[2010–12 Gib LR 1]

VIZCAYA PARTNERS LIMITED, ASPHALIA FUND LIMITED and ZEUS FUND LIMITED v. BANK J. SAFRA (GIBRALTAR) LIMITED and PICARD

COURT OF APPEAL (Stuart-Smith, P., Aldous and Kennedy, JJ.A.): February 18th, 2010

Bankruptcy and Insolvency—fraudulent dispositions—identification of recipients—may order Norwich Pharmacal disclosure in Gibraltar in aid of foreign bankruptcy proceedings if enables tracing of recipients of funds—expedient to do so under Civil Jurisdiction and Judgments Act 1993, s.17—deciding ownership of funds traced unnecessary—enforceability of foreign bankruptcy proceedings in Gibraltar irrelevant

Civil Procedure—judgments and orders—appealable decisions—no decision capable of appeal if court endorses parties' draft order without being asked to rule on objections—skeleton arguments no substitute for oral submissions

A trustee in bankruptcy issued Part 8 proceedings in the Supreme Court against a Gibraltar bank and four companies incorporated in the British Virgin Islands and Cayman Islands, seeking *inter alia* a freezing order and disclosure of the whereabouts of certain funds.

The second respondent had been appointed the trustee in bankruptcy of Bernard L. Madoff Investments Securities LLC in the US Bankruptcy Court in New York, following the collapse of Mr. Madoff's fraudulent multi-billion dollar "Ponzi" scheme. The four companies had invested in the scheme and collectively received repayments of US$150m. within three months of the liquidation, which they paid into their respective accounts with the first respondent, the Gibraltar bank. The Gibraltar Financial Intelligence Unit made a "no consent" order, under the Crime (Money Laundering and Proceeds) Act 2007, preventing the investing companies from dealing with the accounts, which effectively froze the funds.

The New York court had sent a letter of request to the Acting Chief Justice seeking his assistance in obtaining disclosure by the bank of information about the transfer and whereabouts of the funds. The trustee commenced the present proceedings in Gibraltar against the investing companies and against the bank for a freezing order and disclosure. The Supreme Court (Dudley, Ag. C.J.) granted the application on the terms of a draft order drawn up by the parties. The court noted the objections of the investing companies, including that Cayman law restricted the disclosure

of confidential information by a director of a Cayman company. The terms of the order required the bank to provide specified documents and details of the registered shareholders of the non-voting shares in two of the companies. There were also terms for the payment of money into the Gibraltar court pending the hearing of the New York bankruptcy proceedings. Three of the investing companies obtained leave to appeal and a stay of the disclosure terms of the order pending determination of their appeal. At the time of the present appeal, and pursuant to the order, approximately US$75m. had been paid into court by the investing companies. The rest, so far as was known, was out of the jurisdiction.

The appellants submitted that (a) the Supreme Court had made decisions or rulings on the matters set out in their skeleton argument, even those not argued orally, which were capable of appeal and for which leave had been granted; (b) disclosure was not expedient because the trustee already had a tracing claim and there was no allegation of bad faith on the part of recipients of the funds; (c) the letter of request from the New York court was too vague to be enforced; (d) the doctrine of universalism, that there should be a single bankruptcy in which all creditors were entitled and required to prove, had no application here, as it was not accepted that the funds formed part of the estate; and (e) the judge had failed to give reasons for the order.

The respondents submitted in reply that (a) the Supreme Court had made no ruling or decision on matters contained in the appellants' skeleton argument that had not been raised in oral submissions. Leave to appeal had only been granted in relation to the Cayman confidentiality point, which had been correctly decided; (b) it was expedient and necessary to grant disclosure as interim relief under the Civil Jurisdiction and Judgments Act 1993, s.17 to enable the New York court to discover the whereabouts of the funds claimed and enable the trustee to trace ownership; (c) the letter of request was not too vague and the terms and Schedule were acceptable to the bank; (d) the doctrine of universalism did apply as the funds formed part of the estate; and (e) reasons were neither required nor asked for and the judge had simply endorsed the draft order of the parties.

