Neutral Citation Number: [2017] EWCA Civ 83

Case No: A3/2015/2509

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Carr, DBE
CL-2014-001023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2017

Before :

LORD JUSTICE BRIGGS
LORD JUSTICE SALES
and
LORD JUSTICE HENDERSON

- -

Between :

VINCENT AZIZ TCHENGUIZ & ORS	**Appellants**
- and -	
(1) KAUPTHING BANK HF	**Respondents**
(2) JOHANNES RUNAR JOHANNSSON	

- -
- -

Christopher Hancock QC, Jonathan Crystal, David Caplan and Charlotte Tan
(instructed by **McGuire Woods London LLP**) for the **Appellants**
Robert Miles QC, Jeremy Goldring QC and Tom Gentleman
(instructed by **Travers Smith LLP and Clifford Chance LLP**) for the **Respondents**

Hearing dates : 1 and 2 February 2017

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Approved Judgment

Lord Justice Briggs :

1. This appeal concerns the relationship between two groups of mutual arrangements ("Instruments") between European states relating to aspects of jurisdiction, recognition, enforcement of judgments and applicable law in connection with civil, commercial and insolvency proceedings. The first group (which I will call "Jurisdiction Instruments") seek to establish a common basis for the allocation of jurisdiction in civil and commercial matters between the courts of the participating Member States, as the basis for the mutual recognition and enforcement throughout the Member States of the judgments in those matters given by the court or courts to which jurisdiction is allocated. They have a common ancestry in the 1968 Brussels Convention, and in their current form consist now of the Judgments Regulation (EU) No.1215/2012 between the Member States of the EU, and the Lugano Convention signed on 30th October 2007, which applies across the slightly wider membership of the European Economic Area ("EEA").

2. The second group of Instruments (which I will call the "Insolvency Instruments") operate within the field of what is commonly called cross-border insolvency, by establishing a common scheme for the allocation of jurisdiction, recognition and applicable law in relation to bankruptcy, winding-up and analogous insolvency proceedings. The Insolvency Regulation (EC) Regulation No. 1346/2000 applies within the EU, in relation to cross-border insolvency generally, but excluding the insolvency of certain financial institutions, including credit institutions. The Directive No. 2001/24/EC on the reorganisation and winding up of credit institutions ("the Winding-up Directive") establishes a similar, but more rigorous, common scheme in relation to the reorganisation and winding up of credit institutions throughout the EEA.

3. The particular relationship which calls for examination on this appeal is that between the Lugano Convention and the Winding-up Directive, although substantially the same issues may arise as between the Judgments Regulation and the Insolvency Regulation. The issues for determination on this appeal have arisen in the following way. On 27 November 2014 Mr Vincent Tchenguiz and three associated entities issued High Court proceedings in England claiming damages for the tort of unlawful means conspiracy against five defendants, the fourth of which was Kaupthing Bank HF, an Icelandic Bank by then the subject of winding up proceedings in Iceland, which is a member of the EEA, although not a member of the EU. It was decided by the judge, Carr J, and is now common ground, that the English court has jurisdiction under the Lugano Convention in relation to that claim, against all the defendants. The first defendant, Grant Thornton UK LLP is domiciled in England, as are the second and third defendants, Messrs Akers and Hamedani, partners in Grant Thornton. The fourth defendant is Kaupthing and the fifth defendant, Mr Johannsson, was an Icelandic domiciled member of Kaupthing's Winding-up Committee. The harmful events are alleged to have taken place in England. Thus, Articles 2, 5.3 and 6.1 of the Lugano Convention together confer jurisdiction on the English courts. Since there is no *lis alibi pendens* in the courts of any other Member State, the English courts are the only courts with jurisdiction in relation to the claim under the Lugano Convention.

4. The fourth defendant Kaupthing Bank HF ("Kaupthing") was until 2008 the largest bank in Iceland. It is a credit institution within the meaning of Article 1 of the Winding-up Directive. Winding-up proceedings (within the meaning of Article 2) were instituted in Iceland, by means of a moratorium order made by the District Court of Reykjavik on

24 November 2008 and a winding-up Order on 22 November 2010. It is common ground that Iceland is the "home Member State" for all purposes connected with the application of the Winding-up Directive to Kaupthing. It is therefore also common ground that Icelandic insolvency law is the law applicable to the winding-up of Kaupthing within the meaning of Article 10 of the Winding-up Directive, so as to determine in particular the "effects of winding-up proceedings on proceedings brought by individual creditors" under Article 10.2(e), and that Mr Tchenguiz's English conspiracy proceedings are proceedings brought by him as an individual creditor of Kaupthing.

5. The judge decided, but it remains in issue on this appeal, that the effect of Icelandic insolvency law was to prohibit the bringing of the Appellants' claims by proceedings against Kaupthing in any court within the EEA at any time after the commencement of its winding-up, to require creditors' claims to be submitted to Kaupthing's Winding-up Committee, and for disputes about them to be determined by the District Court in Reykjavik. It followed that, although the Lugano Convention conferred jurisdiction on the English courts in relation to the Appellants' conspiracy claims against all the defendants, including Kaupthing, their pursuit of that claim in the English courts against Kaupthing contravened Icelandic insolvency law, applicable throughout the EEA, including England, and she therefore dismissed the claim against Kaupthing. It continued against the other defendants, including Mr Johannsson, for whose alleged participation in the conspiracy Kaupthing is said to be vicariously liable. I should add that all the allegations of wrongdoing by the defendants are vigorously denied, and that the merits of the dispute remain to be determined.

6. The Appellants' case on this appeal falls into two main parts. First, it is said that the judge's conclusion involved a mis-reading of the Winding-up Directive. On its true interpretation, its provisions for identifying applicable law were not designed to go so far as to negate the allocation of jurisdiction in relation to a civil or commercial matter achieved by the Lugano Convention. The Winding-up Directive should be read as subject to an implied limitation to that effect.

7. The second part of the Appellants' case asserts that, even if the Winding-up Directive may have that effect, the provisions of Icelandic bankruptcy law did not in fact do so, being limited in scope purely to domestic effect within the territory of Iceland.

8. Of these two parts of the Appellants' case, the first is much the more important, and took up most of the argument. It was submitted for the Appellants that its resolution would require a reference to the Court of Justice. There is also a free standing appeal on costs, with which I deal at the end of this judgment.

The Relevant Texts

The Lugano Convention

9. The Preamble contains the following recitals:

> "Determined to strengthen in their territories the legal protection of persons therein established.

> Considering that it is necessary for this purpose to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements."

