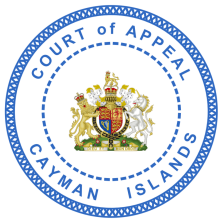

Neutral Citation Number: [2026] CICA (Civ) 10

OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT OF THE CAYMAN ISLANDS,
CIVIL DIVISION

CICA (Civil) Appeal 13 of 2025
(Cause No. FSD 95 of 2018 (JAJ))

IN THE MATTER OF SECTION 147 OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)

BETWEEN:

(1) SIMON CONWAY
(2) ANTHONY MANTON
(3) MOHAMMED FARZADI
Joint official liquidators of ABRAAJ HOLDINGS (IOL)

Plaintiffs/Proposed Respondents

- and –

AIR ARABIA PJSC

Defendant/Proposed Appellant

BEFORE: **The Hon John Martin KC, Justice of Appeal**
The Rt Hon Sir Jack Beatson, Justice of Appeal
The Rt Hon Sir Anthony Smellie KC, Justice of Appeal

Appearances: **Mr Steven Thompson, KC instructed by Mr Erik Bodden and Mrs Alecia Johns of Conyers Dill & Pearman for the Appellant**
Mr Tom Smith, KC instructed by Mr Peter Sherwood and Ms Kalyani Dixit of Carey Olsen for the Respondent

Heard: **7 November 2025**

Date draft circulation: **1 May 2026**

Date of Judgment: **12 May 2026**

JUDGMENT

MARTIN JA:

1. This application for leave to appeal raised the question whether a foreign creditor who submits a proof of debt in the liquidation of a Cayman company, but otherwise has no presence in the Cayman Islands, renders himself liable to the Grand Court's jurisdiction under section 147 of the Companies Act (2023 Revision) to order that he contribute to the company's assets as a knowing party to the carrying on of the company's business with intent to defraud creditors.

2. Leave to appeal was sought from an order dated 4 June 2025 of Asif J. By that order the judge declared that the plaintiffs did not require leave of the Court to serve section 147 proceedings on the defendant out of the jurisdiction and that the defendant had been validly and effectively served with the proceedings. The order also made provision for the future conduct of the proceedings.

3. The judge refused leave to appeal. The defendant's application to a single judge of this court for leave to appeal was referred by the President to the full court and was heard by us on 7 November 2025, when we refused leave.

4. These are my reasons for that decision.

5. The plaintiffs (the respondents to the proposed appeal) are the Joint Official Liquidators ("the JOLs") of Abraaj Holdings (in Official Liquidation) ("the Company") which went into provisional liquidation in the Cayman Islands on 18 June 2018.

6. The proposed appellant, Air Arabia PJSC ("Air Arabia"), is a company incorporated in the UAE which operates air services across the Middle East, Asia and Europe. It has no office in the Cayman Islands, does not operate flights there, and has no other presence in the Cayman Islands. However, on 4 July 2018 and 12 April 2019 it submitted two proofs of debt in the Company's liquidation in relation to moneys advanced by it from about 2007 to companies and investment funds within the Abraaj Group with which the Company is affiliated.

7. On 14 June 2024 the JOLs issued a writ against Air Arabia seeking a declaration under section 147 that Air Arabia was liable to contribute to the Company's assets as a knowing party to the carrying on of the Company's business with intent to defraud creditors. The estimated amount of the contribution sought by the JOLs is said by them to be at least US $700 million. Air Arabia denies

that it is amenable to the section 147 jurisdiction, or that there is in any event a factual basis for the granting of section 147 relief against it.

8. The writ was amended on 19 August 2024, and on the same day the JOLs applied by summons for declarations that service of the amended writ out of the jurisdiction was permissible without leave and could be effected by email and by delivery to Air Arabia's address in the UAE.

9. Before the summons was heard, the amended writ was purportedly served by email on 26 August 2024 and by delivery on 10 September 2024. Prior leave to serve out was neither sought nor obtained. Air Arabia disputed the validity of the service.

