Digitally signed by Advance Performance Exponents Inc
Date: 2025.05.20 16:07:54 -05:00
Reason: Apex Certified
Location: Apex

Neutral Citation Number: [2025] CIGC (FSD) 41

Cause No: FSD 2024-0183 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

BETWEEN:

(1) SIMON CONWAY

(2) ANTHONY MANTON

(3) MOHAMMED FARZADI

Suing as Joint Official Liquidators of ABRAAJ HOLDINGS (In Official Liquidation)

Plaintiffs

-and-

AIR ARABIA PJSC

Defendant

Appearances:	**Mr Tom Smith KC of counsel and Mr Peter Sherwood and Ms Kalyani Dixit of Carey Olsen for the Plaintiffs**
	Mr Steven Thompson KC of counsel and Mr Erik Bodden, Ms Alecia Johns and Mr Harry Clark of Conyers, Dill & Pearman LLP for the Defendant
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**12 and 13 November 2024**
Judgment:	**20 May 2025**

Insolvency—submission of proof of debt—whether leave to serve out of the jurisdiction required to bring fraudulent trading claim under Companies Act, s.147

Insolvency—whether Companies Act, s.147 has extraterritorial effect—whether leave to serve out of the jurisdiction required to bring fraudulent trading claim more generally

Practice and procedure—requirement in CWR O.24, r.2(1) that applications related to existing liquidation must be brought within the liquidation—whether to waive irregularity in commencing proceedings by writ

- -

JUDGMENT

- -

Table of Contents

A. Introduction

1. The parties are agreed that this case raises a novel point, on which there is no authority in the Cayman Islands other than a very short judgment of Jones J in *Re ICP Strategic Credit Income Fund* [2014] 2 CILR 1, which the Defendant invites me to disregard and which the Plaintiffs criticise in other respects.

2. The primary issue before me is whether leave to serve out of the jurisdiction is required for a claim under s.147 of the Companies Act (2023 Revision), namely the fraudulent trading provision, where the person from whom a contribution to the company's assets is sought has submitted a proof of debt within the liquidation. Secondly, the arguments presented raise the wider question whether s.147 of the Companies Act is of extraterritorial effect, such that leave to serve out is not needed in any event, even where the person from whom a contribution is sought has not submitted a proof of debt. This is obviously of wider importance to the conduct of insolvent liquidations under the jurisdiction of the Court generally. Thirdly, the case raises procedural points regarding the appropriate form for applications brought under Part V of the Companies Act by liquidators and the applicable procedural route if leave to serve out of the jurisdiction is required for a claim under s.147 of the Act.

3. I record at the outset that the Defendant disputes that the Court has any jurisdiction over it. The Defendant also disputes that the Plaintiffs' service of these proceedings by email and delivery by courier to the Defendant's offices in Sharjah, United Arab Emirates was effective. The Defendant has indicated that its participation in the hearing of the Plaintiffs' summons should not itself be treated as being a submission to the jurisdiction of the Grand Court.

4. The procedural route taken to bring the matter before me is slightly unusual in that, having served the amended writ on the Defendant in the UAE on the basis that leave to do so is not required, the Plaintiffs have proactively issued a summons seeking declarations from the Court to that effect, and that service on the Defendant has been effective, rather than waiting for the Defendant to acknowledge service contesting jurisdiction under GCR O.11 and for the Defendant to apply to set aside service. However, the Defendant did not object to this procedural approach.

5. I am very grateful to Mr Tom Smith KC and Mr Steven Thompson KC and their supporting legal teams for their extremely helpful written and oral arguments. They have not made my task any easier, but they have illuminated the path towards my conclusions. I am also grateful to the parties for their patience in awaiting this judgment.

B. Relevant background

B.1 The underlying liquidation proceedings

6. The current writ action arises out of the collapse of the Abraaj group of companies in early 2018. The First and Third Plaintiffs, along with a Mr Michael Jervis, were initially appointed as joint provisional liquidators of Abraaj Holdings by McMillan J on 18 June 2018. On 11 September 2019, McMillan J put Abraaj Holdings into official liquidation and those same individuals were appointed as its joint official liquidators. Following Mr Jervis' death, the Second Plaintiff was appointed to replace Mr Jervis as a joint official liquidator on 15 February 2024.

7. The first meeting of Abraaj Holdings' creditors took place on 17 July 2018. The Defendant attended and was appointed to the Liquidation Committee. Mr Conway's unchallenged evidence is that the Defendant has attended 29 of the 33 Liquidation Committee meetings held between 29 September 2018 and 1 January 2024 and continues to be a member of the Liquidation Committee.

8. The Defendant has submitted two proofs of debt within Abraaj Holdings' liquidation, as follows:

   8.1 A proof of debt dated 4 July 2018 for approximately US $78.8 million in respect of monies said to be owed under a short-term investment agreement dated 9 January 2018, which provided for a *"minimum guaranteed return"* of 10.25% per annum. This loan forms part of the foundation for the Plaintiffs' claim against the Defendant in these proceedings.

   8.2 A proof of debt dated 12 April 2019 for approximately US $108.5 million arising from a Subscription Agreement dated 7 May 2012 between Abraaj Holdings and the Defendant, amongst others. This loan also provides part of the basis for the Plaintiffs' current claim.

9. The Plaintiffs state that the Defendant's first proof of debt was adjudicated for the purpose of voting for and constituting the Liquidation Committee only, and that neither of the Defendant's proofs of debt have been adjudicated or admitted for any other purpose.

10. The Defendant's proofs of debt are both signed by Mr Adel Abdulla Ali, the Defendant's CEO, and record the following contact addresses for the Defendant:

Post	Air Arabia Head Office, Building A1, Next to Cargo Entrance, Sharjah International Airport, P.O. Box 132, Sharjah, United Arab Emirates
Email	oromeih@airarabia.com magarwal@airarabia.com and vraghavan@airarabia.com
Telephone	+971 6 508 8988

B.2 Summary of the Plaintiffs' intended claim against the Defendant

11. The Plaintiffs commenced these proceedings against the Defendant by a writ issued on 14 June 2024. Their claim is for a declaration pursuant to s.147 of the Companies Act that the Defendant is liable to contribute to Abraaj Holdings' assets because the Defendant was knowingly a party to Abraaj Holdings' business being carried on with intent to defraud creditors and/or for a fraudulent purpose.

12. Originally, the writ also named Abraaj Holdings as a co-plaintiff and included a claim by Abraaj Holdings against the Defendant for dishonest assistance, based on the same facts as the s.147 claim. However, on 19 August 2024 and prior to service of the writ, the Plaintiffs amended the writ to remove Abraaj Holdings and to delete the dishonest assistance claim. They did not need leave to do so as the writ had not been served.

13. The Plaintiffs served the amended writ on the Defendant at the addresses stated in the Defendant's proofs of debt by email on 26 August 2024 and by delivery by courier on 10 September 2024.

14. The basis for the Plaintiffs' claim against the Defendant is certain loans made by the Defendant to Abraaj Holdings or other Abraaj entities from time to time from about March 2013 until early 2018. The Plaintiffs allege that the Defendant made short-term loans to Abraaj Holdings totalling nearly US $1 billion over this period. The Plaintiffs allege that the loans were used by Mr Arif Naqvi, the

founder of the Abraaj group and Abraaj Holdings' executive director, vice chairman and CEO at the relevant time, to help prop up Abraaj Holdings and the wider Abraaj group while it was suffering from a chronic shortage of cash.

15. The Plaintiffs intend to argue that the way in which the Defendant made the loans enabled Mr Naqvi to "window dress" Abraaj Holdings' accounts and conceal that cash shortage from the Abraaj group's investors and creditors, and to defeat, hinder or delay the payment of Abraaj Holdings' creditors and creditors of the wider Abraaj corporate group. The Plaintiffs allege that, for example, the loans from the Defendant were often made to off-balance sheet entities associated with the Abraaj group, which allowed Abraaj Holdings and the Abraaj group to avoid disclosing the resulting debt owed to the Defendant, and the loan proceeds were paid into bank accounts for Abraaj group companies to inflate the cash balances in the year-end financial statements or to procure inflated bank balance confirmations to appease investors demanding to have visibility over fund balances, before the monies were then repaid to the Defendant.

16. Further, the Plaintiffs allege that the circumstances in which the loans were made, including continuous "roll-overs" of loans, and the terms on which the loans were made, were highly unusual, artificial and uncommercial. As an example of the last point, the Plaintiffs assert that the Defendant negotiated favourable terms such as high interest rates or exorbitant lending fees in exchange for the loans.

17. The Plaintiffs intend to assert that the Defendant knew, or suspected but made a deliberate decision to avoid confirming that suspicion, that Abraaj Holdings was carrying on its business with an intent to defraud creditors or for a fraudulent purpose, such that the Defendant was a knowing participant in the carrying on of Abraaj Holdings' business fraudulently for the purpose of s.147(2) of the Companies Act.

18. The Plaintiffs say that the effect of the concealment of Abraaj Holdings' cashflow insolvency and the insolvency of the wider Abraaj group was artificially to delay Abraaj Holdings' inevitable collapse and to facilitate Abraaj Holdings' continued perpetuation of a fraud on its creditors and on the creditors of the Abraaj group.

19. It is then said for the Plaintiffs that if the loans had not been made, Abraaj Holdings' deteriorating financial position would have been revealed far sooner: Abraaj Holdings would have gone into official liquidation earlier than June 2018 (when it went into provisional liquidation), with the consequence that the losses suffered by Abraaj Holdings' creditors would have been significantly lower than has transpired.

20. The Plaintiffs will apparently contend that, in those circumstances, as a result of the Defendant's knowing participation in the carrying on of Abraaj Holdings' business fraudulently, the Court should order that the Defendant is liable to make a contribution to Abraaj Holdings' assets pursuant to s.147 of the Companies Act.

B.3 Summary of the Defendant's response to the Plaintiffs' intended claim

21. The Defendant has not yet filed a Defence to the Plaintiffs' claim but has indicated its intended position in its skeleton argument for the hearing of this summons. The Defendant rejects the Plaintiff's claim. The Defendant stresses that it is wholly unconnected to Abraaj Holdings. It argues that, unlike most fraudulent trading claims, it is not an insider, e.g. a director, controller or shadow director, and nor is it a shady associate such as a spouse, relative or friend of Mr Naqvi or others involved in Abraaj Holdings' management. Instead, it is a well-known and reputable, listed, international airline operating a large fleet of aircraft from its base in the UAE to numerous destinations in the Middle East, Asia and Europe. It says that it happens to have had a trading relationship with Abraaj Holdings, which commenced long before Abraaj Holdings became insolvent. This was at a time, the Defendant asserts, when Abraaj Holdings had a good reputation in the Middle East and worldwide, and a huge business footprint. The Defendant says it is "bemused" by the Plaintiffs' claim, which it describes as opportunistic and brought simply because the Defendant has deep pockets.

22. It is clear that, if this matter proceeds to a determination on the merits, it will be hotly contested on both sides.

C. The issues on the Plaintiffs' summons

23. There are five primary areas of dispute between the parties arising from the Plaintiffs' summons:

23.1 Were the Plaintiffs wrong to have commenced these proceedings by writ? Should they instead have issued a summons within the winding up proceedings and, if so, what is the consequence?

23.2 Has the Defendant submitted to the jurisdiction of the court by lodging its proofs of debt, such that the Plaintiffs did not need leave to serve the Defendant out of the jurisdiction?

23.3 Were the Plaintiffs properly able to use the methods of service that they adopted, namely email and courier delivery to the Defendant's offices, or should the proceedings have been served personally upon the Defendant?

23.4 Does s.147 of the Companies Act have extraterritorial effect, so that leave is not required to serve a claim under s.147 out of the jurisdiction?

23.5 Were the Plaintiffs entitled to serve the writ on the Defendant out of the jurisdiction without needing leave, by virtue of GCR O.11, r.1(2)?

