugano Convention without regard to the 2001 Directive. So much is clear from the introductory words : "*In order to guarantee equal treatment...*" and also from the narrative to Articles 7 and 14, for example, where duties to inform known creditors of their rights are addressed.

90. The Claimants go on to submit, as they are bound to do, that the reasoning in *Lornamead* is wrong. Proposition 2 was not before Gloster J, though they say it should have been, and so she did not have the point before her. Moreover, Gloster J was wrong in her analysis at paragraph 95. There would be no risk of uncontrolled litigation (and in any event there is no reason for treating banks operating internationally specially), no breach of principles of comity, no subversion of the purpose of the 2001 Directive.

91. I do not accept these criticisms. As already noted, Article 1(2)(b) was plainly before Gloster J. The reasoning in paragraph 95 in *Lornamead* is compelling. It is not a question of giving international banks special treatment. It is a question of analysing the position of credit institutions such as Kaupthing under the 2001 Directive.

92. The Claimants rely on a number of cases, in particular *Gibraltar Residential Properties v Gibralcon 2004 SA* [2011] BLR 126 ("*Gibraltar*") and *Enasarco.* As for *Enasarco*, the comments of David Richards J at paragraph 28 were clearly addressing questions of jurisdiction, not choice of law rules. The question was whether the Swiss proceedings were proceedings between the same parties and involved the same cause of action in circumstances where another court was first seised of the proceedings. The 2001 Directive, and in particular Article 10, was not in play in any way.

93. The position in relation to *Gibraltar* is more complex. This authority pre-dates *Lornamead, Oscatello* and *Stanford* and was not considered in any of those cases. Edwards-Stuart J considered whether the English Court had jurisdiction to hear claims relating to a contract where the defendant was in insolvency proceedings in Spain prior to commencement of proceedings to resolve the claims. He rejected an argument that the claims fell within the bankruptcy exception in Article 1(2)(b). During the course of his reasoning there, he stated at paragraph 30 :

> "*...To consider the Insolvency Regulation...in isolation is, in effect, to assume that which one is seeking to prove : namely*

> *that the proceedings in question fall within the exception in [Article 1(2)(b)]...*"

94. He went on to reject a further argument based on Article 4(2)(f) of the Insolvency Regulation. At paragraph 37 Edwards-Stuart J said :

> "*37. I consider that the Insolvency Regulation...and the [Judgments Regulation] are intended to provide mutually exclusive codes in relation to jurisdiction : the former is confined to insolvency and analogous proceedings, whereas the latter applies to other civil and commercial proceedings (save for those specifically excluded, such as, for example, arbitration).* "

95. I do not read the comments of Edwards-Stuart J as going beyond a statement that the regimes in the Judgments Regulation and the Insolvency Regulation are mutually exclusive on the question of jurisdiction. The arguments were presented as a matter of jurisdiction. Moreover, as is apparent from paragraph 9 of the judgment, there does not appear to have been any material insolvency issue raised between the relevant Member States. As a result, the answer was simple and the question of jurisdiction was governed by the Judgment Regulation. There was no Spanish law issue, no question of a stay, analogous to Article 116.

96. The Claimants relied on two further authorities :

a) *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma' Case* C-213/10 [2013] Bus LR 232 ("*F-Tex*"); and

b) *Nickel v Goeldner Spedition GmbH v Kintra UAB* Case C-157/13 ("*Kintra*"),

and also certain passages in chapter 2 of Sheldon (including paragraphs 2.17 and 2.140). Those passages were relied on simply so as to demonstrate their silence on Kaupthing's proposition, with the suggestion that it must therefore be wrong. This does not assist, since Article 4 of the Insolvency Regulation and questions of choice of law are dealt with quite separately in chapter 2, and as set out above in the context of *Arm*.

97. The passage relied on by the Claimants in *F-Tex* reads as follows :

> "*48. Consequently, and without the need to rule on the existence of any direct link between that action and the insolvency of the debtor, it must be held that that action is not covered by article 3(1) of [the Insolvency Regulation] and, symmetrically, that it does not concern bankruptcy or winding-up for the purposes of [Article 1(2)(b) of the Lugano Convention].*"

The short answer is that this statement is dealing self-evidently with jurisdiction, not choice of law.

98. The passage relied on by the Claimants in *Kintra* reads as follows :

> "***The first question***
>
> *20 By its first question the referring court asks, in essence, whether an action for the payment of a debt based on the provision of carriage services brought by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and directed against the recipient of those services, established in another Member State, falls within the scope of Regulation No 1346/2000 or of Regulation No 44/2001.*
>
> *21 In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p.36), which was replaced by Regulation No 44/2001, the Court has held that that Regulation and Regulation No 1345/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that Regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in F-Tex, C-213/10, EU:C2012:215, paragraphs 21, 29 and 48).*
>
> *22 The Court also noted that, as inter alia recital 7 in the preamble to Regulation No 44/2001 states, the intention on the part of the EU legislature was to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of that Regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation No 1346/2000, in accordance with recital 6 in the preamble thereto, should not be broadly interpreted (judgment in German Graphics Graphische Maschinen, C-292/08, EU:C2009:544, paragraphs 23 to 25).*"

99. Again, as Kaupthing points out, these comments are dealing with jurisdiction only, in the context of a response to a request for a preliminary ruling concerning the interpretation of Articles 3 (not 4) and 44 of the Insolvency Regulation.