10. The summons was heard by Asif J on 12 and 13 November 2024. The JOLs contended that leave to serve out of the jurisdiction was not required because Air Arabia had submitted to the jurisdiction by filing proofs of debt in the liquidation. Air Arabia contended that the proofs of debt did not amount to a submission to the jurisdiction for the purposes of a claim under section 147; that the proceedings should not have been commenced by writ but by summons in the liquidation (in which case there would have been no provision in the rules for service out of the jurisdiction), and the JOLs should not be permitted to benefit from their adoption of the wrong procedure; and that section 147 did not have extraterritorial effect.

11. In a judgment dated 20 May 2025 the judge held that the JOLs did not need leave to serve out, since Air Arabia had submitted to the personal jurisdiction of the Court by proving in the liquidation; that service had been validly effected; that the proceedings should have been commenced by summons, and should continue as if so commenced; and that section 147 had extraterritorial effect.

12. The order dated 4 June 2025 in relation to which leave is sought was made consequent on that judgment.

13. Air Arabia's draft notice of appeal seeks orders discharging the judge's orders and declarations and instead striking out or staying the proceedings, and it claims declarations from this Court that Air Arabia has not submitted to the jurisdiction by lodging proofs of debt and that service of the proceedings has not been validly effected. Air Arabia also makes clear - and I accept - that its application for leave to appeal is not itself to be treated as a submission to the jurisdiction.

14. The draft Memorandum of Grounds of Appeal identifies six proposed grounds. The first two of these are (1) that the judge erred in law in finding that a person who submits a proof of debt in the liquidation of a Cayman company thereby and without more submits to the jurisdiction of the Grand Court for the purpose of a claim under section 147, and (2) that the judge erred in construing section 147 as having extraterritorial effect. Grounds (3) to (6) challenge the judge's conclusion that the proceedings had been validly served.

15. Leave to appeal will be granted only if the proposed appeal has a realistic prospect of success or there is some other reason why the matter should be considered by the Court of Appeal. In my judgment, neither applies in this case.

16. The proposed appeal can only succeed if Air Arabia can establish that the judge was wrong to conclude that Air Arabia's lodgement of the proofs of debt amounted to a submission to the court's jurisdiction under section 147. If the judge was right about that, then questions of extraterritoriality and of service fall away. That is because, as the judge explained at paragraphs 64 and 65:

> "*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. … 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*".

The same applies to extraterritoriality: even if a provision could not be enforced against a foreigner overseas, submission to the jurisdiction is an acceptance that the judicial remedies available in the relevant jurisdiction are available against the person so submitting.

17. Section 147 of the Companies Act is in the following terms:

> *"(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"*.

18. Other provisions of the Companies Act relevant to the arguments are sections 145 (concerned with voidable preferences) and 146 (concerned with dispositions at an undervalue). So far as relevant, they read as follows:

> *"145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be voidable upon the application of the company's liquidator if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.*
>
> *146. (2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator. ...*
>
> *(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition."*

19. The judge identified Air Arabia's arguments on this issue between paragraphs 38 and 43 of his judgment. Those arguments were that it was necessary first to determine whether section 147 had extraterritorial effect, since Air Arabia had no presence within the Cayman Islands and so was not amenable to the jurisdiction of the Grand Court unless section 147 did have extraterritorial effect (paragraph 38); and if it did not have extraterritorial effect it would be illogical that the availability of section 147 relief against a foreign target should depend on whether the target was a creditor and had submitted a proof of debt (paragraph 39).

20. At paragraph 40 of his judgment, the judge recorded Air Arabia's concession 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.

21. But, so the judge recorded, Air Arabia contended that a distinction was to be drawn between sections 145 and 146 of the Companies Act on the one hand and section 147 on the other. The former sections were concerned with unwinding of transactions that had already occurred with a view to restoration of the status quo ante; whereas section 147 was not concerned with an existing situation but created a new statutory liability to contribute to the liquidation estate. For that reason, submission of a proof of debt might be a submission to the jurisdiction for the purposes of section 145 and 146, but was not a submission for the purposes of section 147 (paragraph 41). The cases

relied on by the JOLs did not involve relief for fraudulent trading, and were distinguishable (paragraph 42); and none of the cases was authority for the proposition that submitting a proof of debt amounted to submission to the jurisdiction for the purposes of a section 147 claim, which was a purely discretionary statutory claim for a new liability to contribute and had nothing to do with realisation of or getting in an asset of the company or the adjustment of concluded transactions or the return of payments or property to the company. It would be an unacceptable extension of the principle that lodging a proof of debt amounted to a submission to the jurisdiction 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 English cases (paragraph 43).