24. It is useful to note here that, as explained by Lewison LJ in the English case of *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847 at [20], the word *"jurisdiction"* is slippery in that it has different possible meanings in a legal context. The first is that it can describe a territory, for example the Cayman Islands or England and Wales. It is this use which is intended when employing the phrase *"service out of the jurisdiction"*. Secondly, it can mean the power of the court to do something. Thirdly, it can mean whether the court will exercise a power that it possesses on settled principles. Lewison LJ gave as an example the question that he was called upon to decide in *Orexim* *"whether the court has jurisdiction to permit service of the claim out of the jurisdiction."* It is important to bear these different meanings in mind in a case such as this.

D. Summary of the parties' arguments

D.1 Form of proceedings used and consequences

25. Based on the wording of CWR O.24, r.2(1), Mr Thompson KC, appearing for the Defendant, submits that the Plaintiffs have used the wrong procedural form to pursue their claim. He says that the Plaintiffs should simply have filed an ordinary summons within the existing liquidation proceedings relating to Abraaj Holdings. Mr Thompson relies on CWR O.24, r.2(1), which provides:

> *"(1) Every application or appeal to the Court made in connection with a proceeding which is already pending before the Court shall be made by summons."*

He also referred me to *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch) and to the Bahamian appeal in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37 to support his submission.

26. By the time that the summons came to be argued before me, the Plaintiffs had accepted that the proceedings should have been commenced by summons issued within the liquidation proceedings. Mr Smith KC, appearing for the Plaintiffs, explains the Plaintiffs' reasons for not doing so as being:

26.1 as originally contemplated, the proceedings included Abraaj Holdings as a co-plaintiff bringing a dishonest assistance claim, which had to be brought by way of separate proceedings and could not have been included in a summons within the liquidation proceedings; and

26.2 the common practice within the Cayman Islands is for liquidators to bring claims by separate writ action, rather than by summons within the liquidation proceedings, and Mr Smith gives examples including writ actions brought arising out of the insolvencies in the *Weavering*, *Platinum Partners* and *Traded Life Policies* cases.

The Plaintiffs therefore invite the Court to waive the irregularity in the form of proceedings used under GCR O.2, r.1.

27. In response to Mr Smith's first submission, Mr Thompson contends that the Plaintiffs' claim should always have been brought by ordinary summons within the liquidation proceedings, as required by CWR O.24, r.2(1). He says that Abraaj Holdings' intended claim for dishonest assistance is irrelevant to the proper procedural form that the Plaintiffs should have used for their own separate claim: the Defendant's position appears to be that Abraaj Holdings would have had to bring its claim by separate

proceedings in parallel to the Plaintiffs filing a summons for relief under s.147 within the liquidation proceedings.

28. In answer to Mr Smith's second justification for the Plaintiffs using a writ instead of a summons, Mr Thompson says that the fact that an erroneous practice may have grown up in the Cayman Islands of using new proceedings to bring liquidators' claims provides no justification for the Plaintiffs' breach of the clear requirement of CWR O.24, r.2(1).

29. Mr Thompson complains that the Plaintiffs have not filed any summons seeking that the Court waive the irregularity in the form of the proceedings. He submits that the proceedings remain irregular unless and until the Court decides to exercise its discretion to do so: see *Metroinvest Anstalt v Commercial Union* [1985] 1 WLR 513 at 520C.

30. Mr Smith submits that there is no prejudice resulting from the Plaintiffs' use of an incorrect procedural form and invites the Court to direct that the proceedings are treated as having been commenced by summons within the liquidation proceedings instead of by separate writ. In this context, Mr Smith draws my attention to the English cases of *Re Continental Assurance Co of London plc (No.2)* [1998] 1 WLUK 361, [1998] 1 B.C.L.C. 583; *Hughes and another v Beckett and others* [1998] Lexis Citation 1530 (which is the appeal from *Re Continental Assurance*); and *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch), where the court took such an approach.

31. Mr Thompson, however, argues that the Plaintiffs' adoption of the wrong procedural approach leads to complex consequences: if the Court is to waive the irregularity, then the question arises on what terms? Mr Thompson says that the Court should consider whether the innocent party has suffered any prejudice, and should not allow a party to achieve through the back door that which it could not through the front door: see *Leal v Dunlop Bio-Processes* [1984] 1 WLR 874, cited in the *Supreme Court Practice 1999* at 2/1/3.

32. He submits that the Court must consider whether proceedings in the correct form could have been validly served on the Defendant and how they should have been served, and then decide whether the Plaintiffs have obtained an unfair procedural advantage by adopting the wrong procedural form.

33. As explained more fully later in this judgment, Mr Thompson says that the CWR do not contain any provisions requiring service of a petition under Part V of the Companies Act nor service of an ordinary summons under that Part of the Act. Such applications therefore do not fall within CWR O.1, r.4(1), which applies the rules on service in the GCR where a document is required by the CWR to be served. He submits that as a result neither the CWR nor the GCR provide a procedural route for service of applications under Part V of the Companies Act. Moreover, neither the Companies Act, the CWR nor the GCR contains any provision allowing service of an application under Part V of the Companies Act outside the territory of the Cayman Islands.

34. Mr Thompson contends that by adopting an incorrect procedural form, namely a writ instead of an ordinary summons, the Plaintiffs have obtained an unfair procedural advantage in that they are able to argue that they validly served the writ on the Defendant in the UAE under the GCR when they would otherwise have been unable to serve a summons outside the territory of the Cayman Islands under the CWR.

35. Although not expressly submitted, the Defendant's position appears to be that the Court should therefore refuse to waive the irregularity and should dismiss the current proceedings, leaving the Plaintiffs to start again using the correct procedural form and to address the question of service when it arises but in the correct procedural context. It was agreed before me that there is no relevant limitation issue that would prevent the Plaintiffs from doing so.

D.2 Jurisdictional consequences of lodging proof of debt

36. Mr Smith's primary submission is that the Defendant has submitted to the jurisdiction of the Grand Court as a result of its participation in the liquidation of Abraaj Holdings by submitting proofs of debt. He argues that the Defendant should not be allowed to benefit from Abraaj Holdings' liquidation by seeking payment of dividends through the proof of debt procedure, without the burden of complying with orders made in that proceeding and any related proceedings. Otherwise, the Defendant could obtain priority access to Abraaj Holdings' assets in subversion of the statutory liquidation scheme because the Plaintiffs would be required to adjudicate and potentially pay a dividend on the Defendant's proofs of debt, whilst being unable to obtain a contribution from the Defendant under s.147 to Abraaj Holdings' assets available to creditors. This would deprive the estate

of additional funds and cause loss to other creditors at the same time as unfairly favouring the Defendant. Mr Smith argues that the purpose of the relevant law on submission to the jurisdiction by filing a proof of debt is to avoid this outcome.

37. Mr Smith contends that the Plaintiffs therefore did not need any leave to serve the Defendant with the current proceedings in the UAE. He relies on: *Rubin v Eurofinance SA* [2012] UKSC 46 at [165] and earlier authorities going back to *Ex p Robertson, In re Morton* (1875) LR 20 Eq 733; *Stichting Shell Pensioenfonds v Krys* [2015] AC 616; *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379, [2015] 1 CLC 706; *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 524, [2002] CLC 1090; *NMC Healthcare Limited v Noor Capital PSC* [2022] ADGMCFI 0003; *Crumpler and Farmer v Yoong and Three Arrows Capital Ltd* (Claim No. BVIHC (COM) 2023/0003, Claim No. BVIHC (COM) 2022/0119) (unreported, 12 December 2023); *Dicey, Morris & Collins, The Conflict of Laws* (16th ed.), Rule 33 and paragraph 11-036, and *Briggs, Civil Jurisdiction and Judgments* (7th ed.) at paragraph 21.02.

38. Mr Thompson argues that the Court cannot determine the question of submission to the jurisdiction of the Grand Court as a result of lodging a proof of debt without first determining whether s.147 of the Companies Act has extraterritorial effect. His argument is that the Defendant has no presence within the Cayman Islands, so the Court cannot or should not exercise jurisdiction over the Defendant unless s.147 does have extraterritorial effect.

39. Mr Thompson submits that, if s.147 does not have extraterritorial effect, then it would be illogical for the availability of relief under s.147 of the Act as regards a foreign target to be dependent on whether the foreign target is a creditor of the company and has submitted a proof of debt. Mr Thompson relies on this to support his argument outlined later in this judgment that any submission to the jurisdiction by lodging a proof of debt does not extend to s.147 claims.

40. Mr Thompson concedes that submission of a proof of debt is an acceptance by the creditor that the Cayman Islands is the appropriate jurisdiction for the due administration of the liquidation, including the recovery of the company's debts and assets: see *ex parte Robertson; In re Morton* (1875) LR 20 Eq 733.

41. He submits that despite being positioned next to ss.145 and 146 in Part V of the Companies Act, s.147 is different in nature from those sections. Mr Thompson characterises both ss.145 and 146 as concerning unwinding of transactions that have already occurred in order to restore the *status quo ante*, and argues that s.147 is not concerned with restoring the *status quo* but with creating a new statutory liability to contribute to the estate in the exercise of the court's discretion: see *In re M. C. Bacon* [1991] Ch 127 and *Re Howard Holdings Inc* [1998] BCC 549. He submits that there are other aspects of the nature of ss.145 and 146 that also differentiate them from s.147. Mr Thompson says that the difference in the nature of the remedy under s.147 must inform the reading of the case law on submission to the jurisdiction and supports the Defendant's position that lodging a proof of debt may be a submission for the purposes of ss.145 and 146 but is not a submission for the purpose of s.147 of the Act.

42. Mr Thompson adopts a narrow reading of the authorities on which Mr Smith relies. He argues that *ex parte Robertson* concerned recovery of a void payment and the underlying proceedings in *Rubin v Eurofinance SA* were avoidance claims and the *rationes* of these cases is confined to such claims. He says that neither case involved relief for fraudulent trading, and therefore they do not shed light on whether a submission to the jurisdiction covers claims for relief under s.147 of the Companies Act. He submits that *Stichting Shell Pensioenfonds v Krys* is even further removed from this case in that it involved a creditor in the British Virgin Islands who was attempting (a) to rely on a pre-judgment conservatory attachment issued by the Dutch court in respect of approximately US $71 million held in a bank account in Ireland, which was also claimed by the liquidators, and (b) to pursue a damages claim against the company before the Dutch court for misrepresentation. The creditor was held to be amenable to an anti-suit injunction to prevent it from pursuing the Dutch proceedings.

43. Mr Thompson therefore submits that none of these cases is authority that submitting a proof of debt amounts to submission to the jurisdiction for the purposes of a s.147 claim, which he describes as a purely discretionary statutory claim for a new liability to contribute, and which has nothing to do with any attempt to realise or get in an asset of the company or to adjust concluded transactions or return payments or property to the company. Mr Thompson argues that it would be an unacceptable extension of the principle in *ex parte Robertson* for submission of a proof of debt to expose a foreign creditor to a claim to impose a new liability owed to the liquidator, and not otherwise due to the company, without any of the safeguards envisaged by the parallel case law in England on which the

Plaintiffs rely, namely *Re Paramount Airways* [1993] Ch 223; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1; and *AWH Fund v ZCM Asset Holding* [2019] UKPC 37.

D.3 Validity of methods of service used

44. The Plaintiffs seek a declaration that service of the writ has been validly effected by email and courier delivery to the Defendant's office in Sharjah, using the addresses specified in the Defendants' proofs of debt.

45. Mr Smith argues that the Plaintiffs were entitled to use the methods of service specified in the Defendant's proofs of debt and were not required to serve the writ upon the Defendant by personal service. Alternatively, on the basis that the Plaintiffs' claim should be treated as having been commenced by a summons within the liquidation proceedings instead of by way of a writ, Mr Smith submits that there is no requirement for personal service upon the Defendant because GCR O.65, r.1 is not engaged and the Plaintiffs were entitled to serve by the methods appropriate for ordinary service specified in GCR O.65, r.5 and 5A.