10. Under the heading "Scope", Article 1 provides, so far as is relevant, as follows:

> "1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> 2. The Convention shall not apply to:
>
> a) …
>
> b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
>
> c) …"

Under "Jurisdiction", Article 2 provides:

> "1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that state.
>
> 2. …"

Under "Special Jurisdiction", Article 5 provides:

> "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:
>
> …
>
> 3. In matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where a harmful event occurred or may occur;"

Article 6 provides:

> "A person domiciled in a State bound by this Convention may also be sued:
>
> 1. Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is

> expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; "

The Insolvency Regulation

11. Although not directly applicable, the following provisions of the Insolvency Regulation are material, both because they contain text substantially the same as that in the Winding-Up Directive which has been interpreted in relevant authorities, and because, as a whole, the Insolvency Regulation is part of the framework within which the Winding-Up Directive needs to be read and understood.

12. The Insolvency Regulation contains the following relevant recitals:

> "(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.
>
> (7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions on Accession to this Convention.
>
> …
>
> (11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On

> the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.
>
> …
>
> (23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings."

13. Article 1, headed "Scope", provides as follows:

> "(1) This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
>
> (2) This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings."

Article 2, headed "Definitions", provides that for the purposes of the Insolvency Regulation:

> "(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;"

Article 3, headed "International Jurisdiction", provides:

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

> (2) Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
>
> (3) …"

Article 4 is headed "Law Applicable" and contains the following relevant provisions:

> "(1) Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.
>
> (2) The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
>
> (a) …
>
> (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
>
> …"

Other items in the non-exhaustive list of particular examples in Article 4.2 include determination of the assets forming part of the insolvent's estate, the powers of the insolvent debtor and liquidator, the lodging of claims and the treatment of claims arising after the opening of insolvent proceedings, the rules governing the verification and admission of claims and the rules governing the distribution of proceeds from the realisation of assets and the ranking of claims.

14. Articles 5 to 15 contain a number of exceptions or partial exceptions from the applicability of the *lex concursus*. They include third parties' rights in rem, aspects of set-off, rights arising from reservation of title, contracts relating to immoveable property and contracts of employment. The exceptions conclude with Article 15, headed "Effects of insolvency proceedings on lawsuits pending":

> "The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending."

15. There are detailed provisions in the Insolvency Regulation governing the relationship between main proceedings and secondary proceedings. As generally explained in

recital (11), the provision for secondary proceedings tempers the rigour of the universalism which would otherwise be achieved by permitting only main insolvency proceedings. Their relevance to the interpretation of the Winding-up Directive is only that, because it makes no provision for secondary proceedings in relation to credit institutions, it imposes a more rigorous universalism than does the Insolvency Regulation.

The Winding-up Directive

16. As noted above, the Winding-up Directive establishes for the reorganisation and winding-up of credit institutions a regime for jurisdiction, recognition and applicable law which, although closely modelled on the Insolvency Regulation, is more rigorous in its effect. Its principal departure from the structure of the Insolvency Regulation is that it permits no secondary insolvency proceedings. Thus jurisdiction for reorganisation and winding-up is confined exclusively to that of the home Member State which is, broadly speaking, the state where the credit institution has its head office and pursuant to the law of which it is regulated.

17. The Winding-Up Directive contains the following relevant recitals:

> "(3) This Directive forms part of the Community legislative framework set up by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions. It follows therefrom that, while they are in operation, a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted.
>
> (4) It would be particularly undesirable to relinquish such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings.
>
> …
>
> (16) Equal treatment of creditors requires that the credit institution is wound up according to the principles of unity and universality, which require the administrative or judicial authorities of the home Member State to have sole jurisdiction and their decision to be recognised and to be capable of producing in all the other Member States, without any formality, the effects ascribed to them by the law of the home Member State, except where this Directive provides otherwise.
>
> (17) The exemption concerning the effects of reorganisation measures and winding-up proceedings on certain contracts and rights is limited to those effects and does not cover other questions concerning reorganisation

> measures and winding-up proceedings such as the lodging, verification, admission and ranking of claims concerning those contracts and rights and the rules governing the distribution of the proceeds of the realisation of the assets, which are governed by the law of the home Member State.
>
> …
>
> (30) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending are governed by the law of the Member State in which the lawsuit is pending, by way of exception to the application of the *lex concursus*. The effects of those measures and procedures on individual enforcement actions arising from such lawsuits are governed by the legislation of the home Member State, in accordance with the general rule established by this Directive."

18. It will be apparent from a comparison between recital (11) of the Insolvency Regulation and recitals (16) and (17) of the Winding-up Directive that a more rigorous form of universalism is contemplated for credit institutions, than for insolvent persons generally.

19. Title III is headed "Winding-up Proceedings" and Part A applies to credit institutions having their head offices within the Community. Article 9, headed "Opening of winding-up proceedings – Information to be communicated to other competent authorities" provides as follows:

> "(1) The administrative or judicial authorities of the home Member State which are responsible for winding up shall alone be empowered to decide on the opening of winding-up proceedings concerning a credit institution, including branches established in other Member States.
>
> A decision to open winding-up proceedings taken by the administrative or judicial authority of the home Member State shall be recognised, without further formality, within the territory of all other Member States and shall be effective there when the decision is effective in the Member State in which the proceedings are opened.
>
> (2) The administrative or judicial authorities of the home Member State shall without delay inform, by any available means, the competent authorities of the host Member State of their decision to open winding-up proceedings, including the practical effects which such proceedings may have, if possible before they open or otherwise immediately thereafter. Information shall be communicated by the competent authorities of the home Member State."

Article 10, headed "Law applicable" is in almost identical terms to Article 4 of the Insolvency Regulation. It provides as follows:

> "(1) A credit institution shall be wound up in accordance with the laws, regulations and procedures applicable in its home Member State insofar as the Directive does not provide otherwise.
>
> (2) The law of the home Member State shall determine in particular:
>
> (a) …
>
> (e) the effects of winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending, as provided for in Article 32;"

The list of non exhaustive examples of the application of the home Member State's insolvency law is substantially the same as the list in Article 4.2 of the Insolvency Regulation, although the omission of the first (in that Regulation) means that the lettering of paragraph 2 is different.

20. Title IV of the Winding-up Directive contains, in Articles 20 to 33, a series of exceptions from the applicability of the law of the home Member State which is similar, but not identical, to that in the Insolvency Regulation. In particular, Article 32, headed "Lawsuits pending", provides as follows:

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

21. The Winding-up Directive is, by its terms, expressed to be applicable only within the EU, but it was extended to apply throughout the EEA by the Decision of the EEA Joint Committee number 167/2002.

22. In accordance with Article 34 of the Winding-up Directive, effect was given to it in England by the Credit Institutions (Reorganisation and Winding-Up) Regulations 2004 ("the 2004 Regulations"). Paragraph 5 provides as follows:

> "(1) An EEA insolvency measure has effect in the United Kingdom in relation to –
>
> (a) any branch of an EEA credit institution,
>
> (b) any property or other assets of that credit institution,

> (c) any debt or liability of that credit institution as if it were part of the general law of insolvency of the United Kingdom"

Paragraph 5(6) defines an "EEA insolvency measure" as including "directive winding-up proceedings which have effect in relation to an EEA credit institution by virtue of the law of the relevant EEA State".