Held, dismissing the appeal:

(1) The Supreme Court had not made a decision or ruling that could be appealed. The issues now raised by the appellants had not been argued orally and the judge had not been asked to rule on them. Arguments could not be raised on appeal that had never properly been advanced below. The draft order had been put before the court with the agreement of all parties and although reference had been made in the appellants' skeleton argument to objections, they had only submitted orally that these be noted, not that they be ruled upon. Time had been available in which any objections could have been fully argued, had the appellants chosen to ask for a ruling or decision. The appellants had not been given leave to appeal on the basis that the disclosure affected their confidential information, although, in any

case, the interests of justice overrode any interference with their right to privacy. The court had ruled, and given leave to appeal, only on one specific point relating to confidentiality under Cayman law. It had correctly decided that Cayman law related only to the disclosure of confidential information by a director of a Cayman company and not to disclosure by a Gibraltar bank (paras. 15–18; para. 20).

(2) Moreover, it was expedient and necessary to exercise the court's power by the Civil Jurisdiction and Judgments Act 1993, s.17 to order *Norwich Pharmacal* disclosure by the bank. The bank was in possession of information which would enable the trustee to trace the funds and their ownership. Disclosure would also enable the New York court to discover the whereabouts of the funds claimed. It was not possible to come to any conclusion on the law of property in New York and the fact that a New York judgment might be unenforceable in Gibraltar was irrelevant (paras. 20–28).

(3) The court would also grant the order for disclosure under the Evidence Act 1948, ss. 9 and 10 to give effect to the letter of request from the New York court. The request was not too vague to be enforced, and counsel for all parties had negotiated the terms of the order and the Schedule, which the bank had accepted (paras. 31–33).

(4) It was therefore unnecessary to decide whether the doctrine of the universality of bankruptcy proceedings at common law justified the judge's order. Ownership of the funds had not been decided in the present proceedings, and authority that universalism had no application if the property did not form part of the estate might well be distinguishable (paras. 34–36).

(5) Further, the order would not be set aside on the grounds that the judge had failed to give reasons. The order was directed at the bank rather than the funds and reasons were neither asked for, nor required (para. 16).

Cases cited:

(1) *Asbestos Ins. Coverage Cases*, *In re*, [1985] 1 W.L.R. 331; [1985] 1 All E.R. 716, distinguished.

(2) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; 2005–06 MLR 297; [2006] UKPC 26, considered.

(3) *English* v. *Emery Reimbold & Strick Ltd.*, [2002] 1 W.L.R. 2409; [2002] 3 All E.R. 385; [2002] EWCA Civ 605, distinguished.

(4) *Jones* v. *M.B.N.A. Intl. Bank*, [2000] EWCA Civ 514, followed.

(5) *Motorola Credit Corp.* v. *Uzan (No. 1)*, [2002] 2 All E.R. (Comm) 945; [2002] EWCA Civ 989, considered.

(6) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, applied.

(7) *R. (Compton)* v. *Wiltshire Primary Care Trust*, [2009] 1 W.L.R. 1436; [2009] 1 All E.R. 978; [2008] EWCA Civ 749, distinguished.

(8) *Rio Tinto Zinc Corp.* v. *Westinghouse Elec. Corp.*, [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, distinguished.
(9) *Rubin* v. *Eurofinance S.A.*, [2009] EWHC 2129 (Ch), considered.

Legislation construed:
Civil Jurisdiction and Judgments Act 1993, s.17(2): The relevant terms of this sub-section are set out at para. 22.
s.17(3A): The relevant terms of this sub-section are set out at para. 21.

Evidence Act 1948, s.9: The relevant terms of this section are set out at para. 30.
s.10: The relevant terms of this section are set out at para. 30.

A. White, *Q.C.* and *R. M. Vasquez* for the appellants;
T. Mowschenson, *Q.C.* for the first respondent;
K. Azopardi for the second respondent.

1 **STUART-SMITH, P.,** delivering the judgment of the court:

Introduction

This is an appeal by the first defendant Vizcaya Partners Ltd. ("Vizcaya"), the third defendant Zeus Partners Ltd. ("Zeus") and the fourth defendant Asphalia Partners Ltd. ("Asphalia") (collectively referred to as "the funds") against part of an order made by Dudley, Ag. C.J. on October 28th, 2009 that the second defendant Bank J. Safra (Gibraltar) Ltd. ("the bank") produce documents listed in the Schedule to the order and the names of the registered shareholders of the non-voting shares in Zeus and Asphalia. The Acting Chief Justice gave leave to appeal and, on November 3rd, 2009, a stay of execution of this part of the order until the determination of the appeal in this court.