46. Mr Thompson maintains that the applicable rules do not provide a procedural route for service of a summons seeking relief under s.147 beyond the borders of the Cayman Islands. He asserts that CWR O.1, r.4(1), which applies the rules in the GCR relating to service, is engaged only where the document in question is *"... required to be served by these Rules"*, i.e. the CWR must explicitly provide that the document must be served. In the absence of such a provision, Mr Thompson says, there is no applicable procedural mechanism in the CWR for service of the document in question. The Defendant's case is that there is no provision in the CWR requiring service of a summons seeking relief under s.147, so that the summons would have to be listed before a judge for directions in the first instance, including directions as to service of the summons. However, the judge would not have power to order service overseas because that would require express authority by statute or applicable rules, and there is none.

47. Secondly, Mr Thompson suggests that, in reality, the Plaintiffs are seeking to obtain an order for substituted service without complying with the procedural and evidential requirements for such an order. He says that there is no evidence that personal service of the proceedings on the Defendant is

impractical, and there is no suggestion that the Defendant is seeking to evade service. He relies on *Cadogan Properties Ltd v Mount Eden Land Ltd* [1999] 6 WLUK 421, [2000] I.L.Pr. 722 to support the Defendant's position that substituted service should not be permitted in the absence of evidence satisfying these requirements.

D.4 Availability of GCR O.11, r.1(2) and extraterritorial effect of s.147 of the Companies Act

48. Alternatively to the Plaintiffs' primary case, Mr Smith argues that the Plaintiffs were entitled to serve the Defendant in the UAE without the necessity for leave by virtue of GCR O.11, r.1(2). This is on the basis that the claim is one which the Court has power to determine by virtue of a *"Law"* notwithstanding that the defendant is not within the Cayman Islands.

49. Mr Smith submits that a claim under s.147 of the Companies Act is one which the Court has power to determine by virtue of a Law as a matter of construction of the Companies Act because s.147 has extraterritorial effect, i.e. s.147 is applicable to conduct wherever it occurred geographically and whatever the nationality of the respondent. In support of the Plaintiffs' position, Mr Smith relies on the English cases of *Re Paramount Airways* [1993] Ch 223; *Clark v Oceanic Contractors Inc.* [1983] 2 A.C. 130; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1; and the decision in the appeal to the Privy Council from the Court of Appeal of the Bahamas in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37. Mr Smith accepts that these decisions are not binding on the Grand Court but says that they should be treated as being of strong persuasive authority, in accordance with the approach in *Schramm v Financial Secretary* [2004-05 CILR 104] and *Miller v R* [1998] CILR 161.

50. Secondly, Mr Smith argues that if s.147 does not have extraterritorial effect, then it would be rendered effectively toothless and that that cannot have been Parliament's intention. The resulting need for a liquidator to bring a s.147 claim in the jurisdiction where the respondent is resident, if that were possible under the law of that country, would be inconsistent with the general principle that the winding up of a company should take place within its legal jurisdiction of incorporation: see *Re Philadelphia Alternative Asset Fund* (unreported, Henderson J, 22 February 2006),[1] *Re Silver Base Group Holdings Limited* (unreported, Doyle J, 8 December 2021) and *Re BCCI SA* [1992] B.C.C. 83.

[1] Reported in note form at [2006] CILR Note 7

51. Mr Thompson contends that GCR O.11, r.1(2) is not available to the Plaintiffs as a matter of principle. He relies on *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 to argue that the ability to serve process out of the jurisdiction depends on whether the statute in question contemplates on its face that proceedings may be brought against persons not within the jurisdiction of the court. Mr Thompson submits that s.147 of the Companies Act does not.

52. Further, Mr Thompson argues that, as a matter of principle, a claim under s.147 can only be served within the Cayman Islands. He says that this conclusion is consistent with and flows from the decisions in *Re Paramount Airways*; *Bilta (UK) Ltd v Nazir (No 2)* and *AWH Fund v ZCM Asset Holding*.

53. Mr Thompson invites the Court to depart from the previous decision of Jones J in *In re ICP Strategic Credit Income Fund* [2014] 2 CILR 1 where Jones J considered that s.147 does have extraterritorial effect. Mr Thompson points out that the case was before Jones J on an application by the liquidators for sanction to commence a claim for relief under s.147 of the Companies Act in the United States. He contends that the application was not opposed and was not fully argued, and does not appear to have considered the English line of authority on service in this context.

54. Mr Thompson relies in addition on *In re Tucker (R.C.), ex parte Tucker (K.R.)* [1990] Ch 148, where the Court refused to issue a summons against the bankrupt's brother, who was resident in Belgium, requiring him to produce documents and attend at court for examination, and *In re Akkurate* [2021] Ch 73, which concerned an application by liquidators for an order that two Italian companies deliver their books and records and give an account of their dealings with the company in liquidation. In both those cases, the courts came to the conclusion that the relevant statutory provisions did not have extraterritorial effect, albeit in *In re Akkurate* [2021] Ch 73, Sir Geoffrey Vos C, indicated at para [53] that if he had not concluded that *Re Tucker* was binding authority, he would have been inclined to a different result (espousing the same comment by David Richards J in *MF Global* [2016] Ch 325). Mr Thompson argues that I should adopt the same approach as in *Re Tucker* to construing whether s.147 of the Companies Act contemplates that proceedings might be brought against foreign nationals outside the Cayman Islands, rather than applying the line of authority exemplified by *Re Paramount Airways*; *Bilta (UK) Ltd v Nazir (No 2)* and *AWH Fund v ZCM Asset Holding* or adopting the preferred

responses of David Richards J and Sir Geoffrey Vos, even though I am not bound by *Re Tucker* as they were.

55. In support of the Defendant's wider argument, Mr Thompson submits that it should be inferred from the absence of any provision in the CWR permitting service of an application under Part V of the Companies Act outside the Cayman Islands that s.147 of the Act (and seemingly ss.145 and 146) are not intended to have extraterritorial effect.

56. The Plaintiffs respond to this argument by reference to *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847 and *Re NMC Healthcare Ltd* [2024] ADGMCFI 0007. Mr Smith argues that the fact that the Defendant has submitted proofs of debt can itself be a sufficient connection with the jurisdiction, if that needs to be considered at this stage rather than at the stage of determining whether or not to order the relief sought. He relies on the English cases of *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] BCC 16[2]; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2018] EWHC 2458 (Comm); and *Suppipat v Narongdej* [2020] EWHC 3191 (Comm).

E. Analysis

57. Notwithstanding the different competing sequences in which the Plaintiffs and the Defendant addressed the topics for decision, I consider it is most useful to approach matters in the following order:

57.1 the statutory framework and context for s.147 of the Companies Act;

57.2 the jurisdictional consequences of lodging a proof of debt;

57.3 the correct form of proceedings for applications under s.147 of the Act and the consequences of adopting a different form of proceedings;

57.4 whether the methods of service used by the Plaintiffs were valid;

57.5 whether s.147 of the Act has extraterritorial effect;

[2] Reversed in part on appeal: see *Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No.2)* [1999] 7 WLUK 620

57.6 whether the Plaintiffs can rely on GCR O.11, r.1(2) to permit them to serve the Defendant in the UAE without leave of the court.

E.1 The statutory framework and context for section 147 of the Companies Act

58. Section 147 of the Companies Act is contained within Part V of the Act. It provides as follows:

> *"(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.*
> *(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper."*

59. Section 147 is adjacent to ss.145 and 146 of the Companies Act, dealing respectively with voidable preferences and dispositions at an undervalue.

60. As Mr Thompson points out:

60.1 an application under s.147 can only be brought by a liquidator;

60.2 a respondent can only be made liable under s.147 if it were knowingly a party to the fraudulent business;

60.3 if those requirements are met, the court has an unfettered discretion to declare that the respondent should make such contribution to the company's assets as the court thinks proper (including no contribution).

61. As Mr Thompson also points out, the Companies (Amendment) Act 2007 repealed the previous text of Part V of the Companies Act and replaced it with a completely new version of Part V. By the Companies (Amendment) Law, 2007 (Commencement) Order, 2009, this took effect from 1 March 2009. The new Part V, including ss.145, 146 and 147, was based on a review of the insolvency regime in the Cayman Islands carried out by the Law Commission and appears to have been modelled on the English Companies Act 1948. The equivalent to s.145 of the Companies Act (voidable preferences) is now s.239 of the English Insolvency Act 1986; the equivalent to s.146 of the Act (dispositions at an undervalue) is s.238 of the English Act; and the equivalent to s.147 of the Act (fraudulent trading)

is s.213 of the English Act. Mr Thompson noted that s.213 of the English Act can be traced back to 1928.

62. At the same time as the replacement of Part V of the Companies Act, the previous reliance in the Cayman Islands on the English Insolvency Rules 1986 was abandoned and the Cayman Islands introduced its own Companies Winding Up Rules, which also came into force on 1 March 2009.

63. Both parties rely on this statutory history in support of parts of their arguments before me and, for the reasons I address later, is relevant to my determination of the issues raised.

E.2 Jurisdictional consequences of lodging a proof of debt

a) *The nature of a submission to the jurisdiction*

64. The first point of principle, which is not in dispute between the parties, is that submission to the jurisdiction (of whatever kind) is separate and distinct from establishing the jurisdiction of the court over a person by service of process. It is always open to anyone outside the geographical jurisdiction of a court voluntarily to submit to the personal jurisdiction of that court, even if they could not validly be served with proceedings issued from the court. As a matter of law and fact, that is exactly what every plaintiff who is based in another country does when they elect to use a court which is foreign to them to pursue a claim. The authors of *Dicey, Morris & Collins on the Conflict of Laws* express it this way (citations and footnotes omitted):

> *"**11R–062 RULE 33—The court has jurisdiction to entertain a claim in personam against a person who submits to the jurisdiction of the court.***
>
> ***11–063** A person who would not otherwise be subject to the jurisdiction of the court may be precluded by its own conduct from objecting to the jurisdiction, and thus give the court an authority over him which, but for that submission, it would not possess.*
>
> ***11–064** A claimant who begins proceedings in general gives the court jurisdiction to entertain a counterclaim against the claimant which may extend to cases in which, if separate proceedings were to be brought, permission to serve process … might not be obtainable. Although it is sometimes said that it is not necessary that the counterclaim be related to the claim, the true principle is that a counterclaim is allowed so that justice can be done as between the parties. …"*

This analysis is supported by, amongst others, the English Court of Appeal decision in *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 524, on which the Plaintiffs rely.

65. It follows that, in a case where the court's jurisdiction over a defendant is based on voluntary submission, the procedural rules on service out are irrelevant and have no part to play in establishing jurisdiction because the court's jurisdiction over the defendant is not founded on service at all. Thus, it is not necessary for a plaintiff to obtain leave to serve the proceedings overseas; nor, following a defendant's submission to the jurisdiction, is it necessary for a plaintiff to continue to rely on any leave to serve overseas which has already been granted.

b) *Lodging a proof of debt is a submission to the jurisdiction*

66. Secondly, it is also not in dispute in this case that lodging a proof of debt in a winding up process amounts to a submission to the jurisdiction of the court with conduct of the winding up. For this purpose, it is not necessary that the proof of debt has been admitted, adjudicated or a dividend paid. The mere fact of lodging the proof of debt is treated as a submission to the jurisdiction: see *Stichting Shell Pensioenfonds v Krys* at [31] (set out below) where the proof of debt had been rejected by the liquidators, *Erste Group Bank v VMZ Red October* at [51] and *NMC Healthcare Limited v Noor Capital PSC* at [56].

c) *The scope of the submission to the jurisdiction resulting from lodging a proof of debt*

67. The area of disagreement between the parties is as to the scope of the submission to the jurisdiction which results from lodging a proof of debt.