By paragraph 2, "directive winding-up proceedings" means winding-up proceedings as identified in Article 2 of the Winding-up Directive.

23. As the judge noted, the 2004 Regulations do not use quite the same phraseology as the Winding-up Directive, but neither she nor the parties to this appeal suggest that this makes any difference to a conclusion as to the issues of interpretation of the Winding-up Directive. I agree.

Provisions of Icelandic Insolvency Law

24. It is common ground that Iceland is the home Member State, the administrative or judicial authorities of which are responsible for the winding-up of Kaupthing pursuant to Article 9 of the Winding-up Directive. Accordingly the laws, regulations and procedures applicable to that winding-up pursuant to Article 10 are those of Iceland.

25. For present purposes the relevant provisions of Icelandic insolvency law are to be found in the Icelandic Bankruptcy Act number 21 of 1991, which are made applicable to the winding-up of an Icelandic credit institution by the Icelandic Financial Undertakings Act number 161/2002 ("the FUA").

26. Article 116 of the Icelandic Bankruptcy Act provides (in agreed English translation) as follows:

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

There follow detailed provisions, beginning in Article 117, requiring creditors' claims to be notified first to the trustee in bankruptcy. Article 171 then provides that:

> "If a dispute arises relating to bankruptcy proceedings which, according to the provisions of this Act, the trustee in bankruptcy shall refer to the district court for a resolution, or if the trustee considers that a district court resolution is needed for resolving any other disputes that may arise in the course of bankruptcy proceedings, he shall direct a written request to this effect to the district court that appointed him."

There is then provision in Article 174 for the judge of that district court ("the appointing court") to decide on the time and place of a court session, and to give directions for the filing and subsequent conduct of those proceedings.

27. There was a debate between the parties' experts before the judge as to whether these provisions had purely domestic or extra-territorial effect, to which I will have to return. It is sufficient for present purposes to note that the Icelandic District Court is the only court of first instance in which civil claims may be made, and that it was the District Court in Reykjavik which was the appointing court for the purposes of Article 171.

Analysis

28. The judge concluded, after hearing expert evidence, that the effect of Icelandic insolvency law, applied throughout the EEA by reason of Article 10 of the Winding-up Directive, was that individual creditors of Kaupthing were prohibited from bringing civil proceedings, after the commencement of Kaupthing's winding-up, anywhere within the EEA (including but not limited to Iceland), and that such claims could only be pursued against Kaupthing by notifying them to the Winding-up Committee, to be accepted, rejected or (in the event of a dispute) determined as part of the liquidation process.

29. The first, and main, submission by Mr Hancock QC for the Appellants was that, on the assumption (which he disputed) that Icelandic law might have that effect, it was inconsistent with established jurisprudence about the way in which the Lugano Convention and the Winding-up Directive (and the Judgments Regulation and the Insolvency Regulation) dovetailed together to interpret the Winding-up Convention as permitting the insolvency law of the home Member State to alter the allocation of jurisdiction within the EEA over civil and commercial proceedings in any way. The provisions in the Winding-up Convention as to applicable law (and in particular Article 10) should be interpreted subject to the implied limitation that the insolvency law of the home Member State should have no such jurisdictional effect upon civil and commercial proceedings within the scope of the Lugano Convention.

30. The judge did not accept that Article 10 of the Winding-up Directive was a jurisdictional provision in any sense. Rather she described the submission which I have just summarised as one which confuses questions of jurisdiction with questions of choice of law: paragraph 76. At paragraph 78 she said that:

> "This flaw cuts across all the claimants' submissions on the applicability and scope of the [Winding-up Directive]".

Referring to the submission by leading counsel for the claimants (then Mr Romie Tager QC) that this distinction was merely a play on words, she said, at paragraph 77:

> "I do not consider that it is. Jurisdiction and choice of law rules are quite separate and discrete notions. They are treated separately and discretely in the instruments. Whilst the application of choice of law rules may create a bar to proceeding in a particular jurisdiction, that does not lead one to equate the two concepts."

31. Although the distinction between provisions as to jurisdiction and provisions as to applicable law is of fundamental importance, I would for my part prefer to start from the basis that the insolvency law of one or more of the EEA home Member States may indeed impact upon civil and commercial proceedings of a type not excluded from the

Lugano Convention by its Article 1.2(b) in a way which can fairly be described as jurisdictional in effect. By that I mean an effect which decides, as between the courts of different Member States, which of them may undertake the determination of the civil and commercial matter in question. Viewed on its own, I rather doubt whether Article 116 of the Icelandic Bankruptcy Act does have that effect. It simply prohibits the taking of any civil proceedings, in any Member State including Iceland, against a credit institution after its winding-up has commenced. For this purpose I assume, without having to decide at this stage, that Article 116 has extra-territorial effect throughout the EEA.

32. But when Article 116 is read together with Articles 117 and 171 they do (if extra-territorial in effect) appear to have jurisdictional effect, in the sense that they do not only prohibit the bringing of proceedings about civil and commercial matters against the credit institution anywhere within the EEA, but also require any disputes about such claims ultimately to be determined by the Reykjavik District Court in Iceland, with an appeal to the Icelandic Supreme Court (see Article 179). The Icelandic courts are thereby, in effect, given exclusive jurisdiction to determine such disputes.

33. It is therefore in my view appropriate to address head on the question whether the Winding-up Directive should be interpreted as permitting the applicable law of the home Member State to have that jurisdictional effect, which would plainly produce a different result from the allocation of jurisdiction contemplated by the Lugano Convention, ignoring for the moment the insolvency proceedings affecting the respondent credit institution.

Interpretation of the Winding-up Directive

34. Mr Hancock's submissions on this main issue may, I hope without distortion, be summarised as follows:

    i) There is a wealth of domestic and European authority to the effect that jurisdiction as between Member States is allocated by the Jurisdiction Instruments (i.e. the Lugano Convention and the Judgments Regulation) and the Insolvency Instruments (i.e. the Insolvency Regulation and the Winding-up Directive) in a way that dovetails together seamlessly, with neither conflict or lacuna, in relation to civil and commercial matters.

    ii) The effect of that dovetailing is (in relation to insolvency) that proceedings either are or are not within the excluded class identified by Article 1.2(b) of the Lugano Convention. If particular proceedings are within the exclusion, then jurisdiction is governed by the Insolvency Regulation or, in relation to insolvent credit institutions, the Winding-Up Directive. If proceedings are not within that excluded class, then jurisdiction in relation to them (as between the courts of different Member States) is entirely governed by the Lugano Convention.

    iii) To permit provisions as to applicable law in the Insolvency Instruments (here the Winding-Up Directive) to have a jurisdictional effect (in the sense described above) upon civil and commercial matters not within the Article 1.2(b) excluded class would be to undermine the certainty as to where a claimant should sue, which is a main objective of both these types of instrument.

iv) Effect may be given to the need to preserve and enforce the dovetailing principle either by excluding from the ambit of Article 10 of the Winding-up Directive those provisions of the home Member State's insolvency law which affect jurisdiction over civil and commercial matters, or to treat the reference in Article 10.2(e) to "proceedings brought by individual creditors" as if it were limited to enforcement proceedings, rather than proceedings for the resolution of a dispute about the merits.

35. I accept a significant part of Mr Hancock's analysis, and indeed his starting point is not in dispute. But I am far from being persuaded that his submissions lead to the conclusion for which he contends. In particular, as I shall explain, they wholly ignore the purposes of the Insolvency Instruments (both the Insolvency Regulation and the Winding-up Directive) clearly set out in their recitals and in a wealth of English and European authority, and the conclusion for which Mr Hancock contends would be gravely destructive of the fulfilment of those purposes.

36. There is indeed ample authority supportive of Mr Hancock's points (i) and (ii). The concept of dovetailing as between the Jurisdiction and Insolvency Instruments takes its origin from the report of Professor Doctor Peter Schlosser on the Brussels Convention in 1978. At paragraph 53, under the heading "Bankruptcy and similar proceedings", he says:

> "Leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975, deliberately adopted the principal terms 'bankruptcy', 'compositions' and 'analogous proceedings' in the provisions concerning its scope in the same way as they were used in the 1968 Convention. To avoid, as far as possible, leaving lacunae between the scope of the two Conventions, efforts are being made in the discussions on the proposed Convention on bankruptcy to enumerate in detail all the principal and secondary proceedings involved and so to eliminate any problems of interpretation."

That endeavour finally manifested itself in Annex A to the Insolvency Regulation, in which the relevant types of insolvency proceedings, excluded from the Judgments Regulation and the Lugano Convention are listed, Member State by Member State, within the EU, although not the EEA.

37. Examples of the recognition of the dovetailing principle by the Court of Justice may be found in *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] 1 WLR 2168, at paragraphs 18-23 and 28 of the Judgment, and in *F-Tex SIA v Lietuvos-Anglijos UAB* "*Jadecloud-Vilma*" (Case C-213/10) [2013] Bus LR 232 at paragraphs 20-30 and 47-48 of the Judgment. Neither of these cases, however, concerned the extent, or limitations upon the extent, of the international application of the insolvency law of the home Member State, either under Article 4 of the Insolvency Regulation or Article 10 of the Winding-up Directive.

38. Mr Hancock placed particular emphasis on the decision of the Court of Justice in *German Graphics Graphische Maschinen GmbH v Alice Van De Schee* (Case C-292/08) [2009] ECR I-8421. It concerned a contest between the potentially different effects of the Judgments Regulation and the Insolvency Regulation upon proceedings by an individual creditor of a company in winding-up to enforce its rights as seller to that company under a reservation of title clause in the relevant contract. Mr Hancock submitted that its outcome was illustrative of his submission that an Insolvency Instrument should be narrowly interpreted if its effect would otherwise be to undermine jurisdiction established by a Jurisdiction Instrument (in that case the Judgments Regulation). The seller was a German company and the buyer a Dutch company, which went into liquidation on the order of the Utrecht District Court. The seller sought to enforce its reservation of title over the machinery which had been sold, which was by then situated in the Netherlands, by bringing proceedings in Germany, and seeking to have them recognised in the Netherlands. A dispute in the Dutch courts about whether the German judgment in the seller's favour should be recognised in the Netherlands led to the reference to the CJEU. The arguments of the Dutch buyer's liquidator, which the Court of Justice considered and rejected, were only that:

    i) the reservation of title claim was a form of insolvency proceedings within the exception of Article 1.2(b) of the Insolvency Regulation and;

    ii) since the relevant assets were located in the home Member State, Article 4(2)(b) of the Insolvency Regulation re-inforced that conclusion. Article 4.2(b) applies the law of the home Member State so as to determine:

        > "The assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;"

    It was not suggested that Dutch insolvency law contained any provision which prohibited civil proceedings being brought against a company in liquidation, nor did the Court of Justice therefore consider whether, if it did, that prohibition would be over-ridden by the reservation of title exception in Article 7 of the Insolvency Regulation.

39. The Court of Justice decided only that proceedings enforcing a contractual reservation of title against an insolvent buyer were civil and commercial proceedings within the scope of the Judgments Regulation, and not insolvency proceedings excluded by Article 1.2(b), notwithstanding Article 4.2(b) of the Insolvency Regulation, and regardless of the fact that the assets in question were located in the home Member State. That unsurprising conclusion is not of itself of any assistance to the Appellants, because their claim is not based on reservation of title, a well-recognised exception from the universality of the *lex concursus*, nor does it fall within any of the other express categories of exception which are, as I have said, broadly the same in both the Insolvency Regulation and the Winding-up Directive. But nor did the court's conclusion that the seller's claim fell within the scope of the Judgments Regulation provide any relevant assistance to the Appellants on this appeal, since it is now common ground that their claim against Kaupthing also falls within the scope of the Lugano Convention.

40. The nearest which the Court of Justice came to expressing any general views about the relationship between the Judgments Regulation and the Insolvency Regulation is to be found in paragraphs 23 and 24 of the judgment, as follows:

> "23. Those recitals indicate the intention on the part of the Community legislature to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of Regulation No 44/2001 and, consequently, to provide that the article should be broad in its scope.
>
> 24. Such an interpretation is also supported by the first sentence of the sixth recital in the preamble to Regulation No 1346/2000, according to which that regulation should, in accordance with the principle of proportionality, be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings."

41. In my judgment these observations provide no assistance at all in resolving the present question, which is whether the insolvency law of the home Member State has the effect of prohibiting the bringing of proceedings within the scope of the Lugano Convention, when those proceedings are not within any of the Articles which exclude the application of the *lex concursus*. This is not because the Court of Justice was considering different Insolvency and Jurisdiction Instruments, but because that issue was simply never raised nor argued, let alone decided.

42. There is also a consistent stream of English authority which recognises the general effect of the dovetailing principle. As the judge noted (at paragraph 56), it may be said to have started with my decision in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) and been fortified by the decision of David Richards J in *Fondazione Enasarco v Lehman Brothers* [2014] 2 BCLC 662 at paragraph 28.

43. Mr Hancock took us to *Gibraltar Residential Properties Limited v Gibralcon 2004 SA* [2010] EWHC 2595 (TCC), a decision of Edwards Stuart J sitting in the Technology and Construction Court, in 2010. The claimant GRPL, a Gibraltarian company, had engaged the defendant Gibralcon, a Spanish company, to carry out a property development in Gibraltar, pursuant to a contract applying the law of Gibraltar and submitting disputes to the exclusive jurisdiction of the English courts. Gibralcon went into a insolvency process in Spain, following which GRPL issued proceedings in England challenging certain adjudications under the building contract, on the merits. Gibralcon then challenged the English courts' jurisdiction, relying on its Spanish insolvency process. The judge rejected that challenge, on the basis that jurisdiction in relation to the proceedings under the building contract was governed by the Judgments Regulation, rather than by the Insolvency Regulation. In so doing, he quoted and accepted the submission of Mr Gabriel Moss QC for GRPL, in the following terms:

> "The question of which Member State of the EU has jurisdiction to hear these two sets of proceedings, in view of the lack of any

> material insolvency issue being raised by them, is governed by the Jurisdiction and Judgement Regulation 44/2001 ("J + J Regulation") and not the insolvency regulation 1346/2000. This is a point of EU law clearly established in a binding way by the ECJ and also by English case law. It does not depend on any expert evidence. Article 23 of the J + J Regulation awards exclusive jurisdiction to the UK on the basis of the exclusive English jurisdiction clauses agreed between the parties. That is the end of the matter."

44. The judge qualified his acceptance of that submission by saying, at paragraphs 13 to 15, that he would apply it only to proceedings about the merits, rather than to any process of enforcement. He was pressed by counsel for Gibralcon with, but rejected, submissions based on Article 4.2(f) of the Insolvency Regulation (which corresponds with Article 10.2(e) of the Winding-up Directive). He heard expert evidence about the question whether Spanish insolvency law had extra-territorial effect so as to deprive a foreign court of jurisdiction, and concluded that it applied only to proceedings which were themselves insolvency proceedings (and so excluded from the Judgments Regulation), rather than to proceedings brought by individual creditors. The relevant provisions of Spanish insolvency law were not, of course, the same as those of Icelandic law, and it is not clear whether, as here, they included any general prohibition upon the bringing of civil proceedings following the commencement of the winding-up of the insolvent defendant.

45. Carr J (at paragraphs 92 to 95) dealt with the *Gibralcon* case simply by saying that it was concerned purely with questions of jurisdiction, rather than applicable law, so that it fell within her general criticism of the Appellants' case as based upon an illegitimate mixing up of different concepts. Again, I would prefer to address the question head on, in particular because of the passages in *Gibralcon* (whether or not cited to the judge) which record reliance being placed upon the applicable law provisions of Article 4 of the Insolvency Regulation.

46. In my judgment, to the extent that the *Gibralcon* case can be interpreted as going beyond a simple re-statement of the dovetailing principle, for example by suggesting that nothing in the Insolvency Instruments may be permitted to have a jurisdictional effect upon proceedings for which jurisdiction is allocated by the Jurisdiction Instruments, then it is simply wrongly decided. It may well be that the outcome can be justified by reference to the judge's findings about the limited extra-territorial effect of Spanish insolvency law, about which I need express no conclusion. It does not appear that the judge in *Gibralcon* was taken to the materials which I am about to describe, about the fundamental purposes of the Insolvency Instruments, which lead me unhesitatingly to the opposite conclusion.

47. Mr Hancock sought to bolster his general submission that, wherever there is an effect on jurisdiction, the Jurisdiction Instruments prevail over the Insolvency Instruments, by suggesting that this is a natural consequence of the application of the principle that the particular prevails over the general. He submitted that the "general" in the present context is the extension of the home Member State's insolvency law across the EU (or the EEA), and that a small sub-set of the effects of that extension was jurisdictional effect. That was, he said, the "particular", so that the relevant Jurisdiction Instrument should prevail over the effects of the *lex concursus* wherever the two came into

collision. He sought to ground that submission in *Syska v Vivendi Universal SA* [2008] EWHC 2155 (Comm) [2009] Bus LR 367. As will appear, that decision of Christopher Clarke J is a central obstacle in the way of Mr Hancock's submission that Article 10.2(e) applies only to enforcement proceedings. It may or may not be an example of the application of the maxim that the particular prevails over the general, but it comes nowhere near supporting Mr Hancock's attempt to bend it to his purposes. In my view, the relevant "general" in the present context is the framework for the allocation of jurisdiction over civil and commercial matters throughout the EEA provided for by the Lugano Convention, and the "particular" is the specific effect upon that jurisdiction which may be created by the application of the law of the home Member State, where the relevant defendant to a civil or commercial claim is not merely in an insolvency process, but is a credit institution in such a process.

48. I must now set out my reasons for concurring with the conclusion reached by the judge, with my added gloss that, even if, contrary to her view, the application of Icelandic insolvency law to the Appellants' claim is jurisdictional in its effect, it is nonetheless clearly the correct consequence of applying the Winding-up Directive, and Article 10.2(e) in particular, to proceedings such as theirs, falling within the scope of the Lugano Convention. At this stage I do so upon the necessary assumption that Icelandic bankruptcy law is, in itself or by virtue of the Winding-up Directive, given extra-territorial effect beyond Iceland.

49. The starting point is a full appreciation of the purposes of both the Insolvency Regulation and the Winding-up Directive. At the heart of all winding-up proceedings is the fundamental objective of collecting in the assets of the insolvent entity, and distributing them fairly (usually *pari passu*) among its creditors subject to preferential, security and other rights giving priority to particular persons or classes, and to the proprietary rights of third parties, so far as they are not over-ridden by relevant insolvency law. Both the orderly getting in of those assets and their *pari passu* distribution after the determination and satisfaction of prior claims, require constraints to be placed upon the uninhibited pursuit of individual claims, whether those claims are merely for enforcement of rights about which there is no dispute, or claims which the office holder of the insolvent entity wishes to challenge on the merits. The moratorium upon the unrestrained pursuit of such claims imposed by most modern systems of insolvency law is not merely designed to prevent the well-heeled, well-advised and fast-moving individual creditor from obtaining an unfair share of the assets in a rush to judgment, but to enable the insolvency office-holder to address the myriad claims and demands upon the insolvent entity in an orderly, proportionate and economic manner, and to apply the usually limited resources available for the purpose to those activities, including the dispute of claims on the merits, calculated as being most likely to serve the interests of the creditors.

50. In the cross-border context, that is where the insolvent entity has branches, assets, creditors and debtors in more than one contracting state, it is obvious that a unitary insolvency process best serves those objectives. After an early but unsuccessful attempt to devise a harmonised insolvency law across all Member States, independent from the different systems in existence in each, the framers of the Insolvency Regulation fastened upon the universal application of the *lex concursus* (the insolvency law of the home Member State) as the only practicable means of achieving unity in cross-border insolvency. In relation to ordinary insolvency under the Insolvency Regulation, this is

achieved only partially, because of the scope for recognising secondary insolvency proceedings in Member States where the insolvent entity has branches and assets: see recital (11) to the Insolvency Regulation. In the context of insolvent credit institutions, this unity is achieved with greater rigour, because secondary insolvency proceedings are prohibited: see recitals (3), (4), (16) and (17) of the Winding-up Directive, which show how this more rigorous approach to unity flows from a recognition that the head office and branches of a credit institution forms a single entity, subject to the supervision of the competent authorities of the home Member State.

51. In relation to insolvency generally, the general purpose of the application of the *lex concursus* is well summarised in paragraph 7.03 of Bork and Van Zwieten's commentary on the European Insolvency Regulation (in a passage contributed by Sir Richard Snowden):

> "The rationale for the general application of the lex concursus is that the collective nature of insolvency proceedings that lies at the heart of the Regulation is only possible if there is a single law generally applicable to questions of both substance and procedure in those proceedings. Further, the unification of the applicable law and the law of the forum in which the proceedings are taking place will minimise characterisation difficulties and promote the administrative efficiency and cost-effectiveness of the process. This is highly desirable given that creditors will (by definition) already have lost money or will be at risk of doing so, and will be eager to see a speedy and cheap process take place to minimise the time taken to distribute the maximum amount of the remaining assets of the debtor to them."

52. Although the Winding-up Directive removes the derogation from universalism constituted by the provision for secondary insolvency proceedings, found in the Insolvency Regulation, it maintains the second group of exceptions, slightly re-worded but otherwise substantially unchanged, namely those regarded by the Member States as necessary to give effect to local law about particular kinds of claims, rights and issues, such as reservation of title, third parties' rights in rem, employment contracts and certain aspects of set-off. These are all clearly and precisely defined as exceptions to the general rule, enshrined in Article 10 of the Winding-up Directive, that the law of the home Member State should apply. It is striking that the examples of the application of that principle in Article 10.2 are non-exclusive, whereas the exceptions, in Articles 20 and following, are precisely defined. This is consistent with a fundamental principle of construction of European instruments, namely that general provisions are to be generously interpreted, and exceptions strictly construed.

53. On its face, Article 10.2(e) of the Winding-up Directive applies the insolvency law of the home Member State, so far as it concerns the effect of winding-up proceedings on proceedings brought by individual creditors, without limitation. Winding-up law is invariably a mixture of substantive and procedural law, and it is obvious that this phraseology is apt to embrace those provisions of home Member State winding-up law which are designed to impose a moratorium, in whatever form, upon proceedings by individual creditors.

54. It is in my view equally plain that the "proceedings brought by individual creditors" cannot sensibly be a reference only to insolvency-type proceedings within the exclusion from the Lugano Convention in Article 1.2(b). If they were insolvency proceedings then jurisdiction in relation to them would be confined to the home Member State by virtue of Article 9. The clear intent must be to extend the insolvency law of the home Member State to all kinds of proceedings brought by individual creditors, and indeed mainly to proceedings within the scope of the Lugano Convention. It is a normal (although not perhaps invariable) characteristic of insolvency proceedings that they are collective in nature, whereas it is a normal (but again not invariable) characteristic of civil and commercial proceedings within the scope of the Lugano Convention that they are brought by individuals or small groups, but not classes of creditor or stakeholder.

55. To insert a supposed limitation, based on the dovetailing principle, that the apparently unconstrained effect of Article 10.2(e) upon proceedings brought by individual creditors is subject to an exception wherever the home Member State's insolvency law is jurisdictional in its effect, would be to create a large, ill-defined and wholly unstated exception with potentially disastrous consequences for the unity and universalism which is characteristic of both the Insolvency Regulation and the Winding-up Directive, and which is more rigorous in the latter. When considering its effect upon creditors based in different Member States, it would hardly create a level playing field, as it should between persons intended to be treated equally. In the present case, it would constrain Icelandic creditors by confining them to the process which I have described (namely lodging claims with the liquidation committee and having disputes determined in the court which appointed it) leaving unaffected creditors in every other Member State, who would be constrained, if at all, only by such greater or lesser form of moratorium as was to be derived from their local law.

56. It needs to be borne in mind that, as is again apparent from the recitals, the reason for the exceptions to the uniform application of the *lex concursus* is that the local laws of different Member States make important and different provision in relation to the particular matters falling within the exceptions, and that there are local public policy reasons why that law should prevail. The obvious example is employment contracts. By contrast, a supposed implied exception designed to preserve in full claimants' rights to sue under the Lugano Convention would not serve or recognise differences in local law at all. Rather, that exception would serve to prioritise a harmonised allocation of jurisdiction throughout the Member States. This is a completely different objective than that which is served by the express exceptions. It is nowhere mentioned in the recitals to either the Insolvency Regulation or the Winding-up Directive. Had it been agreed, it could with the greatest of ease have been spelt out in an express exception, and any justification for it duly recited.

57. I would regard this analysis as flowing clearly and inevitably from a simple reading of the provisions of the Winding-up Directive in the context of the recitals as to its purpose, without the need for authority. But there is a wealth of authority, again both European and domestic, which supports it.

58. The main European authorities cited to us were *Commission v AMI Semiconductor Belgium & Ors* (Case C-294/02) [2005] ECR I-2178, in which the Court of Justice applied this analysis by analogy, at paragraphs 69-70 of the judgment, and *LBI hf (formerly Landsbanki Islands hf) v Kepler Capital Markets SA* [2013] (Case C-85/12), judgment of 24 October 2013, a case about the effect of the Winding-up Directive in

connection with the insolvency of another Icelandic credit institution in which, at paragraphs 49 to 58, the Court of Justice emphasises the need to construe the exceptions to the application of the *lex concursus* strictly, so as to avoid calling into question the effectiveness of the principle of universality established by the Directive.

59. Most of the relevant English authority is to be found in first instance decisions, but the fact that they are not binding on this court by no means detracts from their persuasive force. The case most nearly in point is *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611(Comm) [2013] 1 BCLC 73, in which the conclusions and reasoning of Gloster J (as she then was) are, in my view, compelling. Carr J quoted them *in extenso* in the present case. They will not be improved by summary, and would better be read in full in the Law Reports.

60. As the judge said, Gloster J's analysis was followed in *Isis Investments Limited v Oscatello Investments Limited* [2013] EWHC 7 (Ch) and by this court in [2013] EWCA Civ 1493, and in *LBI hf v Stanford* [2014] EWHC 3921 (Ch).

61. To those authorities I would add the judge's analysis of the previous authorities in the present case, at paragraphs 52 to 71, with which I broadly agree.

62. My reasoning thus far is sufficient to lead me to the conclusion, at a level of confidence which makes it unnecessary to refer the question to the CJEU, that the Appellants' first and main ground of appeal, based upon an implied restriction upon the application of the law of the home Member State wherever it would have a jurisdictional effect, must be rejected.

63. The Appellants' alternative ground, as an approach to the interpretation of the Winding-up Directive, was that the application of the insolvency law of the home Member State to proceedings brought by individual creditors under Article 10.2(e) was limited to enforcement proceedings, with no application at all to proceedings on the merits. Mr Hancock advanced this submission with becoming diffidence because, as he readily acknowledged, it ran flatly contrary to every relevant authority on the point, his only refuge being that his precise submission, based on the primacy to be given to the Lugano Convention on matters of jurisdiction, had not previously been addressed head on. It is, in my view, one of those genuinely hopeless submissions which need only be dealt with summarily, and Mr Hancock is to be commended for having deployed it with extreme brevity.