100. To this, the Claimants riposte that *German Graphics Graphische Maschinen GmbH v Schee* Case C-292/08 [2009] ECR I-8421 ("*German Graphics*"), cited in *Kintra,* had not been addressed. In *German Graphics* the court did discuss the interface between Article 1(2)(b) of the Brussels Regulation and Article 4(2)(b) of the Insolvency Regulation. At paragraph 37 the court said :

> *"37. As regards the possible effect of Article 4(2)(b) of [the Insolvency Regulation] on the answer given by the Court concerning the classification of the action in the main proceedings, it must be noted that that provision only constitutes a rule intended to prevent conflicts of law by providing that the law of the State of opening of the insolvency proceedings is to apply in order to determine "the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings." That provision has no effect on the scope of the application of the [Judgments Regulation]."*

101. I fail to see how this can assist the Claimants. The consideration in paragraph 37 was in the context of addressing the scope of the insolvency exception in Article 1(2)(b) of the Lugano Convention. It was asked in that context whether or not Article 4(2)(b) of the Insolvency Regulation was of any relevance. The answer was "no". If anything, this supports Kaupthing's position, in demonstrating that jurisdiction and choice of law are two quite separate concepts.

102. Secondly, the Claimants submit that Article 10 of the 2001 Directive relates only to the enforcement, not the bringing, of proceedings. They accept that, once a claim has been determined in a country with jurisdiction to decide the claim, then it must be submitted to the Winding-up Committee to be dealt with in accordance with Icelandic law.

103. It is not tenable in my judgment to argue that Article 10(2)(e) applies only to enforcement proceedings. It is not what Article 10(2)(e) says. It is not how Gloster J approached the position in *Lornamead* (see for example paragraph 95 (ii)). It is not consistent with the decision in *Kepler*. There at paragraph 54 the court said :

> *"54. Therefore it is necessary to distinguish, as regards determining the law applicable to the effects of reorganisation measures or winding-up proceedings, between lawsuits pending and individual enforcement actions arising from those lawsuits, the latter actions being subject to, in accordance with the general rule established by [the 2001 Directive], to the legislation of the home Member State. Accordingly, as the European Commission noted in its written observations, the words "lawsuits pending" cover only proceedings on the substance."*

104. Proceedings within Article 10(2)(e) are "*proceedings on the substance*", not mere enforcement actions. The Claimants relied on paragraph 55 of *Kepler* already set out above. In my judgment, that cannot be said to support their argument. The reference to enforcement actions in that paragraph are understandable in the context of a case where the question was whether or not an enforcement action is to be treated as a pending lawsuit but do not advance the argument substantively.

105. The Claimants also relied on paragraphs 6 and 7 of the opinion of Lord Hoffmann in *HIH* to suggest that the principle of universality applies to enforcement only. There Lord Hoffmann stated as follows :

> *"6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.*
>
> *7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, 517, paragraph 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also Fletcher, Insolvency in Private International Law, 2nd Ed (2005), pp 15 – 17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."*

It does not seem to me possible to derive such a conclusion from the broad statement there made by Lord Hoffmann in the last sentence of paragraph 6.

106. Equally, the definitions of "*reorganisation measure*" and "*winding-up proceedings*" in the 2001 Directive where reference is made to the aim of realising assets do not cut across the conclusion that the wording of Article 10(2)(e) covers the bringing of proceedings, anymore than do the definitions and wording of Regulation 5 of the 2004 Regulations.

107. The Claimants relied on paragraphs 14 and 15 of the judgment in *Gibraltar* as follows :

> *"14. So I must make it entirely clear that this court, having made declarations as asked, would then leave the question of GRPL's entitlement to payment to be dealt with in the insolvency proceedings in Spain. In the alternative, if it was found that a net sum was due to Gibralcon, the court would make directions for payment of that sum to the administrators in Spain or, at least, order a stay of such payment in order to give the administrators an opportunity to intervene and seek an appropriate order from this court.*
>
> *15. Accordingly, there is no question whatever that this court would take any step to prejudice or interfere with the Spanish insolvency proceedings. This court will do no more than determine the rights of the parties under this contract, disputes which are subject to the exclusive jurisdiction of the courts of*

> *England and Wales, and make declarations accordingly, and, in particular, determine so far as it can which party is owed money by the other and how much.*"

This does not appear to me to be authority for the proposition that Article 10(2)(e) of the 2001 Directive does not apply to substantive proceedings.