68. Mr Smith argues:

68.1 a submission to the jurisdiction by lodging a proof of debt is effective for all purposes connected with the winding up of the company, adopting the broad principles that he says should be drawn from the relevant case law in England and in the Privy Council;

68.2 the distinction that the Defendant seeks to make between ss.145 and 146 on one side and s.147 on the other is misconceived; and

68.3 the Defendant's approach would lead to bizarre consequences.

69. Mr Thompson contends that a submission to the jurisdiction by lodging a proof of debt is not effective for claims under s.147 of the Companies Act, although he concedes that it would be effective for

claims under ss.145 and 146 of the Companies Act. Mr Thompson relies on a narrow reading of the same authorities on which the Plaintiffs rely.

70. In my judgment, the Plaintiffs' arguments on this topic are to be preferred.

71. I start with the relevant English and BVI authorities, which are not strictly binding on me, but which are of persuasive value.

72. *Rubin v Eurofinance SA* [2012] UKSC 46 was a conjoined appeal in two underlying cases, the second of which was *New Cap Reinsurance Corp v Lloyds Syndicate 991*. In *New Cap*, the Lloyds syndicate had submitted proofs of debt to New Cap's administrator in Australia and had participated in creditors' meetings. The administrator admitted the syndicate's claim to the extent of approximately £650,000. The administrator then brought unfair preference claims against the syndicate in respect of two substantial payments made to the syndicate by New Cap shortly before New Cap went into administration. The syndicate refused to accept service and did not participate in the Australian proceedings. The administrator obtained a default judgment from the New South Wales Supreme Court, Equity Division, for about US $8 million. The administrator pursued a claim in England to enforce the Australian judgment. The English judge at first instance recognised and enforced the Australian judgment. The Court of Appeal upheld that decision, and the syndicate appealed to the Supreme Court. The Supreme Court dismissed the syndicate's appeal. In Part VIII of the judgment, Lord Collins JSC, giving the majority judgment, considered the question of the effect of submission to the jurisdiction by lodging a proof of debt:

> *"164. The Syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the Syndicate in the liquidation a submission for the purposes of the rules relating to foreign judgments?*
>
> *165. In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In* Ex p Robertson, In re Morton *(1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Sir James Bacon CJ held that the court had jurisdiction. He said, at pp 737-738:*

> *'... what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. ... [C]an there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit .. [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.'*
>
> ...
>
> *167. I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding."*

Lords Mance and Clarke JJSC, who gave separate judgments, agreed with Lord Collins JSC's reasoning and conclusions on this point.

73. The second relevant case is <u>*Stichting Shell Pensioenfonds v Krys*</u> [2015] AC 616. This involved an anti-suit injunction obtained in the BVI against a Dutch creditor, which had submitted a proof of debt in the liquidation being conducted in the BVI, but which sought in parallel to enforce its claims against money held in a company bank account in Ireland through proceedings before the courts of the Netherlands. In a judgment given by Lords Sumption and Toulson JJSC, the Privy Council responded to criticisms of that part of Lord Collins JSC's judgment in <u>*Rubin*</u> concerning submission to the jurisdiction set out above and elaborated on the scope of a submission to the jurisdiction by filing a proof of debt as follows:

> *"31. It has been suggested by Professor Briggs in a recent lecture in Singapore (New Developments in Private International Law: A Busy 12 Months for the Supreme Court, 21 November 2013) that this conclusion was 'astonishing' because no proof had been admitted and no dividend had been paid. Miss Newman, adopting this criticism, submitted that Lord Collins was wrong on this point. The Board is satisfied that his statement was correct. The present case is not properly speaking a case of election, like those in which a party must elect between two mutually inconsistent remedies. In such cases he is usually not taken to elect until he has actually obtained one of the remedies. The question here is not what remedy is Shell entitled to have, but whether it has submitted to the jurisdiction of the court. A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning*

> *an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants.*
>
> *32. Turning to Miss Newman's reservation, the argument was that Shell had not submitted to the jurisdiction of the BVI courts for all purposes. In particular, it was said to have submitted only for the purpose of claims under the Insolvency Act and Rules, and not for the purpose of claims governed by the general law, such as its claim in the Netherlands for misrepresentation and breach of warranty. This, it was said, was because the BVI courts have no subject matter jurisdiction over the damages claim that is being asserted in the Netherlands. The Board has no hesitation in rejecting this contention. It has no bearing on the question whether Shell submitted by participating in the injunction proceedings, because that submission necessarily involved an acceptance on its part of the court's jurisdiction to grant the injunction sought in those proceedings. The point appears to the Board to be equally irrelevant to the question whether Shell submitted by lodging a proof of debt for the redemption price. Liquidation is a mode of collective enforcement of claims arising under the general law. There is, in the present context, no relevant difference between the claim for which Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being proved in the liquidation. If they are proved, the BVI courts will have subject matter jurisdiction to adjudicate on them. And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it."*

74. The breadth of the impact of submitting a proof of debt was helpfully summarised and commented upon in *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379, where Gloster LJ stated:

> *"51. The English law principle articulated in* Rubin*, and recently affirmed in* Shell*, is that a foreign creditor submits to the jurisdiction of the court supervising a company's insolvency by proving in that insolvency. That, by itself, is sufficient without more (and irrespective of whether the proof has been accepted or a dividend has been received) to require the creditor to have all questions, of whatever kind, as against the debtor resolved within the insolvency as administered by the court of the jurisdiction of that insolvency. The rationale for the rule was first set out in* Ex parte Robertson; Re Morton *(1875) LR 20 Eq 733, at 737–738. The latest summary of the law is to be found in paragraphs 29 et seq of* Shell*.*
>
> *…*
>
> *59. Thirdly, contrary to Mr Salzedo's submissions, it is not a valid argument that the claims being brought in the foreign jurisdiction (i.e. here the conspiracy claims, in* Shell *the claims for misrepresentation and breach of warranty) could be said to be different in character from the claim in respect of which the proof of debt was submitted in the liquidation, or brought under the general law rather than the relevant insolvency rules, or even that such claims are subject to the exclusive jurisdiction of the foreign court, whether by virtue of an exclusive jurisdiction clause or otherwise. …"*

75. Having quoted paragraph [51] from Gloster LJ's judgment, in *NMC Healthcare Limited v Noor Capital PSC*, Andrew Smith J went on to say this:

> *"57. Further, as Mr Smith submitted, two corollaries of this principle, both stated in the* Stichting Shell *case (cit sup) at paras 31 and 32, are these:*
>
> *a. The creditor submits to the jurisdiction of the court of the insolvency from the time when it submits a proof.*
>
> *b. Submission to the jurisdiction of the court of the insolvency constitutes submission to any order of the court in connection with the insolvency procedure, including orders for injunctive relief."* (Emphasis added)

76. I have no doubt that the principles expressed in *Rubin*, *Stichting Shell Pensioenfonds*, *Erste Group Bank* and *NMC Healthcare* regarding submission to the jurisdiction as a consequence of lodging a proof of debt are general common law principles that apply with equal force in the Cayman Islands. I do not accept Mr Thompson's argument that those judgments should be read narrowly as applying only to cases within the four corners of each judgment, namely claims to recover void payments or preferences. It is clear that the Supreme Court and Privy Council were laying down general statements of principle concerning the nature and scope of submission to the jurisdiction by lodging a proof of debt, which were then helpfully elucidated by Gloster LJ and Andrew Smith J.

d) Is a claim under s.147 of the Companies Act within the scope of a submission to the jurisdiction?

77. The question then arises whether a fraudulent trading claim under s.147 of the Companies Act falls outside the scope of submission to the jurisdiction, as Mr Thompson submits, or is within it, as Mr Smith argues. As indicated earlier in this section, I prefer Mr Smith's position.

78. The first reason for rejecting Mr Thompson's argument is that a declaration under s.147 that a person should contribute to the estate must properly be characterised as an order within the winding up proceedings, as referenced in *Rubin v Eurofinance SA* at [167]. It is the very fact of the winding up that gives rise to the liquidator's statutory cause of action under s.147 to apply for relief and the court's power to grant that relief. To put it another way, it is a question *"of whatever kind"* which it is necessary that the court decide *"in order to effect complete distribution of the … estate"*: see *Ex p Robertson, In re Morton* at pp 737-738.

79. Secondly, in my judgment, Mr Thompson's argument that s.147 claims are different in nature from claims under s.145 and s.146 of the Companies Act, such that they should be treated differently as

regards submission to the jurisdiction, is incorrect. There are significantly more similarities between claims of these types than there are differences.

79.1 First, they are all statutory claims that only arise in the context of an insolvent liquidation, following the making of a winding up order, and vest in the liquidator, not the company. They are additional to any claims that the company itself might have.

79.2 Secondly, they each give the liquidator a power or remedy to achieve a proper distribution of the estate by remedying some deficiency resulting from pre-liquidation conduct.

79.3 Thirdly, the remedy in each case is for the purpose of bringing additional assets into the estate for the benefit of the general body of unsecured creditors, it is not for the benefit of the company more generally or for secured creditors, due to the claims being personal to the liquidator.

79.4 Fourthly, the remedy in each case is against someone whose conduct has caused the value of the estate to be diminished in some way, whether that is due to a preference, a void payment or assistance in fraudulent trading causing or facilitating the deficiency in the estate to increase.

80. In this context, it is useful to refer to the decision of Fancourt J in the English case of *Re Tradestar Ltd v Goldfarb* [2018] EWHC 3595 (Ch), concerning s.213 of the English Insolvency Act 1986, which is the equivalent provision to s.147 of the Companies Act. Fancourt J explained:

> *"19 … the starting point seems to me to be that Section 213 is concerned not with losses that the company has suffered but with losses that a creditor or creditors of the company have suffered. The section, as Mr Clarke rights says, is not a remedy for the benefit of the company, nor does it depend on any right of action that the company may have; it is a remedy for the benefit of creditors. …*
>
> *21 … the nature of the inquiry is as to loss caused to the company's creditors generally through an insufficiency of assets with which to meet their debts. … the focus is on the impact of such a claim on the availability of assets for the creditors generally, not on loss caused to the victim by the tortious conduct. The question of loss is not, therefore, one of loss caused to a victim of fraud by those perpetrating the fraud but a loss resulting to creditors of the company as a result of depletion of funds that should be available for them.*
>
> *22 Section 213 is not concerned as such with losses recoverable in claims by victims against those responsible for frauds, nor with the extent of loss that might be recoverable on conventional principles of causation and quantum in such a claim, except to the extent that any such claim that could be brought adversely affects the position of the creditors of the company. …*
>
> *24 The focus, for the purposes of the section, is on what loss, in terms of diminution in assets available for the body of creditors, is a consequence of the fraudulent conduct. …"*

81. Thirdly, in *Re ICP Strategic Credit Income Fund Ltd* [2014] 2 CILR 1, which counsel told me is the only relevant Cayman Islands authority that they could locate on s.147 of the Companies Act, Jones J expressed the view that ss.146 and 147 should be considered as being complementary. He said:

> *"5. I think that s.147 should be read together with s.146. Both of these sections were introduced by the Companies (Amendment) Law 2007. Both sections deal with the consequences of fraudulent trading. Section 147 creates a compensatory remedy when any part of a company's business has been carried on with intent to defraud creditors. Section 146 creates a restitutionary remedy when any of a company's property has been disposed of at an undervalue with intent to defraud its creditors. These sections create statutory remedies aimed at different aspects of the same kind of mischief. There is no apparent reason why the legislature should have intended that official liquidators be permitted to pursue the s.146 remedy in a foreign court but prohibited from pursuing the s.147 remedy in a foreign court. …"*

82. Although *Re ICP Strategic Credit Income Fund Ltd* is a decision of the Grand Court, I put this factor third, rather than first, because the application for sanction in that case was not opposed and the judgment was briefly expressed, so that Jones J's reasoning was not fully tested or set out; that both sides before me have criticised different facets of the judgment; and that, as explained later in this judgment, I have reached a different conclusion from Jones J on one aspect of the construction of s.147 of the Companies Act. Accordingly, its authoritativeness is questionable in certain respects.