64. I have already sought to explain, in the broadest terms, how the effective conduct of all stages of an insolvency process is liable to be undermined not merely by the uninhibited pursuit of enforcement proceedings, but also by a free for all in terms of proceedings by individual creditors on the merits, uncontrolled by the office holders and judicial authorities responsible for the conduct of the liquidation. There is, plainly, no hint of any support for it in the language either of the recitals or operative provisions of the Winding-up Directive, or, for that matter, in the less rigorous Insolvency Regulation. It is another of those supposedly implied exceptions, the recognition of which would run counter both to the purposes of the Insolvency Instruments, and to basic principles of interpretation of European instruments.

65. The European and domestic authorities are unanimous in rejecting this argument. In the *AMI Semiconductor* case, the Court of Justice concluded (albeit by analogy) that it

ought not to entertain proceedings by the Commission against defendants in liquidation, on the grounds of prohibitions in the relevant systems of insolvency law in the home Member States, even though those proceedings were about the merits, rather than by way of enforcement. In the *Syska* case, Christopher Clarke J held that "proceedings brought by individual creditors" within Article 4.2(f) of the Insolvency Regulation encompassed proceedings on the merits as well as proceedings by way of execution, and his decision was upheld on appeal: [2009] EWCA Civ 677, albeit on slightly different, but not inconsistent, grounds. Both in that case, and in the *Kepler* case, it was decided that the "lawsuits pending" exception (in Article 10.2(e) and Article 32) only applied to proceedings on the merits, so that enforcement proceedings pending at the commencement of the liquidation would still be governed by the insolvency law of the home Member State. Since lawsuits pending is an exceptional sub-category carved out of "proceedings brought by individual creditors" it is inevitable that those proceedings include proceedings on the merits.

Issues as to the extra-territorial effect of Icelandic Bankruptcy Law

66. This much more confined part of the appeal also breaks down into two sections. The first raises the question whether Icelandic insolvency law (and its equivalents in all other home Member States) is "internationalised" by virtue of the Winding-up Directive (and the Insolvency Regulation) regardless whether, viewed separately, it has purely domestic or both domestic and extra-territorial effect. The judge concluded that it was internationalised in that sense, and the Appellants' third ground of appeal challenges that conclusion.

67. The second question is whether, viewed on its own, the relevant part of Icelandic insolvency law, namely Article 116 of the Bankruptcy Act, is or is not purely domestic in character. Having read the detailed expert evidence (although there was no live expert evidence or cross examination), the judge concluded that it was not so limited. The Appellants' fourth ground of appeal is that the judge was wrong on this point as well. As a matter of analysis, if the judge's conclusions are upheld on either of those points, then this part of the appeal must fail. In my view, for the reasons which follow, she was correct on both.

68. The answer to the first of those questions flows in my view inexorably from the analysis of the purposes and terms of the insolvency instruments, as described above. The very essence of the universalism sought to be achieved by making the insolvency law of the home Member State applicable across the territory of all Member States depends upon that being achieved in relation to every potential home Member State in which a credit institution is regulated and has its head office regardless whether, apart from those instruments, that State's insolvency law would be anything more than domestic in its application. If that were not so, then the creation of a universally applicable law (subject to strict exceptions) for the insolvency of credit institutions, and other entities, would fall at the first hurdle, in relation to any home Member State the insolvency law of which did not already have cross-border effect.

69. This is well illustrated by reference to English insolvency law which is indeed not generally extra-territorial in its effect, viewed separately from the insolvency instruments. Thus for example, the English statutory prohibition on creditors bringing proceedings against a company being wound up by the court does not have extra-territorial effect: see *Bloom v Harms Offshore GmbH & Co KG* [2010] Ch 187, at

paragraphs 21 and 24, per Stanley Burnton LJ. But whenever this question of the extra-territoriality of English insolvency law has been considered through the prism of the Insolvency Instruments, the court has easily concluded that it has precisely the extra-territorial effect, as the applicable law for the purposes of the insolvency proceedings throughout the territory of all Member States, that is expressly provided by Article 10 of the Winding-up Directive and Article 4 of the Insolvency Regulation.

70. Thus in *Kaupthing HF v Kaupthing Singer & Friedlander Limited (In Administration)* [2012] EWHC 2235 (Ch) [2014] 1 BCLC 13, at paragraphs 39 to 42, Sir Andrew Morritt C had no difficulty in rejecting the notion that, merely because English insolvency law was, in principle and in origin, not extra-territorial in effect, it did not become extra-territorial when applied pursuant to the Winding-up Directive. His reference in those paragraphs to the CIR is to the 2004 Regulations, which implement that Directive. He therefore concluded that the moratorium upon proceedings imposed in the administration of KSF in England had the effect of prohibiting the commencement of proceedings without the consent of the English court or of the administrators, in England and in Iceland. This was because, under the Winding-up Directive, English insolvency law is applicable in Iceland in relation to the winding-up of a credit institution in England, even though, apart from the Directive, it would only be domestic in its effect.

71. This analysis was followed and applied by Nugee J (in relation to the provisional liquidation of a company with its centre of main interests in England, so as to prohibit the prosecution of proceedings against the company in Luxembourg, as well as in England, because of Article 4 of the Insolvency Regulation), in *Re ARM Asset Backed Securities (No 2)* [2014] EWHC 1097 (Ch); [2014] BCC 260.

72. That approach is in my view entirely consistent with the approach of the CJEU in the *Kepler* case (C-85/12) in which, at paragraph 22 of the Judgment, the court said this (in relation to the Winding-up Directive):

> "At the outset, it must be borne in mind that, as is apparent from recital 6 in its preamble, Directive 2001/24 seeks to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised. That objective, and that of guaranteeing equal treatment of creditors, laid down in recital 16 to that directive, require that the reorganisation and winding-up measures taken by the authorities of the home Member State have, in all the other Member States, the effects which the law of the home Member State confers on them."

Although the Court of Justice was not directly addressing the question whether this consequence applied to the law of a home Member State which was not, apart from the Directive, extra-territorial in effect, the generality of that statement appears not to depend in any way upon the territorial scope of the insolvency law of the home Member State, viewed apart from the Directive.

73. The same thinking must have lain behind the "reality check" carried out by Gloster J in the *Lornamead* case at paragraph 95(iii) to (v) of her judgment. In my view, the unanimous approach to this issue in all the English first instance authorities to which I

have referred is plainly correct. The result is that, even if Icelandic insolvency law is, other than when being viewed through the prism of the Insolvency Instruments, only domestic in its effect, it is, as I would describe it, internationalised by virtue of Articles 10 and 4 respectively of those two Instruments. It is common ground that regulation 5 of the 2004 Regulations reflects and gives effect to Article 10 of the Winding-up Directive.

74. This process of internationalisation may be looked at conceptually in two ways. On one view (as set out in the 2004 Regulations) Icelandic bankruptcy law is simply incorporated into English law for the relevant purposes. On the other view, the territory of the UK and other contracting States simply becomes an enlarged part of the originally Icelandic territory to which its insolvency law applies. Both conceptual approaches lead to the same result, and in both cases some sensible adjustment by way of interpretation of the Icelandic statutory language may be required, as was recognised in a different context by the Supreme Court in *Iraqi Civilians v Ministry of Defence (No 2)* [2016] UKSC25, [2016] 1 WLR 2001, when seeking to apply the limitation rules of a foreign jurisdiction under the Foreign Limitation Periods Act 1984. As Lord Sumption JSC put it at paragraph 13:

> "Because the foreign law of limitation will have been designed for foreign proceedings, that necessarily involves a process of transposition."

In the present context, Article 116 of the Icelandic Bankruptcy Act refers in its Icelandic text to what the English translation describes as "the district court" by the word "*Hérað"*. That is a reference to the group of Icelandic district courts which are the only courts in Iceland with first instance jurisdiction in relation to civil matters. The necessary "process of transposition" to be applied to that identification, when used with effect outside Iceland, is that no civil proceedings may be brought in any court, inside or outside Iceland, against a credit institution in liquidation.

75. The above analysis makes the answer to the final question on the main appeal strictly irrelevant. Nonetheless the judge decided, after reading the detailed expert evidence, that the views of Kaupthing's expert Mr Thorláksson, to the effect that Icelandic insolvency law was intended to have extra-territorial effect, were to be preferred over the contrary view of Mr Hall, the expert relied upon by the Appellants. Her analysis of that material took up 25 closely reasoned paragraphs of her careful judgment.

76. Mr Hancock's main point was that the use of "*Hérað*" in Article 116 was plainly intended to confine the prohibition to litigation in the Icelandic district court, and nowhere else, and that this conclusion could be arrived at by applying principles as to Icelandic statutory construction which were not in dispute. He said that this court was as well placed as was the judge to decide this question, even though strictly a question of fact, because there was no oral evidence or cross-examination of the experts during the trial. He did not attempt to take this court through the expert materials, or even through the judge's detailed analysis of them, simply submitting that this court could, in effect, ignore it all and start afresh.

77. That is not in my judgment a legitimate approach to the challenge, on appeal, to the findings of a first instance judge about foreign law. The appellate court's task is to review the decision of the judge below and, if satisfied that it was wrong, on a matter

of fact or law which impacts upon the order made, to allow the appeal. When a judge has made careful findings after a detailed consideration of conflicting expert evidence, it is wholly insufficient for the appellant simply to invite the appeal court to start again.

78. I am content therefore to rest my conclusion that this final part of the judge's analysis should not be disturbed upon the basis that it has not been appropriately challenged on this appeal.

Costs

79. The Appellants brings a freestanding costs appeal, not dependent upon any measure of success in relation to the substance of the judge's decision on the merits. It arises from the fact that Mr Johannsson, the fifth defendant in the proceedings and a member of Kaupthing's Winding-up Committee, joined with Kaupthing in applying for the dismissal or stay of proceedings against him, in his case on the ground that they were insolvency proceedings within the exception in Article 1.2(b) of the Lugano Convention, rather than a civil and commercial matter, as the judge determined that they were, and as is now common ground. Mr Johannsson's application therefore failed, and it has not been renewed in this court by way of appeal.

80. Mr Johannsson was not alone in asserting that the Appellants' claim fell outside the scope of the Lugano Convention. Kaupthing itself ran the same argument, and was equally unsuccessful.

81. In her ruling on costs on 10 July 2015, the judge reflected the failure of both Kaupthing and Mr Johannsson on what she called the jurisdiction point by awarding Kaupthing only 75% of its costs of the successful application. She took into account that, by comparison with what she called the insolvency point (with which this appeal has been solely concerned) the jurisdiction point took up only a very modest part of the time, and engaged a similarly small part of the parties' forensic endeavours.

82. She decided not to make any separate order in relation to Mr Johannsson's application. In paragraphs 14 and 15 of her costs judgment she said this:

> "14. I also take the view that no separate order in relation to JJ should be made. His position was the same as Kaupthing's on the jurisdiction ground. No additional costs were incurred by JJ beyond those incurred by Kaupthing. I do not consider that the Claimants would have incurred significant additional costs in relation to his application either. As I have said, there was but a very small part of the expert evidence addressing JJ's position. The Claimants are fairly compensated for their success on the jurisdiction ground by the reduction in the costs they would otherwise have to pay Kaupthing. Looking at the issues in the round and the narrative, my judgment is that the expert evidence probably would have covered the same ground in any event.

> 15. JJ's witness statement was short and straightforward. And, again, in my judgment, it would probably have been served even if JJ had not been making the application separately that he did."

For completeness (although it was not necessary for the judge to say so) both Kaupthing and Mr Johannsson appeared by the same solicitors and counsel.

83. The Appellants did not by their grounds of appeal challenge the judge's 75%/25% apportionment as between themselves and Kaupthing. Rather, their case is that a separate order should have been made as between them and Mr Johannsson, to reflect that Mr Johannsson's application for the dismissal or stay of the proceedings against him failed.

84. Pressures of time meant that, ultimately with the parties' agreement, the costs issue was left to be determined on appeal by reference only to the parties' skeleton arguments. In summary, the skeleton argument for the Appellants (prepared by Mr Romie Tager QC, Mr Jonathan Crystal and Miss Samantha Knights) asserted that to depart from the "loser pays" principle as between the Appellants and Mr Johannsson was beyond the judge's discretion in relation to costs. As a matter of principle, she ought to have ordered Mr Johannsson to pay the Appellants' costs of their application, and left all questions of apportionment as between the two applications to the costs judge on detailed assessment.

85. I disagree. In circumstances where two parties, using the same legal team, advance the same two arguments, one of which succeeds and the other of which fails, it was well within the discretion of the judge to reflect those different outcomes, as she did, in a proportional costs order, even though those outcomes meant that one party's application succeeded and the other failed. Of course she could, in exercising her broad discretion as to costs, have applied the "loser pays" principle separately to Mr Johannsson's application, but this would have imposed formidable difficulties at the assessment stage. Furthermore, in the context where both Kaupthing and Mr Johannsson were using the same legal team, running the same arguments, it seems to me that such an approach would have had a considerable degree of unreality about it. As the judge said, the Appellants were fairly compensated for his success on the jurisdiction point by the disallowance of 25% of Kaupthing's costs. I would accordingly reject the costs appeal.

Disposition

86. For all the reasons given above, I would dismiss this appeal in its entirety.

Lord Justice Sales:

87. I agree.

Lord Justice Henderson:

88. I also agree.