108. The Claimants submitted that in paragraphs 69 and 70 of *AMI Semiconductor* (set out above) references to actions or proceedings were references to execution proceedings. This is not right on the face of those paragraphs in context, which were ordinary proceedings seeking to establish liability, not enforcement. That conclusion is reinforced when one sees the opinion of the Advocate General referred to in paragraph 70 of the judgment. At paragraphs 84 and 89 of the opinion the Advocate General stated this :

> "*84. The purpose of insolvency proceedings is to distribute the available assets on the basis of equality among the creditors in a single procedure in which all the creditors take part. It is for that reason that national law precludes the bringing of separate legal proceedings once insolvency proceedings have been opened. Creditors can neither bring a direct action to obtain a separate entitlement nor levy individual execution on the basis of an existing entitlement. If that were not the case, some creditors could secure an advantage over others. Article 4(2)(f) of [the Insolvency Regulation] ensures that that principle cannot be circumvented by the bringing of actions in other Member States...*
>
> *89. It must therefore be concluded that the action against A-Consult and Ision is inadmissible because Austrian and German insolvency law, which are applicable in this regard, preclude individual creditors from bringing legal proceedings once insolvency proceedings have been opened.*" (emphases added)

109. Finally on this question, strong, if not conclusive authority, on the point and against the Claimants' position, is to be found in *Syska* at first instance. The point now advanced by the Claimants was there argued fully before Christopher Clarke J and rejected. At paragraphs 23 and 24 he said this :

> "*[23] Elektrim contends that the phrase 'lawsuit(s) pending' in Arts. 4(2)(f) and 15 is limited to individual execution actions against the debtor's assets. In particular Art. 4(2)(f) refers to: (i) a principal category being 'proceedings brought by individual creditors', which means proceedings by way of execution or enforcement against the debtor's assets either with or without the assistance of the court: (ii) a sub-category of such proceedings, being 'lawsuits pending', which means proceedings by way of execution in which the assistance of the court is required.*

> *[24] I accept that the phrase 'with the exception of lawsuits pending' (and other similar language in the other versions of the text) indicates that lawsuits are to be regarded as within the category of 'proceedings brought by individual creditors' but for the exception. All the languages use some variant of exception apart from Greek, which uses (as translated 'unless' 'Εκτός', which appears to have the same meaning. It is not however evident that 'proceedings brought by individual creditors' are to be limited to proceedings by way of execution. In submitting that they are so limited Elektrim relies on (a) the report and (b) Art. 15.*"

Having reviewed the Virgos-Schmit report, he went on to say (at paragraph 35) :

> "*[35] Thus, if one takes the whole of Professor Virgós' writings it becomes apparent that far from contending that the exception to Art. 4(2)(f) and Art. 15 relate to execution against the debtor's assets for which the assistance of the court is required, he takes the view that they extend to actions and arbitrations brought to establish claims and do not extend to executions.*"

110. He went on to conclude at paragraph 47, finding support for his decision in *AMI Semiconductor,* :

> "*[47] I see no reason to limit the expression 'proceedings brought by individual creditors' in Art. 4(2)(f) to proceedings by way of execution. There is no such limitation in the phrase itself which is entirely general in terms. The effect of Elektrim's interpretation is that the law of the state of the opening of proceedings governs the effect of the insolvency on execution proceedings that have not been commenced; but the law of the forum of the lawsuit governs the effect of the insolvency on execution proceedings that have been commenced. There is no principled reason why the draftsman should have chosen to make such a distinction, and it is contrary to the purpose of the Regulation (see [50] below) and para 255 of the Virgós and Garcimartin book (cited at [34] above).*"

This conclusion was not challenged on appeal.

111. Thirdly, the Claimants submit that Regulation 5 is not effective to incorporate Article 116 into English law. The point is a short one : Regulation 5 of the 2004 Regulations is concerned with giving effect to EEA "*reorganisation measures*" and "*winding-up proceedings*" as defined in the 2001 Directive. Article 116 is not a reorganisation measure or a winding-up proceeding as defined. The suggestion is that Regulation 5 is to be read narrowly. Only the winding-up proceedings themselves are addressed in Regulation 5, not the insolvency law of Iceland.

112. There are a number of obstacles in the path of this submission, which submission I also reject :

a) as a matter of statutory interpretation, the legal consequences of a winding-up proceeding must be incorporated if the winding-up proceeding is incorporated;

b) applying principles already set out above, the instrument is not to be read narrowly, but rather purposively so as to give effect to the 2001 Directive;

c) as set out above, *Heritable* indicates that there has been proper and full implementation of the 2001 Directive. Further and specifically Lord Hope said this (beyond his comments at paragraph 31 referred to above) at paragraph 58 :

"*58. The key to a proper understanding of Regulation 5(1), therefore, lies in an appreciation of the fact that, whilst it is designed to give effect to the mandatory choice of the law of insolvency of the EEA state in which the foreign credit institution is located...*" (emphasis added);

d) it is a submission wholly at odds with the conclusion of Gloster J in *Lornamead* (at paragraph 94), where she stated that she would stay the English proceedings pursuant to Regulation 5.

113. For these reasons, I reject the Claimants' position as set out in propositions 2 and 3.

H. Icelandic law – the scope of Article 116

114. The above conclusions render resolution of the debate as to whether or not the stay under Article 116 is of extra-territorial effect as a matter of Icelandic law unnecessary. I address it nevertheless for the sake of completeness. It involves a consideration of the expert evidence of the Icelandic law experts.

115. Submissions were made on either side as to why I should treat one or other expert as the more reliable. For the Claimants it was suggested that Mr Hall's reports were more comprehensive and well researched. Moreover, Mr Thorláksson had shifted in his position on territoriality. For Kaupthing, reference was made to at least one untenable and now abandoned view of Mr Hall.

116. I was not much assisted by these submissions. Much always turns on the questions posed originally to each expert and to the evolution of the arguments. Each expert has in my view provided conscientious written reports for the benefit of the Court. I prefer to look at the respective merits of the opinions advanced as a matter of substance.

117. There are no Icelandic court precedents on this issue, which therefore needs to be interpreted according to general principles of interpretation. As already indicated, it was not a point raised in *Lornamead,* where it was common ground that Article 116 was of extra-territorial effect. This is, of course, in no way determinative, but it is of note that the issue was not raised despite the involvement of specialist counsel on all sides.

118. Mr Hall is of the opinion that Article 116 is not of extra-territorial effect. He relies in particular on the phrase "*hérað*", meaning "*the district court*", which refers to the district courts of Iceland i.e. the Icelandic regular courts of first instance. He states that this term is not a generic term and is not to be regarded as applying to any kind of foreign courts or any other court in Iceland than the district court.

119. He states that support for his approach can be found in an analysis of the background to the Bankruptcy Act and other Acts coming into force on the same day, namely 1st July 1992. These Acts were regarded as a total reform of the Icelandic judicial and executive system. The term "*hérað*" is in these Acts. If the intention of Article 116 had been to capture any kind of court case anywhere, the text would have been different, namely : "*A court case cannot be started against a bankruptcy estate, neither in this country or overseas*".

120. Additionally, Mr Hall states that apart from certain narrow exceptions, the Bankruptcy Act generally does not have extra-territorial effect. He also points to Article 6 of the Bankruptcy Act which provides the Icelandic authorities with power to conclude agreements with other states. The Ministry of Justice Handbook issued in 1992 states that it can be assumed as a rule that moratoriums, compositions and bankruptcies based on Icelandic judicial decisions will not be recognised in other countries, any more than foreign judicial decisions on these matters will be recognised in Iceland. Article 6 contemplates an exception to this general rule. If it had been intended for any Icelandic law exceptionally to have extra-territorial effect, that would have been made expressly clear in the legislation.

121. Mr Hall also points to historical background. When Iceland entered the EEA Treaty in the 1990s, things changed rapidly from an international commercial point of view. It would have been very unlikely for a rule such as Article 116 to have been intended to have extra-territorial effect.

122. Mr Hall also states that it is important to note that the fact that the prohibition in Article 116 does not deprive a claimant from access to a district court in Iceland. Its effect is simply that a case can be brought to court through a referral (if the claim is disputed). Those proceedings could be stayed pending the outcome of another case, Icelandic or foreign. On Mr Thorlákson's interpretation, a claimant would be deprived of having his case heard before a foreign court otherwise with jurisdiction over the subject matter of the case.

123. Having carefully considered the competing opinions and the detailed matters relied on by Mr Hall on the issue of extra-territoriality summarised above, I prefer the views of Mr Thorlákssson.

124. Most fundamentally, Mr Hall's views do not take account of the international context and legislative framework. In the case of insolvency proceedings subject to the FUA, Article 116 of the Bankruptcy Act must be interpreted in the light of its legislative context, namely the FUA along with the 2001 Directive implemented by it. It is common ground that an Icelandic court would seek to interpret Icelandic law consistently with European Directives when the latter have been implemented into Icelandic law, as here. That legislative context makes it clear that Mr Thorlákssson is correct in his view that Article 116 cannot be construed in isolation and should be construed as having extraterritorial effect. It would be a surprising result for the

Icelandic Parliament, in implementing the 2001 Directive specifically designed to have effect across the EEA to have intended Article 116 to have effect only in Iceland. That would undermine the purpose of the regime itself.

125. At paragraph 2.3 of his second report Mr Thorláksson says this :

> "*2.3 Firstly, Mr Hall concludes that Article 116 of the Bankruptcy Act, as it applies in the case of an Icelandic credit institution, does not have extra-territorial effect as a matter of Icelandic law...In my view that conclusion is clearly incorrect...Mr Hall's report fails to place Article 116 in the context of the [FUA] which both implemented the Winding-up Directive and expressly applied Article 116 to credit institutions. When Article 116 is properly interpreted in context, it is in my opinion impossible to interpret it as not being intended to apply to proceedings against the relevant credit institution across the EEA. Rather, I consider it plain that it was intended by the Icelandic Parliament to have extra-territorial effect across the EEA...*"

126. The relevant starting point must be the FUA because that is the Act which contains the regime applicable to Kaupthing's insolvency, and then to consider the proper interpretation of Article 116. And, as Mr Thorláksson states, where there is legislation amending earlier legislation, one looks at the final position post-amendment.

127. The central legislative history is as follows. The 2001 Directive came into force on 4th April 2001. The FUA first came into force on 1st January 2003. It has since been revised and updated several times in the light of the 2001 Directive and the 2008 financial crisis.

128. On 1st January 2005 Act No 130 of 2004 ("the 2004 Act") came into effect, amending the FUA in order to implement the 2001 Directive. The relevant explanatory notes confirm this intention. Article 9 introduced into the FUA a new section headed "*Financial Reorganisation of credit institutions*" with three new articles which effectively introduced the 2001 Directive. By Articles 99 and 104 Icelandic law was to apply in the context of winding-up proceedings "*concerning the legal effect, procedure and implementation of the decision*" subject to certain exceptions. One such exception was at Article 99(h), namely "*the legal effect of a ruling on financial reorganisation on lawsuits, concerning an asset or other right which a credit institution has disposed of, shall be governed by the law of the state where the lawsuit was initiated.*" Although not clear at this stage, this was to implement the exception in the 2001 Directive in relation to pending lawsuits.

129. As already indicated, on 22nd April 2009 the 2009 Act came into effect, again amending the FUA. It introduced a section dealing with the processing of claims. It included the following :

> "*Provisions of Chapter XVIII of the Act and Part 5 of the Act on Bankruptcy etc shall apply concerning processing of claims against a financial undertaking upon its winding-up, including the effect of failure to submit claims...*"

130. Chapter XVIII of the Bankruptcy Act contains Articles 116 and 117. Thus the 2009 Act incorporated Article 116 into the FUA.

131. Again, the explanatory notes confirm that the 2009 Act was there to introduce Article 116 into the FUA, not as a purely domestic measure, but rather as a part of the design to implement the 2001 Directive, creating a cross-border insolvency regime across the EEA. Thus, for example, the notes conclude :

> "*The rules discussed above involve a great deal of benefit, as the financial reorganisation and winding-up of a financial undertakings, which has its head offices in one Member State in the European Economic Area and branches in other member states, shall be subject to only the laws of one member state and not [as] many as could be the case in the past. [The 2001 Directive] sought to implement harmonised rules in the European Economic Area concerning the financial reorganisation and winding-up of financial undertaking.*
>
> *This Legislative Proposal seeks to ensure that these main principles [of unity, universality and non-discrimination] should, to the greatest extent possible, be adhered to, even if that involves inconveniences and a good deal of effort, including with respect to notices to creditors, but it is very important to ensure the complete equality of domestic and foreign creditors of financial undertakings which operate in more than one member state of the European Economic Area.*"

132. On 7th April 2011 Act No 32 of 2011 came into force. It amended Article 99(h) of the FUA so as to insert the words : "*initiated before the ruling on financial reorganisation as pronounced*". This put beyond doubt the question that the exception there identified related to pending lawsuits only.

133. The explanatory notes are again important :

> "*...This Legislative Proposal is submitted following observations provided by the resolution committee of Kaupthing Bank hf. concerning a judgment given on 16 March of this year in the High Court of Justice, Queen's Bench Division, Commercial Court, being a Court of first instance in England. Kaupthing Bank hf. had applied for strike out on the basis, amongst other submissions, that legal proceedings could not be commenced against the Bank while under debt moratorium or in winding-up according to Icelandic law on financial undertakings. The court proceedings tested both whether Kaupthing Bank hf. had been subject to financial reorganisation or winding-up proceedings pursuant to the Directive when the court proceedings had been commenced in England but also the interpretation of the provisions of item b of paragraph 2 of Article 99 of Act no. 161/2002 on Financial Undertakings. The conclusion of the Court which is primarily of importance here was that item h of paragraph 2 of Art. 99*

> *should be interpreted in such a manner that the legal effects of court proceedings commenced against an Icelandic financial undertaking, which is subject to reorganisation or winding-up proceedings, are to be determined by the laws of the host state, i.e. English law in this instance, irrespective of whether or not the court proceedings were commenced prior to the making of an order for the reorganisation or winding-up. Furthermore, that the wording of item h of paragraph 2 of Article 99 suggests that Article 32 of Directive 2001/24/EC had been implemented into Icelandic law in more extensive manner than envisaged by the Directive.*
>
> *The interpretation of the English Court of the provisions of paragraph 2 of Article 99 of Act no. 161/2002 goes against the basic principles of Act no. 21/1991 on: Bankruptcy etc. as well as Chapter XII of Act no. 161/2002. If this interpretation were to be universally accepted in the European Economic Area, it is probable that court proceedings would in many instances be conducted both before foreign and domestic Courts, with resulting costs.*
>
> *In light of the fact that significant interests might otherwise be at stake, and with reference to equality of creditors, through this Legislative Proposal it is proposed that the wording of item h of paragraph 2 of Article 99 will be amended so that any possible doubt will be eliminated that the provision shall be interpreted in accordance with Article 32 of the Directive, i.e. in accordance with its wording, and that only court proceedings commenced prior to the initiation of reorganisation or winding-up proceedings shall be exempted from the limitations on litigation pursuant to paragraph 2 of Article 99.*"

134. The Claimants submitted that the legislative changes, either in their body or by reference to any explanatory notes, did not in fact on close analysis alter the scope of Article 116 at all. But it is a mistake to look necessarily for direct amendment to the wording of Article 116 (or any other express reference to extra-territoriality). It is the overall legislative context in which Article 116 was introduced into the FUA that needs to be considered.

135. Taking it shortly, by reference to the 2011 amendment if nothing else, the Claimant's submission cannot stand. The 2011 amendment, which was clarificatory rather than introductory, was made to put beyond doubt the very question of extra-territoriality. The legislative intent, namely that Article 116 is to apply in respect of proceedings in any EEA territory, is clear. Notably, Mr Hall has no answer to the contents of the 2011 explanatory notes in this regard, other than to say that in his opinion they are not easy to follow.

136. Against the legislative background, Mr Thorláksson concludes in his second report :

> *"4.30 When considering the meaning of the single word "hérað" in isolation, I agree with Mr Hall that this actually refers to the district court...*
>
> *4.31 Further, the reference to "the district court" appears in Article 116 (1) because this is simply the only available court in which proceedings could be commenced in Iceland. To further clarify, all civil proceedings in Iceland have to be commenced in the district court. The meaning and purpose of Article 116 is that, once the debtor is in bankruptcy, no civil proceedings may be commenced, and the claim must be brought within the procedures governing the bankruptcy, rather than in court. The section naturally refers to the district courts as a convenient shorthand way of saying this. ...I do not consider this reference to the "district court" to override the effect of the Winding-Up Directive and mean that Article 116 does not apply extra-territorially (which would put it into direct conflict with the winding-up provisions in the [FUA] and, accordingly the Winding-Up Directive).*
>
> *4.32 I find it obvious...that when Article 116 was implemented into the [FUA] it was not intended to be interpreted in such a narrow way as is suggested by Mr Hall."*

137. In the context of Mr Hall's central position by reference to the word "*hérað*" meaning only a District Court, the Claimants rely heavily on Mr Hall's view that EEA law does not supersede Icelandic law. If a text of Icelandic law is inconsistent with an EEA rule, Icelandic law "*will not be bended or adjusted*" so as to eliminate the inconsistency. Reference was also made to the authority of *Bioskylio Njarovic and CU 2 shf v Irenu Rut Sigrioardottur* Nr 79/2010. There the Icelandic Supreme Court stated :

> *"...Article 3 of Act no. 2/1993 provides that Icelandic Acts and rules shall be interpreted to the extent possible so as to be consistent with the EEA treaty and the rules that are based on it. This rule of interpretation naturally indicates that words in Icelandic, to the extent that this is possible, be attributed meaning that can be accommodated by the Act and that correspond as closely as possible to the common rules that should apply in the European economic area but cannot have the effect of having disregard to the text of Icelandic Acts..."*

138. I do not accept that Mr Thorlákssons's view violates these principles. His interpretation attributes a permissible meaning to the words of Article 116.

139. In short, Mr Thorlákssons's opinion is in my judgment both the more realistic and credible, and Article 116 is to be treated as having extra-territorial effect as a matter of Icelandic law.

I. The jurisdictional ground

140. This is a separate and independent ground of attack. As already indicated, the Applicants contend that the claims against them fall within the exception in Article 1(2)(b), which for ease of reference is repeated here :

> "*1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*
>
> *a. The Convention shall not apply to...*
>
> *b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;...*" (emphasis added).

141. The relevant legal principles to be applied are essentially non-contentious. There should be a broad definition of the concept of "civil and commercial matters" by reference to the intention of the EU legislature: see for example *German Graphics Graphischer Maschinen GmbH v van de Schee* Case C 292/08, [2009] ECR I-8421 (at paragraphs 22 to 23).

142. By contrast, the scope of Article 1(2)(b) is narrower and more specifically defined. For proceedings to fall within the exception in Article 1(2)(b) they must derive directly from the bankruptcy or winding-up and be closely connected with the insolvency proceedings: see Lord Collins in *Rubin & Anor v Eurofinance SA & Ors* [2013] 1 AC 236 (at paragraphs 100 and 101). At paragraph 100 Lord Collins said :

> "*In the context of the Brussels Convention, the Brussels I Regulation and the EC Insolvency Regulation, the European Court has developed a distinction between claims which derive directly from the bankruptcy or winding-up, and which are closely connected with them, on the one hand, and those which do not, on the other hand, and the distinction has been applied by the English Court.*"

143. This is consistent with the approach laid down in *Gourdain v Nadler*, Case C-133/78 [1979] ECR 733 at paragraph 4, and also echoes the wording of Article 25(2) of the Insolvency Regulation.

144. Another way of expressing the same sentiment has been to require insolvency to be the '*principal subject matter*' of the claim : see *Re Hayward* [1997] Ch 45 at 55B-C and *Sabbagh v Khoury* [2014] EWHC 3233 (Comm) (at paragraphs 271 to 272).

145. All parties referred to *Polymer Vision R & D Ltd v Van Dooren* [2011] EWHC 2951 (Comm) (*"Polymer"*). There Beatson J also considered the scope of Article 1(2)(b). He confirmed that the exception had to be construed narrowly and that, to be excluded, claims had to be derived directly from the bankruptcy or winding-up, and be closely connected with the insolvency proceedings. The fact that proceedings were consequential upon a bankruptcy, or arose in the context of a bankruptcy was insufficient to engage the exception. The fact that a liquidator or trustee in

bankruptcy was a party to the proceedings was similarly insufficient. At the same time, a direct juridical derivation is not necessary. A factual derivation may be sufficient.

146. At paragraph 59 Beatson J went on to consider cases where there was a link with the bankruptcy/insolvency, but an insufficiently close one :

> *"...the reason the link was insufficiently close in those cases was because the only relevance of the insolvency was that its opening transferred either the debtor's rights under the general law or the debtor's liabilities under the general law to the trustee/liquidator. They did not involve either the internal management of the insolvency process or the conduct of the insolvency office holder."*

147. In holding, on the facts of the case before him, that the claims were sufficiently close to the insolvency process to fall within the Article 1(2)(b) exception, Beatson J relied on the fact that all that the defendant did as trustee in bankruptcy was subject to the supervision of the supervisory judge; the claimants had statutory rights in respect of the trustee's actions; the underlying transactions the subject of the claims were negotiations and a settlement with the defendant acting as trustee; the dispute concerned the insolvency process/procedures; a post-insolvency declaration by the trustee and subsequent litigation by the trustee undoubtedly qualified; the negotiations with the claimants were instigated at the suggestion of the presiding judge in summary proceedings to enable certain intellectual property rights to be sold as part of the insolvency process.

148. Against this background, the Applicants rely on the following facts and matters :

a) the claims concern the conduct of JJ wholly and exclusively in relation to his capacity and conduct as an insolvency office holder after the winding-up proceedings were commenced. This is confirmed by the Claimants' allegation that Kaupthing is vicariously liable for the actions of JJ (amongst others) means that his acts must have been carried out in the course of his role as a member of the Winding-up Committees : see *Dubai Aluminium v Salaam* [2003] 2 AC 366 at paragraphs 23 and 30. In this regard the Applicants rely in particular on the comments of Beatson J in *Polymer* at paragraph 59 as set out above;

b) the Resolution Committee was obliged to follow the FME's decisions based on Article 100 of the FUA and to operate in consultation with the FME. Members of the Winding-up Committee are court appointees, owing duties to the court. They are also to be regarded as trustees in bankruptcy for the purposes of Icelandic law (as set out by Mr Thorláksson in his first report). If they commit wrongs they may be potentially liable under the Bankruptcy Act;

c) the claims against JJ are equivalent to an action for liability against a liquidator which may satisfy the requirements of Article 1(2)(b) – see *Seagon v Deko Marty Belgium NV* [2009] 1 WLR 2168 (ECJ) at paragraph 55;

d) JJ's central alleged motive is pleaded to have been to facilitate the realisation of securities held by Kaupthing and/or to force the Claimants to compromise on terms favourable to Kaupthing;

e) The conspiracy is alleged to have been with individuals at GT, who were retained to assist Kaupthing in the winding-up proceedings.

149. Thus it is contended that the connection between the claims and the winding-up proceedings is "*very close indeed*".

150. The Claimants say, on the contrary, :

a) the claims do not arise under the Bankruptcy Act or any other bankruptcy law. They are not based on any provision of insolvency law, are unrelated to the special powers of the Winding-up Committee;

b) the claims do not form an integral part of Kaupthing's winding-up proceedings;

c) the purpose of the proceedings is simply to establish liability as opposed to establishing the ranking of any claim for the purpose of Kaupthing's winding-up.

151. It is said that JJ's role on the Resolution Committee or Winding-up Committee gave him the opportunity to act in the alleged conspiracy. But he was not discharging any of his functions as a member of those committees. For example, he was not alleged to have negligently sold an asset at too low a price, the sale of that asset having been delegated to him by the rest of the relevant committee. Motive is said to be an irrelevance. The claims neither directly derive from Kaupthing's winding-up proceedings, nor are they closely connected to them.

152. No single factor is likely to be determinative, as *Polymer* well demonstrates, and each case will turn on its own facts. Standing back then, and examining all the circumstances of this case, as a matter of both analysis and instinct, in my judgment the claims are not proceedings relating to the winding-up of Kaupthing for the purpose and within the narrow carve-out of Article 1(2)(b).

153. It cannot be said that the pleaded claims against the Applicants derive directly from the proceedings relating to the winding-up of Kaupthing. The winding-up of Kaupthing is not the principal subject-matter of the claims against the Applicants. The gravamen and root of those claims is an alleged tortious conspiracy between three individuals, SA and HH at Grant Thornton, and JJ at Kaupthing, involving deliberate and malicious wrongdoing in connection with an investigation by the SFO. The winding-up of Kaupthing is of course the context, and relevant context. But the claims do not derive directly from it. There is no reliance on any insolvency aspect of the winding-up proceedings, nor are breaches of any duties or powers by JJ in his capacity as a member of the Winding-up Committee relied upon. No reliance is

placed on JJ's status under Icelandic insolvency law nor is any liability under the Bankruptcy Act suggested.

154. The fact that there is no direct juridical derivation is of course not determinative, but it is certainly relevant.

155. Thus, in addition, JJ is not sued because of his position as a member of the Winding-up Committee but rather for his alleged wrongful acts as an individual at Kaupthing dealing with the SFO and others (albeit in his capacity as a member of the Winding-up Committee). Nor does the fact that vicarious liability is pleaded tip the balance in the Applicant's favour. JJ may have been acting in his capacity as a member of the Winding-up Committee, but his liability does not derive from that, or from any duties that he may have owed as an officer of the court, to Kaupthing, or other creditors as a result. The facts of the case are very different from those in *Polymer*, for example. And in none of the cases under consideration by Beatson J in paragraph 59 of *Polymer* was there any suggestion of a self-standing conspiracy, nor is it apparent that when referring to the "*conduct of the insolvency office holder*" Beatson J had such a suggestion in mind. The more natural contemplation in context would be claims against an insolvency officer holder for the negligent discharge of his statutory powers or duties. This is not such a case.

156. Nor are the claims closely connected with the winding-up proceedings. There is clearly a connection, but not a sufficiently close one. It is correct that JJ is said only ever to have acted in his capacity as a member of the Resolution or the Winding-up Committee. But that is not conclusive. Suppose an administrator sells as an asset of the company in the course of his duties, but is alleged by the purchaser to have induced the sale by a fraudulent misrepresentation (for the benefit of the company). Even though the company would be vicariously liable, and the administrator was acting in the course of his duties, a claim against the administrator is independent of the liquidation, save that it provided the context and occasion for the misrepresentation to be made.

157. JJ's capacity (as a member of the Resolution or Winding-up Committee) is the context of the alleged unlawful wrongdoing by JJ. His alleged engagement in a dishonest conspiracy with two individuals at GT is not closely connected to his role or function as a member of the Resolution or Winding-up Committee. Equally, whilst it is alleged that the alleged conspiracy was motivated by a desire on the part of JJ to benefit Kaupthing's position in the winding-up proceedings, that of itself does not connect the claims sufficiently closely to the proceedings themselves. The principal subject-matter of these claims is not the winding-up of Kaupthing, but rather the alleged conspiracy and deliberate wrongdoing against the Claimants.

158. For all these reasons, I find that the claims against both Kaupthing and JJ are within the Lugano Convention and not excluded by Article 1(2)(b) of the Lugano Convention.

J. Conclusion

159. In conclusion, I find :

a) that the proceedings against Kaupthing were brought in breach of a prohibition on legal action against the Fourth Defendant contained in Article 116 of the Bankruptcy Act which has effect in the United Kingdom by reason of Regulation 5 of the 2004 Regulations;

b) the claims against each of the Applicants fall within the scope of the Lugano Convention and are not excluded by Article 1(2)(b).

160. The application by Kaupthing accordingly succeeds on the insolvency ground and the application for stay or dismissal by both Applicants on the jurisdiction ground fails.

161. I invite the parties to draw up an order reflecting the above and to agree all consequential matters, including costs, so far as possible. I also record my gratitude for the able submissions and assistance from counsel on all sides.