83. For all of these reasons, I accept Mr Smith's argument that ss.145, 146 and 147 of the Companies Act are intended to be similar in purpose, and to provide a liquidator with a suite of tools to bring additional assets into the estate to improve outcomes for unsecured creditors. In my judgment, there is no principled basis for the relief under s.147 of the Act to fall outside the scope of a submission to the jurisdiction by filing a proof debt whilst the relief available under ss.145 and 146 is within it.

84. This conclusion is consistent with the approach of Lords Sumption, Toulson and Hodge JJSC in the Supreme Court in *Bilta v Nazir*, where they treated the corresponding provisions in the English legislation as being cognate. Having set out s.213 of the English Insolvency Act 1986, Lord Sumption JSC said:

> *"108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. …*

> *110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets."*

To similar effect, in their consideration of the extraterritorial effect of s.213 of the English Insolvency Act, Lords Toulson and Hodge JJSC at [214] treated ss.213, 238 and 239 (and s.133) as having the same statutory context and purpose and being subject to the same approach to construction.

85. Finally, I agree with Mr Smith's point that if the Defendant's position were correct that s.147 of the Companies Act is excluded from any submission to the jurisdiction, it would generate unfair and absurd results. Most obviously, a liquidator would be obliged to pay a dividend to a creditor based outside the Cayman Islands without the possibility of any recourse to s.147. This would be so even in the clearest case of the involvement of that creditor in blatant fraudulent trading before the collapse of the company, unless there exists some mechanism by which the liquidators could obtain leave to serve that creditor outside the Cayman Islands, which it is the Defendant's case that there is not.

e) *Limiting factors to avoid injustice*

86. As part of his argument against the conclusion that filing a proof of debt amounted to a submission to the jurisdiction for claims under s.147 of the Companies Act, Mr Thompson relies heavily on Sir Donald Nicolls V-C's indication in *Re Paramount Airways* [1993] Ch 223, which I discuss in detail later in this judgment, that he considered it was important that there were limiting factors to avoid potential injustice. Mr Thompson relies on the absence of one of those limiting factors in the Cayman Islands. I record here that Mr Smith disagrees that the limiting factors form part of the Vice Chancellor's *ratio* in *Re Paramount Airways* and argues that they merely supported the conclusion that he had already expressed that s.238 of the English Insolvency Act 1986 has extraterritorial effect.

86.1 The Vice Chancellor explained at 239F-H that there are two important safeguards built into the English statutory scheme. The first is that the court has an overall discretion whether or not to make any order for a contribution and could decide to make no order, even if relevant conduct were proven. The court could also do so where it is not satisfied that the defendant is sufficiently connected with England for it to be just and proper to make an order. The Grand Court has the same discretion when determining an application under s.147 of the Companies Act, so this safeguard, insofar as it is a requirement for s.147 to have extraterritorial effect, is provided for in the Cayman Islands.

86.2 The second safeguard identified by the Vice Chancellor is the need to obtain leave to serve the claim on the defendant out of the jurisdiction. This requires the applicant to persuade the court to exercise its discretion in the applicant's favour, applying the familiar test for obtaining leave to serve out. Sir Donald Nicolls V-C indicated that where the respondent is out of the jurisdiction, the court will consider whether the respondent has a sufficient connection with England.

86.3 Mr Thompson argues that if filing a proof of debt amounts to submission for the purpose of a claim under s.147 of the Companies Act, then that removes the second of the two protections against potential injustice that the Vice Chancellor considered were important in reaching his conclusion on the breadth of the meaning of "any person", albeit it is in practical terms the first filter in time that will be applied.

87. The short answer to Mr Thompson's complaint is that there is an equivalent filter in the Cayman Islands because a liquidator would always have to obtain sanction from the supervising court pursuant to s.110 of and Part 1 of Schedule 3 to the Companies Act to pursue the s.147 claim. In deciding whether to grant sanction, the judge should consider the strengths and weaknesses of the proposed claim, including whether there is likely to be a sufficient connection with the jurisdiction to justify making an order against the defendant. This is because the court will not authorise liquidators to take action that is unlikely to succeed or to result in a substantial recovery: to do so would be to waste the limited resources within the estate, which is, *ex hypothesi*, insolvent. The judge's review and authorisation on a sanction application is therefore equivalent to that on an application for leave to serve out.

88. Thus, if it is important that there are limiting factors to the breadth of the court's jurisdiction as envisaged by Sir Donald Nicholls V-C, then their essence is replicated in the Cayman Islands, albeit in a slightly different form.

89. This consideration applies also in relation to the question whether s.147 of the Companies Act has extraterritorial effect, which I address later in this judgment.

E.3 Form of proceedings used and consequences

90. As I have indicated, it is now common ground that CWR O.24, r.2(1) requires that where there are existing proceedings, an application under Part V of the Companies Act, which includes an application under s.147, must be brought by summons within the liquidation proceedings. For the avoidance of doubt, I agree that this is the effect of CWR O.24, r.2(1) and that the practice that appears to have been adopted in other cases in the Cayman Islands of bringing such applications by separate proceedings is wrong.

91. I note in passing that CWR O.24, r.4 requires that there should be only one court file in respect of any company in liquidation, which reinforces that any applications relating to an existing liquidation should be made within the liquidation proceedings.

92. The Plaintiffs' claim has therefore been commenced using the wrong procedural form. The Plaintiffs need the court to waive the irregularity under GCR O.2, r.1, having appropriate regard to GCR O.2, r.1(3) which indicates that the court should not wholly set aside proceedings merely on the ground that the wrong form of process was utilised.

93. I agree with Mr Thompson that the question whether the Court should waive the irregularity in the form of these proceedings is not as straightforward as the Plaintiffs suggest. Mr Thompson is correct that the court must look at the question whether the Plaintiffs have obtained an unfair or improper advantage by using an incorrect procedure and indeed are seeking to obtain by the backdoor that which they could not properly obtain by the front door.

94. In this regard, Mr Thompson focusses on the question of service of the process on the Defendant. As I have recorded, he submits that there is no mechanism within the CWR which permits service of a summons for relief under Part V of the Companies Act outside the Cayman Islands, and that the relevant GCR are not available because of the particular way in which CWR O.1, r.4(1) is drafted. On this footing, he argues that the Plaintiffs have obtained an improper procedural advantage by using a writ, which can be served outside the Cayman Islands with or without leave, whereas a summons under CWR O.24, r.1(2) could not be.

95. I disagree with Mr Thompson's conclusion for three reasons relating to the effect of the Defendant's submission to the jurisdiction, the effect of GCR O.1, r.2 in this context and the proper construction of CWR O.1, r.4(1).

a) *The effect of submission to the jurisdiction*

96. As I have explained earlier in this judgment, the effect of any submission to the jurisdiction is that the question of leave to serve outside the Cayman Islands becomes otiose. That is because the person in question has voluntarily made themselves amenable to the jurisdiction of the Grand Court, wherever they are based geographically; there is no longer any necessity for them to be served with process for the Grand Court to obtain *in personam* jurisdiction over them.

97. Thus, as a result of the Defendant's submission to the jurisdiction of the Grand Court by filing their proofs of debt, the Plaintiffs would have been entitled to serve a summons upon the Defendant within the liquidation proceedings without the need to obtain leave to serve out. As this would have been an ordinary summons within the liquidation proceedings, there would not have been any necessity for personal service upon the Defendant.

98. CWR O.24, r.2(2) provides that GCR O.32 applies to any summons for relief under Part V of the Companies Act. Amongst other matters, GCR O.32 requires that a summons must be served not less than 4 days before it is heard (unless it is a time summons or the court otherwise directs).

99. GCR O.32 says nothing about the manner in which service should take place. However, it is well established that the parties can agree their own mechanism for service: see *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105 referenced at paragraph 10/3/1 of the *Supreme Court Practice 1999*. I consider that by providing contact details in its proofs of debt, the Defendant was providing addresses to the Plaintiffs which the Plaintiffs were entitled to utilise to serve documents upon the Defendant related to the liquidation of Abraaj Holdings: that must have been the whole purpose of providing such addresses.

100. In my judgment, given the scope and effect of the Defendant's submission arising from submitting its proofs of debt, the Plaintiffs would have been entitled to serve a summons upon the Defendant

making a claim under s.147 of the Companies Act using the addresses specified in the Defendant's proofs of debt.

b) *The effect of GCR O.1, r.2*

101. The architecture of GCR O.1, r.2 is a little convoluted.

101.1 GCR O.1, r.2(1) states that the Grand Court Rules apply to all proceedings in the Grand Court, subject to the provisions in GCR O.1, r.2 that follow. The subsequent sub-rules then set out carve-outs and exclusions to the carve-outs.

101.2 GCR O.1, r.2(2) substantially limits the application of the GCR to criminal proceedings.

101.3 GCR O.1, r.2(4) excludes the application of the majority of the GCR to proceedings governed by other sets of Rules, including proceedings governed by the CWR.

101.4 However, GCR O.1, r.2(5) provides exceptions to the previous exclusions. So far as relevant, these are as follows:

> *"(5) Notwithstanding the provisions of paragraphs (2) to (4) of this rule —*
> *...*
> *(c) except in the case of petitions in proceedings governed by the Matrimonial Causes Rules (as amended and revised), every originating process or other document required to be served by these Rules or any other rules in connection with any civil proceedings shall be served in accordance with Orders 10 and 65 ..."*

101.5 For this purpose, *"any other rules in connection with any civil proceedings"* must include the CWR.

102. The overall effect of GCR O.1, r.2, so far as service is concerned, is therefore that GCR O.10 and GCR O.65 apply to any document required to be served by the GCR or by the CWR. This is so independently of whether CWR O.1, r.4(1) is available.

103. Consequently, the Plaintiffs would have been entitled to serve a summons issued pursuant to CWR O.24, r.2 on the Defendant in accordance with GCR O.65. Because of the Defendant's submission to the jurisdiction, the Plaintiffs did not need to obtain leave to serve the Defendant in the UAE pursuant to GCR O.11.

104. GCR O.65, r.5 deals with ordinary service. It permits service by leaving the document at the proper address of the person to be served, by post, by fax (subject to limitations set out in the rule) or as otherwise directed by the court. In addition, GCR O.65, r.5A permits service by email where an address for service by electronic means has been provided for that purpose.

105. Accordingly, even if I am wrong that the Plaintiffs were entitled to treat the addresses stated on the proof of debt as service addresses for the Defendant, the Plaintiffs would still have been entitled to serve a summons upon the Defendant making a claim under s.147 of the Companies Act by relying on GCR O.65.

c) *The proper interpretation of CWR O.1, r.4(1)*

106. CWR O.1, r.4 is entitled ***"Application of Grand Court Rules etc"***. Rule 4(1) is in the following terms:

> *"(1) Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O.11 shall apply to these Rules."*

107. As previously indicated, Mr Thompson submits that *"required to be served by these Rules"* is the crucial qualifying factor that must be satisfied in order for the Plaintiffs to gain access to the ability to serve out of the jurisdiction under GCR O.11 in accordance with the second sentence of CWR O.1, r.4(1). Mr Thompson says correctly that there is no language in CWR O.24 that specifies that a summons under CWR O.24, r.2 is *"required to be served"*. He argues that this would have been the end of the road for any attempt by the Plaintiffs to serve a summons on the Defendant within the liquidation proceedings.

108. Mr Smith responds that CWR O.24, r.2(2) expressly applies GCR O.32 to any summons issued under that rule. GCR O.32, r.3(2) then requires that every summons must be served on every other party, unless the court otherwise orders or the Rules otherwise provide. He says that this is sufficient to satisfy the "required to be served" rubric in CWR O.1, r.4(1) because the terms of GCR O.32, r.3(2) are incorporated into CWR O.24 by reference and are therefore to be treated as part of the CWR to that extent and for that purpose.