2 The matter arises out of the collapse of a fraudulent scheme operated by Mr. Bernard Madoff and his business Bernard L. Madoff Investments Securities LLC ("BLMIS"). On December 11th, 2008 it was revealed that BLMIS had been defrauding its investors in amounts in excess of US$60bn. by means of a "Ponzi" scheme. The essence of the scheme is that investors are induced to invest on the promise of good returns; in fact the money is stolen by the operators. The scheme is kept going so long as earlier investors can be paid returns on their investment from the moneys subscribed by later investors. But if sufficient numbers of investors wish to withdraw their investments, the fraud is liable to come to light. On that date, insolvency proceedings were filed in New York under the provisions of the Security Investors Protection Act of 1970 and the liquidation of BLMIS began. Subsequently, the second respondent, Mr. Irving Picard, was appointed trustee ("the trustee") by the US Bankruptcy Court, Southern District of New York and took over the liquidation.

3 Vizcaya is a company incorporated in the British Virgin Islands ("BVI"). Between 2002 and 2008 it invested US$327,249,925 in BLMIS. Asphalia (a company incorporated in the Cayman Islands) and Zeus (incorporated in BVI) are shareholders in Vizcaya. Asphalia invested about US$67m. in Vizcaya and Zeus about US$78m.

4 On August 29th, 2008, BLMIS repaid US$30m. to Vizcaya. On October 31st, 2008 BLMIS transferred US$150m. to Vizcaya via its account with the bank. This transfer was within three months of the liquidation. The proceeds of the transfer were distributed as to US$67m. to Asphalia, US$78m. to Zeus and US$4,183,402 was retained by Vizcaya. These transactions were effected through their respective accounts at the bank.

5 On December 19th, 2008, the Gibraltar Financial Intelligence Unit issued a "no consent" order under the Crime (Money Laundering and Proceeds) Act 2007, effectively freezing money in the Asphalia, Zeus and Vizcaya accounts with the bank. Vizcaya sought to challenge this order in judicial review proceedings but on May 28th paid US$10,020,591.05 into court.

6 On about April 9th, 2009, the trustee started adversary proceedings in the US Bankruptcy Court ("the adversary proceedings") against the Bank and Vizcaya seeking repayment of the US$150m. and/or damages on a number of grounds including preference and fraudulent conveyance.

7 On June 18th, 2009, Judge Burton R. Lifland, in the New York Bankruptcy Court, sent a letter of request to the Acting Chief Justice of the Supreme Court of Gibraltar asking for judicial assistance *inter alia* to ensure the turnover of the transfer to the US court, to achieve disclosure in relation to the transfer, and discover the whereabouts of the assets, property or moneys derived from the transfer and to secure the transfer in the meantime.

8 On July 9th, 2009, the trustee commenced a Part 8 claim in Gibraltar against Vizcaya, the bank, Zeus, Asphalia and Siam Capital Management Ltd. ("Siam") seeking a freezing order in relation to the transfer and disclosure in respect of it and other relief.

9 On about September 30th, 2009, the trustee amended the complaint in the US adversary proceedings to seek repayment of the US$30m. and joined Asphalia and Zeus (together with Siam) as additional defendants.

10 On October 26th, the hearing of the Part 8 claim started in the Supreme Court before the Acting Chief Justice. On October 28th, the Acting Chief Justice made the order in the terms of a draft order which was put before him by the parties. So far as is material the order provided as follows:

"[U]pon the court recording that the order for disclosure made in paragraph 3 below is made without the consent of the first, third, fourth and fifth defendants and noting their objections.

It is ordered that—

. . .

(3) the second defendant produce the documents as set out in the Schedule hereto and the names in so far as the second defendant is aware of them of the registered shareholders of the non-voting shares in the third and fourth defendants within seven days."

11 There were other terms of the order, including an order that the claimant be recognized by the Gibraltar courts as the US court-appointed trustee for the liquidation of the business of BLMIS with such rights as such recognition by the Supreme Court of Gibraltar affords him and entitles him to apply for. There was also provision for payment into court of substantial sums of money pending the hearing of the action.