22. The judge started his analysis of the point by reiterating that it was not in dispute that lodging a proof of debt amounted to a submission to the jurisdiction of the court with conduct of the winding up (paragraph 66). The area of disagreement between the parties was as to the scope of the submission to the jurisdiction – in particular, whether it amounted to a submission for the purposes of a claim under section 147. Having stated that he preferred the JOLs' arguments on this topic (paragraph 70), he considered three English cases: *Rubin v Eurofinance SA* and *New Cap Reinsurance Corp v Lloyds Syndicate 991* [2012] UKSC 46 ("*New Cap"*); *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 ("*Shell*"); and *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379 ("*Erste"*). At paragraph 76 the judge said that the principles expressed in those cases regarding submission to the jurisdiction as a consequence of lodging a proof of debt were general common law principles which applied with equal force in the Cayman Islands. They were not to be read narrowly as applying only to cases within the four corners of each judgment, namely claims to recover void payments or preferences.

23. The judge then considered the question whether a fraudulent trading claim under section 147 fell outside the scope of the principles concerning submission to the jurisdiction, and stated that he preferred the JOLs' position. A declaration under section 147 that a person should contribute to the estate was properly to be characterised as an order within the winding up proceedings: it was the very fact of the winding up that gave rise to the liquidator's statutory cause of action under section 147 to apply for relief and the court's power to grant that relief. Secondly, section 147 claims were not different in nature from claims under section 145 and section 146 such that they should be treated differently as regards submission to the jurisdiction. All were statutory claims that only arose in the context of an insolvent liquidation; and they vested in the liquidator, not the company,

and were additional to any claims that the company itself might have. Each gave the liquidator a means of achieving a proper distribution of the estate. The remedy in each case was against someone whose conduct had caused the value of the estate to be diminished in some way, whether due to a preference, a void payment or assistance in fraudulent trading. At paragraph 83, the judge accepted the JOLs' argument that sections 145, 146 and 147 were 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. There was no principled basis for relief under section 147 to fall outside the scope of a submission to the jurisdiction by filing a proof of debt when relief available under sections 145 and 146 was within it. That conclusion was consistent with the approach of the United Kingdom Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 ("*Bilta*"), where sections 213, 238 and 239 of the English Insolvency Act 1986 (the equivalents of sections 147, 146 and 145 of the Cayman Islands Companies Act) were treated as having the same statutory context and purpose and as being subject to the same approach to construction. Finally, the judge accepted the JOLs' submission that treating the claim under section 147 as falling outside the scope of submission to the jurisdiction constituted by lodging a proof of debt would lead to 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 compensating recourse to section 147.

24. Before us, Mr Thompson KC for Air Arabia acknowledged that he was compelled by English authority to accept that lodging a proof of debt amounted to a submission to the jurisdiction for the purposes of sections 145 and 146 of the Companies Act; but he contended that there were significant differences between sections 145 and 146 on the one hand and section 147 on the other, and the reasons for the decisions in the authorities did not extend to, and could not be applied to, section 147. These contentions are examined in greater detail below, but it is desirable first to consider the cases relied on by the judge and referred to by Mr Thompson.

25. The first two cases are *Ex p Robertson, In re Morton* [1875] LR Eq 733 ("*Robertson*") and *New Cap*, the latter being part of the conjoined appeal with *Rubin v Eurofinance SA* [2012] UKSC 46. The former was a case of a payment made after commencement of the liquidation, the latter a case of a voidable preference. The facts of and decision in *Robertson* are set out in the judgment of Lord Collins JSC in *New Cap* and are quoted below. *New Cap* itself concerned enforcement in England of an Australian judgment made in relation to unfair preference claims brought by the liquidator in New Cap's Australian liquidation against a Lloyd's insurance syndicate. The syndicate was

domiciled in England. It refused to accept service of the Australian unfair preference proceedings, but judgment was obtained against it. No leave had been obtained to serve the enforcement proceedings on the syndicate out of the Australian jurisdiction, but reliance was placed by the liquidator on the fact that the syndicate had submitted proofs of debt in the winding-up (and had otherwise participated in the liquidation). At paragraphs 164, 165 and 167 Lord Collins SCJ said this:

> *"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*".