109. Whilst this is a slightly strained reading of CWR O.1, r.4(1), I consider that it is an acceptable one. Lewison LJ in *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847, said at [32]:

> *"32. Given the extent of the court's powers under section 423, I would a priori expect procedural rules to exist to enable the court to exercise those powers."*

To similar effect is the Privy Council's judgment in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37, an appeal from the Court of Appeal of the Bahamas. Lady Arden, giving the opinion of the Board, said:

> *"53. In the Board's judgment, the present case is close to* Seagull *because, as the Board has already held, section 160 is not territorially limited in its application (above, paras 37 to 42). As in* Seagull*, it would be odd, therefore, if proceedings under that section could not be served out of the jurisdiction in an appropriate case. Further, a person who voluntarily enters into a transaction as a result of which he becomes a creditor of a company must anticipate that, if the company is wound up, the liquidation may be conducted in the place of its incorporation."*

The case of *Seagull* to which Lady Arden referred is *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, where the English Court of Appeal held that it was permissible to serve an order for the public examination of a director out of the jurisdiction.

110. In my judgment, and in light of my conclusion below that s.147 of the Companies Act does have extraterritorial effect, it would be equally odd if there were no route by which a summons issued under CWR O.24, r.2 could be served out of the jurisdiction. To the extent that it is needed, the reading of CWR O.1, r.4(1) which I have described provides the mechanism.

d) A further point on the interpretation of CWR O.1, r.4(1)

111. Mr Thompson's argument that a summons for relief under Part V of the Companies Act is not subject to any rules on service, and therefore cannot be served out the jurisdiction, assumes that *"required to be served by these Rules"* qualifies each of the kinds of documents referred to in the opening clause of CWR O.1, r.4(1). In other words, CWR O.1, r.4(1) should be read as if it said:

> *"Every petition [required to be served by these Rules], [every] summons [required to be served by these Rules], [every] order [required to be served by these Rules] or [every] other document required to be served by these Rules …"*

Consequently, his argument is that *"required to be served by these Rules"* provides a threshold requirement for the availability of resort to the mechanisms in GCR Orders 10, 11 and 65 when considering service of petitions, summonses and orders.

112. I am not persuaded that Mr Thompson's construction of CWR O.1, r.4(1) is necessarily correct. In my view, it is reasonably arguable that on a natural reading of CWR O.1, r.4(1), *"required to be served by these Rules"* is an adjectival phrase used to identify the kinds of *"other document[s]"* to which CWR O.1, r.4(1) applies in addition to petitions, summonses and orders generally. The intention of CWR O.1, r.4(1) may be to bring within the universe of petitions, summons and orders for which recourse may be had to the service rules in GCR Orders 10, 11 and 65 any *"other documents required to be served by these Rules"*. Examples of documents referenced within the CWR which the Rules state must be served but where no mechanism for service is specified, so that they would fall within the scope of CWR O.1, r.4(1), include further particulars of a claim, a defence, a notice of appearance, various kinds of affidavit, a notice requiring attendance of a deponent for cross-examination, a notice requiring someone to submit a statement of affairs, a notice of rectification of the Register of Members and supporting report of the liquidator, and an application by a restructuring officer or liquidator to resign.

113. If this broader construction of CWR O.1, r.4(1) is correct, then resort to GCR Orders 10, 11 and 65 is available for all petitions, summonses, orders, and all other documents which the CWR require to be served. However, this particular point concerning the construction of CWR O.1, r.4(1) was not argued before me and I do not need to reach a conclusion on the issue. I therefore leave this point for debate and decision in a case where it is material to the outcome.

e) *Conclusion and relief*

114. In the circumstances, I conclude that the Plaintiffs have not obtained any improper procedural advantage by wrongly commencing these proceedings by way of writ instead of by way of ordinary summons within the liquidation. Accordingly, it is appropriate that I order that the proceedings should be treated as if commenced by way of summons issued within the liquidation proceedings. The cause number will therefore need to be updated to reflect this.

E.4 Validity of methods of service used

115. I have considered this issue already in the context of whether or not to waive the irregularity in the form of the proceedings used by the Plaintiff. In short, it is well established that the parties can agree

their own mechanism for service: see *Kenneth Allison Ltd*, and, in my judgment, that is the purpose of a creditor providing contact details on a form of proof of debt. Alternatively, the Plaintiffs would have been entitled to rely on GCR O.65, r.5 to serve a summons on the Defendant. There was no need for the Plaintiffs to obtain leave to serve the Defendant in the UAE or for the proceedings to be served on the Defendant by way of personal service. The methods of service utilised by the Plaintiffs were therefore appropriate and valid.

E.5 Extraterritorial effect of section 147 of the Companies Act

116. Mr Thompson disputes that s.147 of the Companies Act should be construed as having extraterritorial effect. He relies on this conclusion in support of his argument that the Defendant's submission to the jurisdiction resulting from submission of its proofs of debt does not include submission for the purposes of claims under s.147, which I have already rejected. In addition, he also relies upon this argument to support his position that service out of the Cayman Islands without leave is not permissible under GCR O.11 r.1(2).

a) The English approach

117. The relevant authorities on this point that were cited to me are *Ex parte Blain: Re Sawers* (1879) 12 Ch.D 522, *Clark v Oceanic Contractors Inc* [1983] 2 A.C. 130, *Re Paramount Airways* [1993] Ch 223, *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1, and *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847.

118. The principle expressed in *Ex parte Blain: Re Sawers* (1879) 12 Ch.D 522 at p.526 is that:

> *"... English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature could have ever intended to make such a man subject to particular English legislation."*

119. *Ex parte Blain* was considered by the House of Lords in *Clark v Oceanic Contractors Inc*, where Lord Scarman restated the principle in more modern language at p.145 as follows:

> *"Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only, and secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test."*

Lord Wilberforce memorably described the question at p.152 as being:

> *"Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?"*

Mr Thompson relies heavily on this approach to the construction of s.147 of the Companies Act. However, it is clear from the subsequent cases that I now consider that the law in England has moved on from *Ex parte Blain*.

120. The English Court of Appeal in *Re Paramount Airways* was concerned with an application by administrators of a company to set aside certain transactions with a bank in Jersey on the basis that they were at an undervalue. The administrators obtained leave to serve the bank in Jersey on the basis that *"entered into a transaction with any person at an undervalue"* in s.238 of the Insolvency Act 1986 meant exactly that, i.e. there was no limitation to be applied to *"any person"*. The bank successfully applied to set aside leave on the basis that s.238 did not have extraterritorial effect: the Registrar accepted the bank's argument that there was an implied limitation such that s.238 only applied to persons within England. The administrators appealed to the Court of Appeal. Sir Donald Nicholls V-C gave a judgment with which Taylor and Farquarson LJJ agreed. He concluded that in construing the expression *"any person"* in s.238, it was not possible to identify any limitation which represented the presumed intention of Parliament. The words therefore had to be given their literal unrestricted meaning, and s.238 should therefore be understood as having extraterritorial effect so that the court had jurisdiction to make an order under s.238 against a foreigner resident abroad.

121. The Vice Chancellor described the task as follows at p.233B:

> *"... the court is concerned to inquire as to the persons with respect to whom Parliament is presumed to have been legislating when using the expression, 'any person,' and in making that inquiry Parliament is to be taken to have been legislating only for British subjects or foreigners*

coming to the United Kingdom, unless the contrary is expressed (which it is not here) or is plainly implicit."

122. His analysis at p.235F-236C was that:

> *"... on its face, the legislation is of unlimited territorial scope. To be within the sections a transaction must possess certain features. For instance, it must be at an undervalue and made at a time when the company was unable to pay its debts, the company must be in the course of being wound up in England or subject to an administration order, and so on. If a transaction satisfies these requirements, the section applies, irrespective of the situation of the property, irrespective of the nationality or residence of the other party, and irrespective of the law which governs the transaction. In this respect the sections purport to be of universal application. The expression 'with any person' merely serves to underline this universality. It is, indeed, this generality which gives rise to the problem.*
>
> *In these circumstances one is predisposed to seek for a limitation which can fairly be read as implicit in the scheme of the legislation. Parliament may have been intending to legislate in such all-embracing terms. Parliament may have intended that the English court could and should bring before it, and make orders against, a person who has no connection whatever with England save that he entered into a transaction, maybe abroad and in respect of foreign property and in the utmost good faith, with a person who is subject to the insolvency jurisdiction of the English court. Indeed, he might be within the sections and subject to orders even though he had not entered into a transaction with the company or debtor at all. Such an intention by Parliament is possible. But self-evidently in some instances such a jurisdiction, or the exercise of such a jurisdiction, would be truly extraordinary.*
>
> *The difficulty lies in finding an acceptable implied limitation. Let me say at once that there are formidable, and in my view insuperable, objections to a limitation closely modelled on the formula enunciated in* Ex parte Blain*, 12 Ch.D. 522 as explained by Lord Scarman in* Clark v Oceanic Contractors Inc *[1983] 2 A.C. 130, 145. The implied limitation for which Hambros Jersey contended is riddled with such serious, glaring anomalies that Parliament cannot be presumed to have intended to legislate in such terms."*

123. The Vice Chancellor expressed at p.236C-H four primary objections to the limitation on the scope of s.238 suggested by the bank:

123.1 Using presence of the other party within the jurisdiction as the controlling factor for application of s.238 would be extremely capricious. A transaction with a foreigner who is usually resident within the jurisdiction would be outside the legislation if he happened to be abroad, or chose to be abroad, at the time the transaction was effected. Conversely, a foreign national resident abroad would find that the transaction with him was within the Act if, but only if, he happened to be physically present at the time of the transaction.

123.2 The bank's proposed criterion would mean that the legislation was unable to address a transaction by a debtor with an overseas company wholly controlled by him. The Vice

Chancellor indicated that siphoning money abroad in this way is a typical kind of case to which the legislation must have been intended to apply.

123.3 The bank's test would draw a distinction between the position of British subjects and others on a matter of substantive law affecting property transactions. It would be surprising if Parliament had such an intention.

123.4 The test would mean that there was no remedy in respect of a transaction with an overseas company, or a foreigner living within the country but abroad at the crucial moment, even if the subject matter was English land. Sir Donald Nicholls V-C considered that the bank's concession that such a case might be within the legislation demonstrated the weakness of the bank's position. He pointed out that if a transaction relating to English land is within the legislation, regardless of the identity or whereabouts of the other party to the transaction, why should this not be the case where the transaction related to shares in an English company, or Government stocks, or money in an English bank account? His conclusion was that this showed that the physical absence or presence of the other party at the time of the transaction was irrelevant to the appropriateness of the transaction being within the scope of consideration by the court under s.238.

