



19 October 2011

## PRESS SUMMARY

**In the matter of Kaupthing Singer and Friedlander Limited (in administration) and In the matter of the Insolvency Act 1986 [2011] UKSC 48**

*On appeal from [2009] EWHC 3377 (Ch)*

**JUSTICES:** Lord Hope (Deputy President), Lord Walker, Lady Hale, Lord Collins, Lord Clarke.

### BACKGROUND TO THE APPEALS

This appeal is concerned with distributions made and to be made by the administrators of Kaupthing Singer & Friedlander Ltd (“KSF”), a bank. In particular, the appeal turns on what function, if any, the equitable rule in *Cherry v Boultbee* has to perform in the operation of the rule against double proof as it applies in situations involving guarantees and other sureties [9].

Singer & Friedlander Funding plc (“Funding”) is a wholly-owned subsidiary of KSF and its sole function was to raise funds for use by KSF and other group companies. In 2005 Funding issued £250m floating rate notes constituted under a trust between KSF, Funding and HSBC Trustee (CI) Ltd (“the Trustee”). Under the trust KSF guaranteed payment of the principal and interest on the notes [2]. The net proceeds of the notes were advanced by Funding to KSF by way of an unsecured loan [3].

Both KSF and Funding went into administration in October 2008. When KSF went into administration on 8 October 2008 it owed Funding approximately £242.6m pursuant to the loan. When Funding went into administration on 15 October 2008 approximately £240.3m was prospectively owing on the notes and on 23 March 2009 the Trustee gave notice of an event of default upon which the notes became immediately due and payable and the obligations of Funding (as principal debtor) and KSF (as guarantor) came into immediate effect [3].

On 28 April 2009, the Trustee submitted to each of Funding’s and KSF’s administrators proofs of debt in respect of the loan notes in the sum of approximately £248.1m. On 8 May 2009, Funding submitted a proof in respect of its loan to KSF in the sum of approximately £242.6m [4]. On 20 May 2009, KSF’s administrators gave notice of their intention to make distributions in the administration, including to ordinary unsecured creditors. KSF has numerous creditors who have already received dividends amounting to 58p in the pound [5].

KSF’s administrators applied to the Chancery Division for directions. At the hearing the Trustee recognised that the Chancellor was bound by the Court of Appeal decision in *In re SSSL Realisations (2002) Ltd* [2006] Ch 610 (“*SSSL*”) but the Trustee made clear its intention to argue that *SSSL* was wrongly decided if granted permission to appeal. Accordingly, the Chancellor declared that the rule in *Cherry v Boultbee* was not excluded and directed that the administrators of KSF might rely on it unless and until KSF’s right of indemnity (as a surety) had been satisfied in full. This is a leapfrog appeal direct from the Chancellor, who certified that there was a point of law of general public importance on which he was bound by a fully-considered judgment of the Court of Appeal [6]-[7].

## JUDGMENT

The Supreme Court unanimously allows the appeal. The rule in *Cherry v Boulton* is excluded in this case by the rule against double proof. Accordingly the Trustee must be paid in full before there can be any proof against Funding as the principal debtor by KSF as guarantor. Lord Walker gives the leading judgment with which Lady Hale, Lord Clarke and Lord Collins agree. Lord Hope delivers a short judgment agreeing with Lord Walker's reasons and the result.

## REASONS FOR THE JUDGMENT

The rule against double proof is a rule to prevent the double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. In the simplest case of suretyship there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability. But if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability and the secondary right of obtaining an indemnity from PD. C can proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all [11]. The rule protects other creditors of PD against unfair treatment by an arrangement under which there are multiple creditors in respect of the same debt. The effect is that so long as C has not been paid in full, S may not compete with C either directly by proving against PD for an indemnity, or indirectly by setting off his right to an indemnity against any separate debt owed by S to PD.

The rule in *Cherry v Boulton* is a technique of netting-off reciprocal monetary obligations, even where there is no room for legal set-off [9]. A person who owes an estate money, that is, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim a share given to him out of that mass estate without first making the contribution that completes it [13].

In *SSSL*, the Court of Appeal considered that there are good reasons why the rule against double proof should not have the same effect on the equitable rule in *Cherry v Boulton* as it does on statutory set-off. The Court of Appeal considered that the contrary view involved three misunderstandings. Lord Walker finds much of the reasoning of the Court of Appeal in *SSSL* difficult to follow [49]. For example, the Court of Appeal's suggestion that in a double insolvency the rule in *Cherry v Boulton* and the rule against double proof can and should both apply, as this would strike a fair balance between the competing interests of creditors, would lead to many doubts and difficulties [51]-[52].

The equitable rule in *Cherry v Boulton* may be said to fill the gap left by disapplication of set-off, but it does not work in opposition to it. It produces a similar netting-off effect except where some cogent principle of law requires one claim to be given strict priority to another. The rule against double proof is one such principle. It would be technical, artificial and wrong to treat the rule against double proof as trumping set-off but as not trumping the rule in *Cherry v Boulton* [53].

*References in square brackets are to paragraphs in the judgment*

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)