12 Approximately half of the US$150m. has been paid into court; the other half is no longer within the jurisdiction of this court, so far as is known. It is in relation to the disposal of this money that disclosure is sought.

13 On October 29th, 2009, the appellant gave notice of appeal in respect of para. (3) of the order and on the same day sought an order staying the execution of that paragraph. On November 3rd, the stay was granted.

Are the appellants entitled to appeal?

14 The first issue is whether the appellants are able to appeal at all, having regard to the way in which the matter was conducted before the judge and to the form of the order. This involves an examination of what took place before the judge. Four days had been set aside for the hearing of the application. On the first morning, October 26th, the Acting Chief Justice was not available owing to other urgent business, but no doubt the parties used the time for discussions. The hearing began at 2:30 p.m. There is no transcript of what took place, but a full note derived from counsel's notes and recollections has been provided for the court. Save in one respect, it is agreed. The afternoon was largely taken up with questions of admissibility.

[The learned President then quoted extensively from the note of the second and third day of the hearing (October 27th–28th), during which the parties negotiated a draft order for disclosure by the bank, to which the bank consented. The disputed part of the note is as follows:

"*Ag. C.J.*: 'What is the nature of the objection? *Is it a general one or just on Asphalia?*'

R.V.: '*Specifically to Asphalia.*'"

The investing companies asked that their objections be noted and referred the court to their skeleton arguments. The Acting Chief Justice noted their objections but proceeded to endorse the draft order. He rejected a specific submission from the investing companies that Cayman law prohibited the disclosure of confidential information by a director of a Cayman fund on the ground that the order for disclosure was being made against the bank and not against a Cayman director. Leave to appeal was sought, and given, on that specific point. The learned President continued:]

15 Counsel for the respondents submit that there is no decision or ruling of the Acting Chief Justice which can be appealed. Mr. Vasquez never invited the judge to rule on issues raised in his skeleton argument or required the trustee to make a formal application for disclosure. On the contrary, the draft order was put before the judge with the agreement of all counsel. Although reference was made to the skeleton argument, the judge was merely asked to note the objections, not to rule on them. We accept that since the words italicized in the discussion above were not agreed, reliance cannot be placed on them, but it seems to us that that is the sense of what followed and continued in the granting of the leave to appeal on the specific point in relation to the Cayman law. We do not think for a moment that the Acting Chief Justice can have intended to grant leave to appeal on a whole raft of arguments raised in the skeleton argument but never canvassed before him and on which he was not asked to rule. There still remained a whole day available during which, if para. (3) of the draft order was really in issue, it could have been argued. We accept that the funds would have had *locus* to object to the order for disclosure by the bank, on the grounds that disclosure affected their confidential information; but instead of arguing the point they chose to ask the court merely to note their objection. They cannot now be allowed to raise arguments which were never properly advanced or argued before the court below.

16 In *Jones* v. *M.B.N.A. Intl. Bank* (4), May, L.J. said ([2000] EWCA Civ 514, at para. 52):

> "Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or

> issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

17 Mr. White, Q.C., on behalf of the funds, criticized the Acting Chief Justice on the ground that he gave no reasons for his decision and accordingly that since he did not do so, para. (3) of the order should be set aside. He relied on such cases as *English* v. *Emery Reimbold & Strick Ltd.* (3) and *R. (Compton)* v. *Wiltshire Primary Care Trust* (7). But the judge was never invited to rule or give reasons; he was merely invited to endorse what was put before him as a draft order by all the parties and make it the order of the court. It was not strictly speaking a consent order so far as the funds were concerned. That is because they were not ordered to do anything, it was only the bank that was ordered to give disclosure. It seems to us that the reason why the funds did no more than invite the court to note their objections was that they appreciated the bank would almost certainly be ordered to give the disclosure sought, a view which the bank itself held, but did not wish to seen to be agreeing with it.

18 During the course of his submissions Mr. White posed the question: "Did Mr. Vasquez do enough before the Acting Chief Justice to make the points open on appeal?" Our answer is that he did not. This court does not have the benefit of the judge's views on the arguments referred to in the skeleton but never canvassed in court. It is wholly unrealistic to suppose that a busy judge can be expected to absorb the details of long elaborate skeleton arguments which are never developed in oral argument and then be taken to have rejected those arguments when he was specifically not asked to rule upon them, but merely to note that one part of the order was

not agreed. The only exception to this is that we think the specific point relating to confidentiality under the Cayman law was briefly canvassed and the judge expressed his conclusion on it. He also gave leave to appeal on this specific point alone.