124. Sir Donald Nicholls V-C went on to consider whether there was any other basis for there being an implied limitation on the scope of s.238 but concluded at 237G that there was none:

> *"In the end I am unable to discern any satisfactory limitation. I am unable to identify some other class. The case for some limitation is powerful, but there is no single, simple formula which is compelling, save for one expressed in wide and loose terms (e.g., that the person, or the transaction, has a 'sufficient connection' with England) that would hardly be distinguishable from the ambit of the sections being unlimited territorially and the court being left to display a judicial restraint in the exercise of the jurisdiction."*

125. Finally, of relevance, the Vice Chancellor said at 239C-E:

> *"…Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression 'any person' in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of* Ex parte Blain*, 12 Ch.D. 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."*

126. *Re Paramount Airways* was considered by the Supreme Court in 2016 in *Bilta (UK) Ltd v Nazir (No 2)*. Seven Justices of the Supreme Court sat to hear the appeal where the primary issues were the availability of *ex turpi causa* as a defence to a liquidator's attempts to pursue fraudulent trading claims against those involved in a VAT carousel fraud and whether the dishonesty of the company's directors could properly be attributed to the company itself. The question of the extraterritorial reach of s.213 of the English Insolvency Act was addressed only briefly but nonetheless authoritatively. All of the Justices agreed with the discussion of the extraterritorial effect of s.213 of the Insolvency Act in the judgments of Lord Sumption JSC, and of Lords Toulson and Hodge JJSC. Lord Sumption JSC's conclusion was that:

> *"106. This is a short point and a straightforward one. …*
>
> *107. … The appellants' case is that the provision has no extraterritorial effect and therefore no application to Jetivia which is domiciled in Switzerland or Mr Brunschweiler, who is domiciled in France. In effect the submission is that in subsection (2) 'any persons' means only persons in the United Kingdom. In my opinion this argument is misconceived.*
>
> *108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.*
>
> *109. The English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution. …*
>
> *110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets. None of them have any express limits on their territorial application. Another such provision, section 238, which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in* In re Paramount Airways Ltd *[1993] Ch 223. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213."*

127. To similar effect, Lords Toulson and Hodge JJSC said:

> *"212. The appellants accept that the English courts have jurisdiction in personam. Their challenge is to the court's subject matter jurisdiction as discussed by Hoffmann J in* Mackinnon v Donaldson Lufkin & Jenrette Securities Corpn *[1986] Ch 482, 493 and Lawrence Collins LJ in* Masri v Consolidated Contractors International (UK) Ltd (No 2) *[2009] QB 450, paras 30-31. It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary:* Ex p Blain; In re Sawers *(1879) 12 ChD 522, 526, James LJ. That principle has evolved into a question of interpreting the particular statute:* Clark v Oceanic Containers Inc *[1983] 2 AC 130, Lord Scarman, at p 145, Lord Wilberforce, at p 152;* Masri v Consolidated Contractors International (UK) Ltd (No 4) *[2010] 1 AC 90, Lord Mance, at para 10; and* Cox v Ergo Versicherung AG *[2014] AC 1379, Lord Sumption JSC, at paras 27-29. In* Cox *Lord Sumption JSC suggested that an intention to give a statute extraterritorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para 29.*
>
> *213. In our view section 213 has extraterritorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding up order is worldwide:* Stichting Shell Pensioenfonds v Krys *[2015] AC 616, paras 34, 38. The section provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business.*
>
> *214. In our view the Court of Appeal reached the correct decision in* In re Paramount Airways Ltd *[1993] Ch 223, in which it held that the court had jurisdiction under section 238 of IA 1986 (which empowers the court to make orders against any person to reverse transactions at an undervalue) to make an order against a foreigner resident abroad. Sir Donald Nicholls V-C expressed the view (p 239D-E) that Parliament did not intend to impose any limitation on the expression 'any person' in sections 238 and 239 of IA 1986 and that it must be left to bear its literal, natural meaning. We reach the same conclusion in relation to the use of that expression in section 213 for essentially the same reasons. The section, like sections 238 and 239 and also section 133 (which concerns the public examination of persons responsible for the formation and running of a British company) share the statutory context of the winding up of a British company.*
> *…*
>
> *215. The appellants argued that it was wrong that they should be required to defend themselves against a claim when it would only be after the substantive hearing that the court could decide whether to exercise its jurisdiction on the basis that the defendants were sufficiently connected with England. We do not agree. While the court which hears the claim will have to decide whether in all the circumstances the appellants are sufficiently connected with England, we think that the respondents have a good arguable case that they are. …"*

128. The increasingly international nature of commerce was also recognised by the English Court of Appeal in *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847, where Lewison LJ had to decide whether the applicable procedural rules allowed a claim under s.423 of the Insolvency Act 1986 concerning transactions at an undervalue to be served out of the jurisdiction. Having quoted Sir Donald Nicholls V-C's comments in *Re Paramount Airways* and noted Lord Sumption's characterisation of these as *"unanswerable"*, Lewison LJ went on to say:

> *"33. In construing the words of the paragraph it is also worth bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as 'exorbitant'. But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date."*

I consider that the last comment applies with even more force as regards the business and economic circumstances of the Cayman Islands.

129. Separately, Mr Thompson sought to argue that one of the reasons why s.147 of the Companies Act does not have extraterritorial effect is that there is no mechanism by which a summons seeking such relief can be served out of the jurisdiction. I agree with Mr Smith that such an argument approaches the question from the wrong end of the telescope and impermissibly seeks to use secondary legislation to interpret primary legislation, contrary to the principles set out by Lord Lowry in *Hanlon v Law Society* [1981] AC 124 at 193-194. Moreover, the GCR are not admissible as an aid to construction of s.147 of the Companies Act because they were not made contemporaneously with the Act and were made by a completely different body from the legislature, amongst other reasons.

b) The Cayman authority: Re ICP Strategic Credit Income Fund Ltd again

130. In *Re ICP Strategic Credit Income Fund Ltd* [2014] 2 CILR 1, Jones J reached similar conclusions to those in the English cases referenced. The company in question was in liquidation in the Cayman Islands and the liquidation had been recognised in the United States of America as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code. The liquidators had brought proceedings in the US against a US law firm. They alleged that the law firm had assisted in the commission of a fraud by the company's CEO and were pursuing claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud. The liquidators subsequently decided that they also wished to pursue an application under s.147 of the Companies Act for the law firm to contribute to the estate. They applied to the Grand Court for sanction to add the s.147 claim to the existing proceedings in the

US on the basis that the US Bankruptcy court would be likely to apply substantive Cayman law when determining the claim.

131. Of relevance on the issue of extraterritoriality, Jones J said:

> *"5. I think that s.147 should be read together with s.146. Both of these sections were introduced by the Companies (Amendment) Law 2007. Both sections deal with the consequences of fraudulent trading. Section 147 creates a compensatory remedy when any part of a company's business has been carried on with intent to defraud creditors. Section 146 creates a restitutionary remedy when any of a company's property has been disposed of at an undervalue with intent to defraud its creditors. These sections create statutory remedies aimed at different aspects of the same kind of mischief. There is no apparent reason why the legislature should have intended that official liquidators be permitted to pursue the s.146 remedy in a foreign court but prohibited from pursuing the s.147 remedy in a foreign court. This would be the result if the word 'Court' (which is used in s.147 only) is construed to mean the Grand Court of the Cayman Islands. It seems to me that this is an anomalous and illogical result which the legislature is inherently unlikely to have intended to achieve.*
>
> *6. Counsel for the JOLs also drew my attention to the fact that the s.147 remedy is modelled on the current English law. It is actually identical to s.213 of the English Insolvency Act 1986, except that the word 'court' (with a lower case 'c') is not used as a defined term to mean the English High Court. In* Bilta (UK) Ltd v Nazir (No. 2)*, it was held that s.213 of the English statute has extraterritorial effect and that the expression 'any person' includes those who are domiciled and resident out of the jurisdiction. I think that s.147 of the Cayman Islands statute must be construed in the same way. If the remedy was available only against persons resident or domiciled in this country, it would be stripped of much of its utility. If the remedy is available against foreigners, as I think it is, then it is inherently unlikely that the legislature would have intended that official liquidators be prohibited from seeking the remedy in foreign courts.*
>
> *7. For these reasons, I concluded that, on its true construction, official liquidators are not prohibited from pursuing s.147 claims in foreign courts. The alternative of pursuing the claim in this court is not open to the JOLs in the circumstances of this case. DLA carries on its practice in the United States. The firm does not have any presence in the Cayman Islands. The damage suffered by the funds resulted from acts committed in New York and advice given by a lawyer working in the firm's New York office. In these circumstances, there would appear to be no basis under GCR, O.11 upon which this court could exercise jurisdiction over DLA. It follows that any proceedings against DLA for a s.147 remedy will have to be commenced, if at all, in the United States."*

132. Mr Thompson points out that the liquidators' application for sanction was unopposed and suggests that the question of the extraterritoriality of s.147 of the Companies Act is unlikely to have been fully argued before Jones J. He therefore invites me to conclude that *Re ICP Strategic Credit Income Fund Ltd* was wrongly decided, or at least that I should not follow it.

133. I disagree with Mr Thompson on this point. Jones J was an extremely knowledgeable judge of the Financial Services Division with vast experience in the Cayman Islands in private practice and on the bench. Moreover, his comments in *Re ICP Strategic Credit Income Fund Ltd* regarding the

extraterritorial effect of s.147 chime with those of the English judges in the cases that I have referred to above.

c) *Conclusion on extraterritorial effect of s.147 of the Companies Act*

134. In my judgment, the English cases addressing the interpretation of the English legislation comparable to ss.145, 146 and 147 of the Companies Act also reflect the law of the Cayman Islands.

134.1 It is significant that Part V of the Companies Act was introduced as a replacement for the previous text of Part V in 2007 and took effect from 2009, as Mr Thompson noted in his submissions. Part V of the Companies Act therefore does not have the same lengthy legislative history in the Cayman Islands as do the corresponding provisions in the UK legislation even though Part V is clearly inspired by the English legislation. It is therefore likely that Parliament intended s.147 to be interpreted similarly to the way expressed by Sir Donald Nicolls V-C in *Re Paramount Airways*, reflecting the state of the law at the time that Part V of the Companies Act was enacted and came into force, i.e. without an implied limitation on its territorial scope along the lines of *Ex parte Blain*.

134.2 Moreover, it is important to bear in mind that, well before 2007, the Cayman Islands had become a major global financial services centre offering the ability for businesses around the world to incorporate exempt companies in the Cayman Islands in order to provide them with corporate structures suitable for international business of all kinds. With this comes a significant likelihood that insolvency and fraud touching such corporate structures will have an international element.

134.3 Providing the environment for a successful financial services centre requires, amongst other things, robust mechanisms for dealing with insolvency and fraud, on which international clients can depend. Given that the whole nature of exempt companies under the Companies Act is that their business must be carried on outside the Cayman Islands, it is inevitable that most of the transactions that they enter into, if not all, will be with entities operating outside the Cayman Islands, even if some of those entities might be other Cayman Islands exempt companies.

134.4 Against that background, in my judgment it is extremely likely that Parliament intended ss.145, 146 and 147 of the Companies Act to have extraterritorial effect so that liquidators

have appropriate powers to pursue those involved in transactions or conduct that have the effect of diminishing the value of an insolvent estate wherever they are located and wherever the transaction in question took place. It would make absolutely no sense if ss.145, 146 and 147 were limited to persons and transactions within the Cayman Islands.

134.5 The old approach to limiting extraterritoriality because of the perception that the court would be exercising an exorbitant power, and the risk of overstepping the court's geographical limits, has become far less of a concern due to the growth of international cross-border trade, the globalisation of the world economy and the speed with which digital transactions can be effected.

135. Similarly to Jones J in *Re ICP Strategic Credit Income Fund Ltd*, I therefore conclude that s. 147 of the Companies Act was intended to, and does, have extraterritorial effect.

E.6 Availability of GCR O.11, r.1(2)

136. Whether it would be permissible for the Plaintiffs to serve process out of the jurisdiction without leave under GCR O.11, r.1(2) does not arise for decision in this case in light of the conclusions I have already expressed. However, I will address it since both parties argued the point and my decision on it may become relevant if either party were to pursue an appeal.

137. GCR O.11, r.1(2) allows service out of the jurisdiction without leave when:

> *"... every claim made in the action begun by the writ is one which by virtue of a Law or these Rules the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction ..."*

138. GCR O.11, r.9 extends the application of GCR O.11, r.1 to petitions and summonses, which are the two methods that claims under s.147 of the Companies Act should be commenced, as follows:

> *"(1) Subject to O.73, r.8, and O.102, rr.16 and 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to the service of a writ.*
>
> *(2) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these Rules or under any Law be served without leave."*

139. It appears that there is no Cayman authority on the question whether this allows a claim under s.147 of the Companies Act to be served out of the jurisdiction without leave other than the passing comments of Jones J in *ICP Strategic Credit Income Fund Ltd*. On this point, Mr Thompson relies on the English cases of *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 and *Re Banco Nacional de Cuba* [2001] 1 WLR 2039. Mr Smith responds with *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847.