26. In *Shell* the issue was whether an anti-suit injunction was properly granted to restrain pursuit of an attachment order granted by a Dutch court over assets of a BVI company which subsequently went into liquidation. The Privy Council held that it was, since the attachment could not be used to obtain an advantage over the general body of creditors. A question that arose was whether the attachment creditor was amenable to the jurisdiction of the BVI court. After approving *Robertson* and *New Cap*, the Privy Council said this [31]:

> "*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."*

27. *Erste* (unsatisfactorily cited to us only by reference to what the judge had said about it below), a decision of the English Court of Appeal, concerned a claim in debt, breach of contract, conspiracy and other economic torts brought in England against a Russian company subject to Russian insolvency procedures. The claimant had initially been entered on the list of creditors in the Russian insolvency, but had been removed after litigation in Russia. At para 51 the Court of Appeal said this:

> "*The English law principle articulated in New Cap, 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 p. Robertson, In re Morton (1875) LR 20 Eq 773, at 737 -738".*

28. *NMC Healthcare Ltd (in administration)* v *Noor Capital PSC* [2022] ADGMCFI 0003, a decision of Sir Andrew Smith sitting as a justice of the Abu Dhabi Global Market (ADGM) courts, concerned an anti-suit injunction to restrain pursuit of debt proceedings in Dubai against a company in administration in the ADGM. Having cited from para 51 of the decision in *Erste*, the judge said this (at para 57 of his judgment):

> "*Further, … 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."*

Sir Andrew Smith J recorded at para 58 that the creditor had submitted a proof in the administration "and thereby submitted to the jurisdiction of the ADGM Court*".*

29. Mr Thompson commenced his submissions to us by focusing on these authorities. He warned us against treating all statements in the cases as expressing principles of general application: it was important to focus on the facts and the determinative reasoning. He pointed out that *New Cap* was a case of a voidable preference, concerning a jurisdiction equivalent to that in section 145 of the Companies Act. *Robertson* concerned an invalid payment made after the commencement of the insolvency: a case to which section 99 of the Companies Act would now apply. *Shell*, *Erste* and *NMC* were all cases where a creditor sought to obtain recovery of assets owned by a company in liquidation outside of the statutory liquidation scheme. None of the cases concerned a claim of the type embodied in section 147 of the Companies Act, and none of the statements made in those cases could be treated as applicable to a section 147 case.

30. Although Air Arabia accepted that its lodgement of a proof would amount to submission to the jurisdiction for the purposes of claims concerning voidable preferences and transactions at an undervalue, the differences between the sections dealing with those matters (sections 145 and 146) and the section dealing with fraudulent trading (section 147) were of such significance that rules relating to the former could not be applied to the latter.

31. Section 147 had a far greater reach than sections 145 and 146: sections 145 and 146 contained temporal limits (the impugned transaction had to have occurred at a time when the company was unable to pay its debts in the case of section 145, and there was a time limit of six years on proceedings under section 146), whereas there was no express or implicit time limit on applications under section 147.

32. Sections 145 and 146 related to prior transactions with or effected by the company and were concerned with setting aside such transactions; but no such transaction was required in the case of section 147, which was available against any person and required only knowing participation in fraudulent trading.

33. The requirement of a transaction in the case of sections 145 and 146 provided an implicit limitation on the nature and amount of the relief that could be awarded, whereas under section 147 the contribution to be made to the company's assets was subject to no limitation and depended solely on the exercise of the court's discretion. These differences - in the time within which claims could be made, the availability of relief under section 147 against any person as opposed to a party to a particular transaction, and the fact that relief under section 147 had the effect of swelling the liquidation estate rather than restoring to it assets which had formally belonged to the company, making section 147 relief tantamount to a damages claim - were so significant that the logic of submission to the jurisdiction in section 145 and 146 cases could not be said to apply to a section 147 case. In *Re Paramount Airways* [1993] Ch 223 ("*Paramount*"), Nicholls V-C had stressed the importance of the protection afforded by the requirement to obtain leave to serve out of the jurisdiction in cases under section 213 of the English Insolvency Act, but there would be no such protection if lodging a proof were taken to be a submission to the jurisdiction for the purposes of a fraudulent trading claim. The scope of the section was so great that a foreign target could find itself subject to the section in respect of a transaction whose significance it failed to appreciate, and considerations of that nature would be capable of being taken into account at the stage of giving leave to serve out; but they would have no relevance if such leave were not required because there had been a submission to the jurisdiction.

34. Mr Thompson is right that none of the cases concerns the section 147 jurisdiction or its English equivalent, and right that the statements of principle made in those cases are directed to avoidance provisions or to the necessity to prevent enforcement of debts outside the liquidation process. The focus on the comprehensiveness of the liquidation process is evident from the passage from *Shell*

quoted in paragraph 26 above ("*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*"); and the focus on avoidance provisions appears most clearly from paragraphs 94 and 95 of the judgment of Lord Collins SCJ in *New Cap*, which are in the following terms:

> "*94. In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution. The principle of equality among creditors which underlies the pari passu principle may require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect. Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency. Thus under the Insolvency Act 1986 an administrator, or liquidator, or trustee in bankruptcy may, where there has been a transaction at an undervalue, or amounting to an unlawful preference, apply for an order restoring the position to what it would have been had the transaction not taken place: sections 238 et seq and 339 et seq. Other systems of law have similar mechanisms, but they will differ in matters such as the period during which such transactions are at risk of reversal and the role of good faith of the parties to the transaction.*
>
> *95. The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance…".*

35. It is also noteworthy that the relevant issue in *New Cap*, as described by Lord Collins at [1], was "*whether, and if so, in what circumstances, an order or judgment of a foreign court … in proceedings to adjust or set aside prior transactions, eg preferences or transactions at an undervalue ("avoidance proceedings"), will be recognised and enforced in England*".

36. Mr Thompson is also right that there are differences between sections 145 and 146 on the one hand and section 147 on the other. As he identified, these relate to the timing of claims, the presence or absence of a specific transaction to which relief is tied, the availability against a limited or unlimited class of persons, and the fact that section 147 relief does not restore the company's assets to an anterior position (as is the case under sections 145 and 146) but adds to them.

37. These points notwithstanding, it seems to me that the judge was right to take the view that the cases expressed a consistent rationale for the proposition that lodging a proof constitutes submission to

the jurisdiction of the court conducting the liquidation, and that that rationale applied to all powers exercisable in the liquidation, including the section 147 power, despite differences in those powers.

38. The rationale is as first expressed in *Robertson*, namely that by participating in the liquidation for the purpose of advancing a claim a person impliedly agrees to participate in a process conducted for the benefit of all. It has been consistently applied in the English authorities since then. In *New Cap* it is expressed as being that a creditor "*should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding*", and in *Shell* as being "*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*". It is in effect a particular application of the general principle against simultaneous approbation and reprobation.

39. Once the rationale is understood, the consequence necessarily follows. As expressed in *Erste*, it is "*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*". It is true that that formulation speaks of questions as against the debtor, not as against the creditor; but that is a consequence of the factual situation being addressed in that case, not a consequence of some inherent limitation in the rationale – which applies to all questions. It is implicit in Mr Thompson's acceptance that proving constitutes submission to the jurisdiction for the purposes of sections 145 and 146, both of which are capable of relating to claims against creditors, that the rationale is not confined to claims against the debtor. Nor, as both *Robertson* and *New Cap* demonstrate, is the consequence.

40. I note here that Mr Thompson contended that paragraph 167 of Lord Collins's judgment is dicta, not ratio; an assertion which I regard as contradicted by paragraph 145 of the same judgment, where Lord Collins stated that *"[i]n view of my conclusion in the next section (section VIII [which includes paragraph 167))] that the Syndicate submitted to the jurisdiction of the Australian court, the issues on section 426(4) and (5) of the Insolvency Act 1986, and their relationship with section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 do not arise*".

41. The differences between sections 145 and 146 on the one hand and section 147 on the other do not in my judgment lead to the result that lodging a proof amounts to submission to the jurisdiction for the purposes of the former sections but not the latter. The rationale applies with equal force to all three sections. As the judge pointed out, all three give rise to orders within the winding up

proceedings: they are statutory claims that only arise in the context of an insolvent liquidation, vest in the liquidator not the company, and are additional to any claims that the company itself may have. As the United Kingdom Supreme Court stated in *Bilta* at paragraph 214, the English equivalents of sections 145, 146 and 147 share the statutory context of the winding up of a company. The purpose of each is to ensure that the liquidation estate includes all assets which but for some misconduct it would have included. As the judge put it, the remedy in each case was against someone whose conduct had caused the value of the estate to be diminished in some way, whether due to a preference, a void payment or assistance in fraudulent trading. Like the judge, I accept the JOLs' argument that sections 145, 146 and 147 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.

42. I have mentioned that Mr Thompson pointed out that section 147 imposed potential liability on any person without apparent limitation. In this connection he relied on the decision of the English Court of Appeal in *Paramount*, a case concerned with whether section 238 of the English Insolvency Act 1986 (the equivalent of section 146 of the Companies Act) had extraterritorial effect. Having concluded that it did, since no sensible limit could be proposed to the scope of the expression "*any person*" appearing in the section, Sir Donald Nicholls V-C identified two important safeguards implicit in the English statutory scheme. The first of these was the court's discretion whether or not to make an order in relation to a voidable preference; the second was the necessity to obtain leave to serve the claim on a defendant who was out of the jurisdiction. Mr Thompson's argument was that, whilst the first of those safeguards was replicated in the Cayman Islands, the consequential absence of the second fundamental safeguard meant that lodging a proof of debt could not amount to a submission to the jurisdiction for the purposes of section 147.

43. The judge's answer to this point, as expressed in paragraph 87 of his judgment, was 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 the sanction application is therefore equivalent to that on an application for leave to serve out".

44. Mr Thompson criticised the judge's reasoning on this point. He said that there was no requirement of sanction for a section 147 claim: it was a claim brought in the name of the liquidator and was not a proceeding "*in the name and on behalf of the company*" so as to require sanction under section 110 of and Part 1 of Schedule 3 to the Companies Act. No other provision in the schedule applied. In any event the criteria relevant to a sanction application were not the same as those relevant to an application to serve out of the jurisdiction. I do not think it necessary to decide the merits of these objections; for the fundamental point is that in *Paramount* there was no question of submission to the jurisdiction, which where it exists (as it does here) amounts to a voluntary waiver of any requirement to justify service. Since Mr Thompson accepts that the lodging of proof amounts to a submission to the jurisdiction for the purpose of section 146, which is the exact equivalent of the statutory provision considered in *Paramount*, he cannot argue that the safeguard of obtaining leave to serve out prevents submission operating in a section 146 case; and once that is understood, it deprives the argument that the same does not apply to section 147 of any force.

45. Two further points require to be mentioned. First, Mr Thompson contended that even if we concluded that there was no reasonable prospect of success on his proposed appeal, we should give leave because there was no authority on the question whether proving amounted to submission to the jurisdiction for the purposes of section 147 and the question was of such importance that the full court should consider it. I do not agree: for the reasons I have given, I consider that the matter is adequately covered by existing authority and needs no further elaboration. Secondly, it is right to record that there is a decision of the Grand Court, *Re ICP Strategic Credit Income Fund Ltd* [2014] 2 CILR 1, in which Jones J concluded that sections 146 and 147 were to be similarly treated in terms of extraterritoriality. The judge in the present case did not place much reliance on this case, because it was not contested and the reasoning was not fully expressed, because both parties had criticised some aspects of the judgment, and because the judge himself disagreed with one conclusion on the construction of section 147. In those circumstances I do not think it necessary to address it further.

46. As already stated, I would refuse leave to appeal.

BEATSON JA:

47. I agree with the reasons given by Martin JA for the refusal of leave to appeal when this application last came before the full court.

SMELLIE JA:

48. I also agree with the reasons now articulated fully by Martin JA for the earlier order refusing leave to appeal.