19 In the light of our conclusion on the first issue we propose to deal quite shortly with the appellant's other arguments in support of the appeal.

20 Before coming to the submissions of the parties on the issues of law, it is convenient to set out as background certain matters.

(a) The appellants are individual companies and separate legal entities.

(b) The bank owed to the appellants a duty of confidence and the information required by the order to be disclosed was their confidential information. We had drawn to our attention the general law on confidence, the Constitution of Gibraltar and the law of the Cayman Islands.

(c) The bank and the funds have been joined in proceedings in New York. The funds have not submitted to the jurisdiction and a default judgment could be obtained against them by the trustee. In their evidence, they assert that the law of New York does not entitle the trustee to the money. Their decision not to contest the New York proceedings seems to be tactical.

(d) The bank has submitted to the jurisdiction and is therefore subject to the jurisdiction of the New York court.

(e) There has been no resolution as to whom the money paid into court belongs nor where ownership should be decided.

(f) The disclosure order impinges upon rights of privacy (see *Motorola Credit Corp.* v. *Uzan (No. 1)* (5)), but a requirement of justice overrides such rights.

(g) After the proceedings before the judge, the bank was served with a subpoena requiring production of the documents listed in the Schedule to the order. The bank's lawyers have advised that the subpoena should be complied with. We understand the funds' lawyers advised that there were good grounds for having it set aside.

(h) All parties (including the funds) were parties to the negotiation that preceded the making of the order by the judge, and in particular to the terms of the Schedule to the order.

(i) Before the judge the bank stated that it did not object to the order being made. Before us counsel explained why, namely that the bank was of the view that the information required to be disclosed by the order would become available in one way or another.

Section 17 of the Civil Jurisdiction and Judgments Act 1993

21 There is no dispute between the parties that the orders of the New York court are enforceable against the bank under s.17 of that Act. Section 17(3A) is as follows:

> "(3A) The Supreme Court shall have power to grant interim relief under section 17(1) in relation to proceedings of the following descriptions, namely—
>
> (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State or Regulation State;
>
> (b) proceedings whose subject-matter is not within the scope of Article 1 of the Regulation, Article 1 of the 1968 Convention or Article 1 of the Lugano Convention respectively."

22 Section 17(2) provides:

> "(2) On any application for interim relief under sub-section (1), the court may refuse to grant relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question, makes it inexpedient for the court to grant it."

23 The bank submitted that the court had jurisdiction under the section to enable the New York court to find out where the claimed assets were. The bank, being a Gibraltar bank, was the appropriate defendant, and applying the principles in *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (6), discovery at this stage was both appropriate and expedient. The bank went on to submit that whether or not there was a defence to the trustee's claim depended upon who had the money and where it was. They accepted that it was in all the circumstances just and expedient to provide the information requested.

24 Mr. White submitted that *Norwich Pharmacal* relief was exceptional in nature and disclosure must be necessary before it will be ordered. In that case, unlike the present, disclosure was necessary. Further the trustee does not need such an order as he has already had a tracing claim. He drew to our attention the evidence of Prof. Westbrook in three respects. First, that in New York property that is subject to an avoidance claim does not become property of the estate until the property has been recovered by the estate. Secondly, the relevant code permits subsequent transferees to defeat recovery if they had received the transfer for value in good faith and without knowledge of its avoidability. Thirdly, any judgment obtained in the adversary proceedings would be unenforceable in Gibraltar because the New York court had no jurisdiction.

25 It was said on behalf of the funds that there was no allegation that they took the payments in bad faith or with knowledge of avoidability and therefore took free of the trustee's rights. Thus it was submitted that disclosure was not necessary and relief was not expedient.

26 The trustee has been advised that the advice given to the funds on the law of New York is not correct. He seeks the help of the Gibraltar court to trace funds to which he claims entitlement.

27 In the *Norwich Pharmacal* case, the appellants were the owners of a substance that was mixed in chicken feed. It was being imported into England and they suspected that it was infringing material, not licensed material. To decide whether the material was licensed they had to discover the names of the importers. The Customs were not infringers and refused upon a number of grounds to disclose the names of the importers.

28 It is sufficient to set out the first holding in the headnote in *The Law Reports* to the *Norwich Pharmacal* case (6) ([1974] A.C. at 133):

> "Held, allowing the appeal,
>
> (1) that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a duty statutory or otherwise; and that, accordingly, prima facie the respondents were under a duty to disclose the information sought . . ."

29 We do not believe it possible to come to any conclusion as to the law in New York. What is clear is that there has been a massive fraud and the trustee has the task of tracing funds worldwide so that they can be distributed fairly between the creditors. Once traced, ownership may have to be decided in the country where they are, but we believe it both permissible and necessary to order disclosure under the principles in the *Norwich Pharmacal* case. The bank is in possession of the information which will enable the trustee to trace the funds and their ownership. That will enable the trustee to decide whether he has a valid claim to the assets. That is similar to the position of Norwich Pharmacal. Further, we reject Mr. White's submission that the evidence of Prof. Westbrook shows that it is inexpedient to grant the relief. Certainly it is expedient for the proper conduct of the New York proceedings, particularly when the dispute as to the law has not been resolved and the bank has accepted that the order is correct. Further, in our view, the fact that a judgment in the New York court may be unenforceable in Gibraltar is irrelevant to this issue.

The Evidence Act 1948

30 The application by the trustee is also made under the Evidence Act 1948, ss. 9 and 10. Sections 9 and 10 are as follows:

> "9. Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—
>
> (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction in a country or territory outside Gibraltar; and
>
> (b) that the evidence to which the application relates is to be obtained for the purpose of civil proceedings which either have been instituted before the requesting court or whose institution before the court is contemplated, the court shall have the powers conferred on it by the following provisions of this Act.
>
> 10.(1) Subject to the provisions of this section the court shall have power, on any such application as is mentioned in section 9 by order to make such provision for obtaining evidence in Gibraltar as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.
>
> (2) Without prejudice to the generality of subsection (1) but subject to the provisions of this section, an order under this section may, in particular, make provision—
>
> (a) for the examination of witnesses, either orally or in writing;
>
> (b) for the production of documents . . ."

Those provisions reflect the terms of the English Evidence (Proceedings in Other Jurisdictions) Act 1975.

31 Mr. White submitted that the letter of request was too vague to be enforced and it was not the function of this court to re-write a letter of request (see *Rio Tinto Zinc Corp.* v. *Westinghouse Elec. Corp.* (8) and *In re Asbestos Ins. Coverage Cases* (1)).

32 We accept the propositions of law upon which that submission is based, but we do not feel they have any application in this case. Here, counsel for all parties negotiated the terms of the order and in particular the Schedule. The party who had to comply with the request if made and the subsequent order, the bank, accepted the terms of the order as being appropriate. As counsel for the bank pointed out, his clients could not see that anything was to be gained by rejecting the request on the grounds

suggested, as all that would follow would be another letter and further expense. In the bank's view, the letter of request was acceptable, as were the terms of the order and in particular the Schedule to it.

33 In the circumstances of this case there are no proper grounds for objecting to the request of the New York court. We agree with counsel for the bank that to do so would only lead to further cost.

Common law

34 Mr. Azopardi adopted the submissions made by counsel for the bank. In his clear written submissions, and orally, he put forward a further ground in support of the judge's order namely, the common law doctrine of "universalism" as explained by the Privy Council in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (2).

35 Mr. White, relying upon the judgment of Mr. Nicholas Strauss, Q.C., sitting as a deputy judge of the Chancery Division, in *Rubin* v. *Eurofinance S.A.* (9), submitted that the doctrine of universalism had no application in this case where the property was not accepted to form part of the estate. Basing himself upon the evidence of Prof. Westbrook, he submitted that there was no arguable case that the trustee was entitled to the funds.

36 In the Part 8 proceedings, the ownership of the money has not been decided. All that is sought in the appeal is discovery for the purpose of the New York bankruptcy proceedings. Therefore, *Rubin* may well be distinguishable. However, it is not necessary for us to decide this issue having regard to our conclusions as to the jurisdiction, the Civil Jurisdiction and Judgments Act, s.17, *Norwich Pharmacal*, and the application of the Evidence Act. We therefore decline to do so.

37 We conclude that this appeal should be dismissed.

Appeal dismissed.