140. In *Re Harrods (Buenos Aires) Ltd* the Court of Appeal was concerned with RSC O.11, r.1(2), which was in substantively the same terms as GCR O.11, r.1(2). At page 116 of the report, Dillon LJ stated that to be within RSC O.11, r.1(2), the statute must at least indicate on its face that it is expressly contemplating proceedings against persons who are not within the jurisdiction of the court. He added that it is not enough that the statute gives a remedy in general cases without expressly contemplating a foreign element.

141. Lightman J (as he then was) in *Re Banco Nacional de Cuba* said that it is *"quite clear"* that a claim under s.423 of the English Insolvency Act 1986 that a transaction was at an undervalue is not one where service out is permissible without leave. However, other than quoting the passage from Dillon LJ's judgment in *Re Harrods (Buenos Aires) Ltd* summarised in the previous paragraph, the learned judge did not give any reasons for reaching that conclusion.

142. *Orexim Trading Ltd* also concerned s.423 of the Insolvency Act 1986. The English Court of Appeal had to consider whether the court had power to grant leave to serve an application under s.423 of the Act outside England and Wales: it was not argued that the claimant did not need leave to do so. The judge at first instance accepted the defendant's argument that *Re Harrods (Buenos Aires) Ltd* applied and that s.423 did not expressly authorise proceedings to be brought against persons outside England and Wales, so leave should be set aside. The Court of Appeal disagreed and expressly did not follow *Re Harrods (Buenos Aires) Ltd* and *Re Banco Nacional de Cuba*, and instead applied *Re Paramount Airways Ltd* to conclude that:

> *"48. Mr Gruder, supported by Mr Pearce, argued that in order to come within the 'gateway' the enactment in question must expressly authorise the bringing of proceedings against persons outside England and Wales. … I do not accept this argument. First, it will be a rare statute that explicitly authorises proceedings to be brought against persons outside England and Wales. … Third, I do not accept that there is a significant difference for these purposes between a statute which explicitly provides for proceedings to be brought against persons outside England and*

> *Wales, and one which on its true construction does that. Fourth, in the case of section 423, the* Paramount Airways case *[1993] Ch 223 holds that section 423 'on its face' does allow such proceedings to be brought, subject to the safeguards to which Sir Donald Nicholls V-C referred."*

143. I accept Mr Smith's argument that, applying that approach, s.147 of the Companies Act does permit proceedings to be brought against persons outside the geographical territory of the Grand Court and so, to the extent that *Re Harrods (Buenos Aires) Ltd* remains good law and is appropriate to be applied in the Cayman Islands, neither of which in my view is certain, s.147 of the Act satisfies the test in *Re Harrods (Buenos Aires) Ltd* for determining whether the proceedings can be served out of the jurisdiction without leave.

144. I have set out earlier in this judgment Lewison LJ's indication in *Orexim Trading Ltd* at [32] that, given the extraterritorial nature of the statutory provisions being considered, he would *a priori* expect procedural rules to exist to enable the court to exercise those powers. I agree and adopt that position regarding s.147 of the Companies Act. It would be surprising for s.147 to be available in circumstances where the respondent has filed a proof of debt so that leave to serve out is not required, but not to be available where the respondent has not done so, whether that is because they are not a creditor at all or because they have made a strategic decision not to file a proof of debt because of the risk that a s.147 claim might ensue. In my judgment, GCR O.11, r.1(2) does provide the appropriate route by which a s.147 claim can be served upon a respondent who has not filed a proof of debt.

145. If this were not the case, a liquidator would have to pursue such a claim in the respondent's home jurisdiction. I consider that there are a number of difficulties with this, which demonstrate that it cannot be the correct approach.

146. First, it would result in inconsistency in application between different cases because the ability to pursue the claim would depend on whether or not the respondent's home jurisdiction would (a) recognise and (b) apply Cayman Islands law. The parties did not adduce evidence as to the countries that would or would not apply Cayman Islands law to enable a claim under s.147 of the Companies Act to be advanced, but it was suggested in argument by Mr Smith that the willingness of the US Bankruptcy Court to apply foreign law under Chapter 15 of the US Bankruptcy Code is unique. I do not need to reach a conclusion on this as it is sufficient that there would be a real question in

many cases whether the foreign court would apply Cayman Islands law, leading to the risk of capricious outcomes depending on extraneous factors.

147. Secondly, it would depend on having to read the term "Court" in s.147 of the Companies Act, which is specifically defined in the Act to mean the Grand Court of the Cayman Islands, as meaning the court in the respondent's home jurisdiction. This was the solution adopted by Jones J in *ICP Strategic Credit Income Fund Ltd*. He reached that conclusion because he considered that otherwise the remedy under s.147 would only be available where the respondent is resident or domiciled in the Cayman Islands. At paragraph 7 of his judgment, Jones J said that it was not possible for the liquidators to pursue a s.147 claim against the law firm in question in the Cayman Islands because the firm did not have a presence in the Islands, the conduct in question occurred in the US and the damage was suffered in the US. It appears from his recital of those factors that Jones J considered that the claim did not get through any of the gateways specified in GCR O.11, r.1(1) to obtain leave to serve out. He does not appear to have considered whether the liquidators were entitled to rely on GCR O.11, r.1(2) to serve a summons out of the jurisdiction without leave on the basis that s.147 has extraterritorial effect, as he had already concluded. It is unlikely in the extreme that that possibility was argued before him, given that the liquidators were positively seeking sanction to be permitted to add the s.147 claim to the existing proceedings in the US Bankruptcy Court, for which Jones J had already given sanction. With some diffidence, I therefore disagree with Jones J that it would not have been possible for the liquidators to have brought the s.147 claim in that case before the Grand Court, and that it is therefore necessary to stretch the meaning of "Court" in s.147 of the Companies Act so that it means any court in the world. In my view, such an interpretation unjustifiably ignores that "Court" is a defined term in the Act and stretches the meaning of "Court" beyond breaking point. It also has the unwelcome consequence of having to rely upon a court in another jurisdiction to exercise a discretionary power that Parliament intended to be entrusted to the Grand Court.

148. Thirdly, I agree with Mr Smith that it would significantly undermine the central role of the court supervising the liquidation. Where a company is incorporated in the Cayman Islands, any liquidation should take place within that jurisdiction and should be under the overall control of the Grand Court. There are two helpful Cayman Islands judgments where this was addressed.

148.1 In *Re Silver Base Group Holdings Ltd* (unreported, 8 December 2021), Doyle J said:

> *"6. The Company is incorporated under the laws of the Cayman Islands. I have full regard to the importance of the laws of the place of a company's incorporation and the international recognition of light-touch provisional liquidators appointed for restructuring purposes. …*
>
> *7. Ian Fletcher puts it well at paragraph 30-054 when he refers to the long accepted fundamental principle that the law of the place of a company's incorporation is primarily, 'possibly immutably', competent to control all questions concerning a company's initial formation and subsequent existence. Dicey Rule 179 sets out the common law and private international law position that the authority of a liquidator (and I would add a provisional liquidator) appointed under the law of the place of incorporation should be recognised in other jurisdictions."*

Doyle J's reference to *"Ian Fletcher"* is to his book, *The Law of Insolvency 5th Edition (2020)*.

148.2 In the earlier case of *Re Philadelphia Alternative Asset Fund Ltd* (unreported, 22 February 2006), where the issue was whether a members' winding up in the Cayman Islands should give way to a receiver appointed in the US, Henderson J said, starting at page 2, line 22:

> *"When the petitioners made the decision to invest in a company domiciled in the Cayman Islands they would have had a reasonable and legitimate expectation that, in the event a winding up was necessary it would occur in the Cayman Islands under the applicable law here. …*
>
> *This is the fund's domicile. The established rule is that any winding up must take place here although, if there are assets in a foreign jurisdiction, ancillary proceedings abroad may be necessary: see* North Australian Territory Co v Goldsborough, Mortand Co. *(1889) 61 LT 716. Counsel have been unable to cite any precedent either here or elsewhere for what Mr Hodgson now asks. I am unaware of any instance of an English or Cayman Court declining to make a winding up order in the place of incorporation of a company for the sake of deferring to a foreign receivership in respect of that company. The court of the country of domicile is the 'principle court to govern' a liquidation: per Vaughn Williams, J. in* Re English, Scottish and Australian Chartered Bank *[1893] 3 Ch. 385, at 394. The fund having been incorporated here, this is the proper court for the management of its liquidation: see* International Credit v Adham *[1994] 1 BCLC 66 at 71. These principles are so clear and of such longevity that it would be wrong in principle to deny the petitioners this winding up order. That remains so whether there will be some duplication of effort and wasted cost or not."*

Henderson J reached this conclusion notwithstanding that the winding up petition was supported by a minority of the members only, most of the assets were in the US and the majority of the members appeared to be content to await the outcome of the US receivership.

148.3 This approach is also consistent with the statement of Sir James Bacon CJ in *Ex parte Robertson; Re Morton* (1875) L.R. 20 Eq. 733, that the court supervising the liquidation has power to decide:

> *"… all questions of whatever kind, whether of law, fact, or whatever else the Court may think necessary in order to effect complete distribution of the bankrupt's estate."*

149. In *Orexim Trading Ltd* Lewison LJ indicated that it was an important part of his reasoning in concluding that a claim for relief under s.423 of the English Insolvency Act could be served out of the jurisdiction that the safeguards described by Sir Donald Nicolls V-C in *Re Paramount Airways Ltd* remained in place, and that these included the need to obtain leave to serve out. As I have already found in this judgment, the need for a liquidator wishing to pursue a claim under s.147 of the Companies Act to obtain prior sanction from the Grand Court judge supervising the liquidation provides an equivalent safeguard. As a result, my conclusion that an application under s.147 of the Act may be served out under GCR O.11, r.1(2) without leave does not offend the need to guard against the risk of potential injustice to the respondent by having to answer the liquidator's claim, if that is a necessary requirement.

F. Disposal

150. For the reasons that I have set out in this judgment, I conclude as follows.

150.1 Submission to the jurisdiction is separate and distinct from establishing the jurisdiction of the court over a person by service of process.

150.2 Where the court's jurisdiction over a defendant is based on voluntary submission, the procedural rules on service out are irrelevant because the court's jurisdiction is not founded on service.

150.3 Lodging a proof of debt in a winding up process is a submission to the jurisdiction of the court with conduct of the winding up. It is irrelevant whether the proof of debt has been admitted, adjudicated or a dividend paid.

150.4 Submission to the jurisdiction by lodging a proof of debt is effective for all purposes connected with the winding up of the company, including a claim under s147 of the Companies Act.

150.5 To the extent that it is necessary that the ability to invoke s.147 of the Companies Act requires limiting factors, they are provided in the Cayman Islands by the need for a liquidator to obtain sanction to pursue the application and the ability of the judge

determining the application to consider the respondent's connection with the Cayman Islands when deciding whether or not to make any order.

150.6 Any application under Part V of the Companies Act must be brought by summons within the liquidation proceedings: CWR O.24, r.2(1). The practice that appears to have been grown up of bringing such applications by separate proceedings is wrong.

150.7 The Plaintiffs' claim was commenced using the wrong procedural form. However, the Plaintiffs have not obtained any improper procedural advantage by issuing a writ instead of an ordinary summons within the liquidation proceedings. The Court will therefore waive the irregularity and treat the proceedings as having been commenced by summons within the liquidation proceedings. The cause number will need to be updated to reflect this.

150.8 Service of the claim upon the Defendant was valid and effective.

150.9 Section 147 of the Companies Act does have extraterritorial effect.

150.10 On its true construction, s.147 of the Companies Act provides for claims to be brought against persons outside the Cayman Islands.

150.11 As a result, a claim under s.147 of the Companies Act can be served out of the jurisdiction without leave under GCR O.11.

151. I invite counsel to indicate within 14 days of finalisation of this judgment whether they require a further hearing to deal with consequential matters or whether they will invite me to deal with those aspects on the basis of short written submissions.

Dated 20 May 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT